APP/B1740/W/23/3324227

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CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT
(AJC GROUP)

Abbreviations and definitions are as used in the Appellant's opening statement[1].

Introduction

1. These closing submissions are structured as follows:
   1.1. The remaining reasons for refusal ("**RfR**");
   1.2. The benefits of the Scheme;
   1.3. Overall planning balance;
   1.4. Conclusions.

The remaining RfR

2. Only four of the seven original reasons for refusal[2] remain in dispute between the Council and the Appellant. The Council's concerns in relation to (i) highway safety[3], (ii) surface water drainage[4] and (iii) potential impacts on protected nature conservation sites[5] have been addressed. These submissions will first consider RfR 1 (design and character) and RfR 7 (trees) together, before considering RfR 5 (public open space and play space) and then RfR 6 (affordable housing).

Design, character and appearance, trees[6]

3. As Mr Harrington explained in his oral evidence, it was apparent to him very early on that the design response for the Site could be considered in two parts ("something different at the front

[1] Additionally: references to a witness accepting, acknowledging, agreeing, clarifying, confirming, identifying or recognising a point are references to their cross-examination, unless stated otherwise.
[2] See the decision notice: CD5-3.
[3] RfR 2.
[4] RfR 3.
[5] RfR 4.
[6] RfR 1 and 7.

and something different behind"); his unchallenged evidence was that he had thought very, very carefully about how to fit that pattern of development into the Site's surroundings. It is essential to note at the outset – and then to keep in mind – that the Council's view is that the prevailing pattern of "much larger houses" is not consistent with identified needs[7]. It is also common ground[8] that it is not necessary for the Scheme to replicate the existing approach in the locality. As Mr Harrington explained[9], both *Manual for Streets*[10] and the *National Design Guide*[11] ("**NDG**") encourage a move away from previous thinking on design. He was correct to observe[12] that it is not possible to design a scheme for the Site that complies with the aspirations of current policy "without taking a step on from where we were in the 1960s".

4. The assertion from third parties (albeit not from the Council) that the Appellant failed to take account of pre-application advice and has been "deaf" to feedback is baseless. Mr Harrington explained in his evidence-in-chief the changes that had been made to the design to address the points raised by the Council at pre-application stage (and see pp. 11 and 12 of the DAS)[13]. He also explained the refinements that had been made in response to feedback from third parties.

5. Turning to the Council's evidence, first of all its criticism of Mr Harrington's proof of evidence as "*post-hoc*"[14] is unjustified:

   5.1. Mr Payne is wrong to assert[15] that the DAS[16] fails to analyse local character and context. As he accepted, the first thing that is said in the DAS about the immediate built character of the Site's surroundings is that it "could be said to be informed more by the substantial tree and hedgerow planting than the buildings"[17]; the sylvan character of the area is also expressly acknowledged later on in the document[18]. Mr Payne in cross-examination initially contended that there had been no "thorough" analysis of the block enclosed by Noads Way, Lime Walk and North Road ("**the Block**"[19]) at application stage but he subsequently conceded that he

[7] Officer report ("**OR**"), CD5-2.
[8] Payne cross-examination.
[9] Evidence-in-chief.
[10] CD7-17.
[11] CD7-18.
[12] Evidence-in-chief.
[13] CD1-21.
[14] Payne rebuttal (CD4-11) p. 7.
[15] Payne proof of evidence (CD4-6) para. 5.1.
[16] CD1-21.
[17] CD1-21, p. 7.
[18] *Ibid.* p. 26.
[19] See Payne proof of evidence (CD4-6), Fig. 1 p. 14.

had "over-egged" that contention and that it was incorrect. The Block is considered within the DAS[20], along with Site's wider surrounding context.

5.2. There is, similarly, nothing in Mr Payne's criticism of the DAS for not including "any community liaison exercise"[21]. That exercise is detailed not in the DAS but instead (and as one would expect) in the *Statement of Community Engagement* that was submitted in support of the application[22].

5.3. As Mr Harrington explained[23], the DAS was produced in accordance with the process recommended by the Council in its *Housing design, density and character supplementary planning document* ("**the 2006 SPD**"[24]). In any event, even had it not been, Mr Payne agreed that the process set down in the 2006 SPD is recommended rather than mandatory and that an application for planning permission would not be rejected if a different process were followed.

5.4. The analysis presented in Mr Harrington's proof of evidence is not "belated"[25]. Mr Payne accepted that it is inevitable that a proof of evidence is partly "*post-hoc*" – because it must address the decision-maker's reason(s) for refusal, which of course do not exist prior to the application for planning permission being determined. For that reason it is, as Mr Payne acknowledged, necessary to "do some more work and have a look at it more closely" on appeal.

6. Turning to the substantive points of dispute between the Council and the Appellant in relation to RfR 1 and 7, it is important to be clear about what is not disputed:

6.1. The Council makes no complaint in respect of the Scheme's architecture[26].

6.2. Nor does the Council's criticism relate to the frontage layout within the Scheme. As Mr Hunter put the point in cross-examination of Mr Moir: "Plot 1 isn't part of the reason for

[20] CD1-21, pp. 21 and 23.
[21] Payne proof of evidence (CD4-6), para. 6.3.2.
[22] CD1-24.
[23] Evidence-in-chief.
[24] CD7-4 at p. 14.
[25] Payne rebuttal (CD4-11) p. 5.
[26] Payne cross-examination.

refusal". Indeed, the view of Mr Gilfillan is that the proposed street frontage property "would be responsive to the character of the area" and that its position will "respect the pattern of development along Noads Way and would not be a prominent feature of the street scene to the detriment of the character of the road"[27]. Mr Payne confirmed that he did not disagree with Mr Gilfillan. He acknowledged that the Scheme will not be out of keeping with the examples of existing frontage properties along Noads Way provided by Mr Harrington[28]. Mr Payne also clarified that the point made on Fig. G within his proof of evidence[29] was not a major point and should not be weighed in any material sense against the Scheme.

7. The Council's criticisms of the <u>interior</u> of the Scheme are difficult to understand. Mr Payne confirmed that the design issues raised by him against the Scheme were caused by density. Yet Mr Gilfillan agreed that the proposed density (27.8 dph[30]) was an acceptable density for the Site.

8. There is nothing in the Council's apparent contention that a density of 27.8 dph is in principle an acceptable density for the Site, yet is unacceptable as proposed by the Scheme:

   8.1. The Scheme does not give rise to any of the "symptoms" that one would expect to result from a scheme that was too dense:

      8.1.1. It is agreed[31] that the Scheme will avoid any intrusive overlooking and overbearing between residents of the Scheme; that it will not give rise to levels of overlooking, overshadowing or overbearing that will have a material impact on the amenity of existing neighbours; and that it will not result in an increase in noise and disturbance to neighbouring properties.

      8.1.2. Separation distances between the Scheme and existing properties are not materially different to existing separation distances between the Lime Close properties and the properties around the edge of the Block. There are moreover – as Mr Payne accepted – numerous examples of the same or shorter separation distances between existing properties in the vicinity of the Site.

[27] Harrington summary (CD4-2) para. 6.2.
[28] Proof of evidence (CD4-2) pp. 22 and 23.
[29] CD4-6.
[30] Dwellings per hectare.
[31] Main SoCG (CD8-1) paras. 8.12 to 8.14.

8.1.3. The Council does not contend that the proposed homes are too small to satisfy internal space requirements. They meet the Government's *Nationally Described Space Standard*.

8.1.4. Daylight / sunlight considerations do not form any part of the Council's RfR.

8.1.5. Mr Harrington was correct[32] to rebut Mr Payne's disparaging suggestion that the Scheme presents "maximum "pack it in" design". It does not. As Mr Harrington explained, there are no compromises, whether internal to the Scheme or externally in the Scheme's relationship with its neighbours.

8.2. Mr Gilfillan's acceptance of proposed density in fact relates not only to the Site but also to the Scheme itself: see his pre-application response[33], which states "I acknowledge that the character of the centre of the site could take a different approach, being higher density as shown" (emphasis added). See also the minutes of the 14 November 2022 meeting[34], at which Mr Gilfillan stated that he "[f]elt that the "interior" of the site was acceptable in respect of a higher density and layout in context of the til[t]ed balance" (emphasis added). Mr Gilfillan was considering the pre-application layout[35], the density of which is the same as the Scheme. The accuracy of the minutes is not disputed.

8.3. The Council's view – as stated by Mr Gilfillan in his officer report ("**OR**"[36]) – is that the Scheme's plot sizes would fit the aspirations of the Neighbourhood Plan and that the prevailing pattern of "much larger houses" is not consistent with identified needs. Of relevance to the latter point and as already noted, it is common ground[37] that it is not necessary for the Scheme to replicate the existing approach in the locality.

[32] Evidence-in-chief.
[33] CD5-1. The pre-application layout is shown at p. 11 of the DAS (CD1-21).
[34] Appendix 3 to CD8-1.
[35] Shown at p. 11 of the DAS (CD1-21).
[36] CD5-2.
[37] Payne cross-examination.

8.4. It is also common ground[38] that:

8.4.1. The Site lies within an area that is defined by the Council's own *Landscape Character Assessment SPG* as a "dense urban area". Contrary to the apparent suggestion at para. 5.11 of Mr Payne's proof of evidence (and as he conceded), the Site is not "on the fringes" of an existing settlement.

8.4.2. In the immediate vicinity of the Site, there are two distinct patterns of development, namely (i) the "street" and (ii) the "cul-de-sac"[39].

8.4.3. That pattern is repeated beyond the Block itself, as a grid layout of connecting streets and "breaches" into those blocks in the form of cul-de-sacs[40]. Mr Payne's contention[41] that "backland is more tranquil, typically greener and less built up than the main streets" does not accord with the reality of the situation: see Fig. 2 of his proof of evidence[42].

8.4.4. Visibility of the Scheme from surrounding streets will be limited[43]. Mr Payne confirmed that his case was not premised on the Scheme's potential visual effects but rather on its (alleged) effects on character. He had not undertaken a visual impact assessment[44].

8.5. There are existing examples of similar and indeed higher densities within the vicinity of the Site[45]. It is obvious – and Mr Payne rightly accepted - that consideration of the Site's context should not be confined to the Block itself. That said, there are existing small plots both within the Block itself and within the wider vicinity of the Site[46] (as Mr Payne acknowledged).

[38] Harrington proof of evidence (CD4-2) para. 4.3.2 and Payne cross-examination.
[39] Harrington proof of evidence (CD4-2) para. 5.6.1; Payne proof of evidence (CD4-6) para. 5.2 and cross-examination.
[40] Harrington proof of evidence (CD4-2) para. 5.6.2 and Image 24; Payne cross-examination.
[41] Proof of evidence (CD4-6) para. 7.1.2.
[42] CD4-6 p. 15.
[43] Harrington proof of evidence (CD4-2) para. 5.6.4 and Payne cross-examination.
[44] To the extent that the Council attempts any reliance upon the Scheme's impact in views from private property: as discussed with Mr Payne in cross-examination, GLVIA3 at para. 6.20 states that the selection of viewpoints should take into account *inter alia* the accessibility of the viewpoint to the public; and para. 6.17 states that the effects of development on private property are frequently dealt with mainly through residential amenity assessments. The Council is not taking any residential amenity point (above).
[45] CD1-21, p. 21.
[46] E.g. at Beaulieu Road and Pine Close.

8.6. In Appendix C to his proof Mr Payne compares the Scheme ("Application proposal") against two comparators ("Suburban Street frontage" and "Backland developments"). The comparison is inapposite given that the Scheme includes areas of public open space, unlike both of the comparators (see the final "Use mix" row in Appendix C). Mr Payne recognised that there was a relationship between garden size and the provision of public open space.

8.7. With reference to his Appendix C, at para. 6.1.3 of his proof of evidence Mr Payne refers to an "abrupt transmission from about two thirds of the land (68% and 62%) being available for planting, down to only one third". The Council however accepts that a density of 27.8 dph is acceptable for the Site. It is not realistic to suggest that an acceptable scheme could come forward at that density with two-thirds of the Site being retained for planting. Mr Payne acknowledged that it would not be possible to bring forward even 14 units (the quantum referred to in the SHLAA) whilst retaining the same percentage of land for planting at has been retained at Lime Close.

8.8. At 27.8 dph, the Scheme's density is slightly below the minimum average net density of 30 dph that is identified for the Site[47] by the 2006 SPD. Mr Payne's position on the 2006 SPD was unconvincing:

8.8.1. He acknowledged that he was relying upon that document quite extensively and confirmed (i) that it remained formally adopted by the Council and (ii) that he did not consider it to be out-of-date. He nevertheless contended that the text relating to Policy DW-E2 of the Council's *Local Plan First Alteration* ("**LPFA**") - which identifies the minimum 30 dph figure – had to be "divorced" from the remainder of the SPD. There is no justification for cherry-picking from the SPD in the manner contended for by Mr Payne. The Introduction to the SPD expressly states that it is <u>supplementary to</u> the LPFA and that it relates <u>particularly</u> to LPFA Policies DW-E1 and DW-E2. As Mr Moir observed[48], the Council has not sought to delete the text relating to Policy DW-E2, nor has it issued any addendum to or note on the 2006 SPD stating that it is to be approached in the manner for which Mr Payne contends.

[47] I.e. for residential development within one of the built-up areas.
[48] Oral evidence.

8.8.2. Moreover, there was no suggestion from Mr Payne that any of the aims of the SPD ought to be disregarded. Those aims include[49] "[t]o promote the successful implementation of policies which promote higher densities in new residential development" and "[t]o highlight the links between quality of design and successful higher density development". The first of those two aims is entirely consistent with the NPPF: policy promoting higher densities in new residential development remains current at the national level (see paras. 124, 125 and 130 of the NPPF, discussed in more detail below).

8.8.3. Nor did Mr Payne suggest that the following passage from p. 12 of the SPD had become in any way irrelevant:

> "Building at higher densities than currently exists in most of the towns and villages in New Forest District at present, inevitably creates public concerns because of perceived changes it may bring to the character of an area. However, through good design, these changes can be brought about in a way which will protect and can often enhance the character of our towns and villages, while at the same time providing additional housing and minimising the need to build on green field sites in the District".

9. The density of the Scheme is amply justified. In reaching a conclusion on whether the proposed density is appropriate it is common ground[50] that regard should be had to the Council's HLS position. The Council is missing almost two years of the requisite 5Y HLS. There is absolutely no prospect of that position being ameliorated through the Local Plan process any time soon; nor has the Council identified any other solution in the near future. In those circumstances, the exhortation within para. 124 of the NPPF to make efficient use of land must be taken very seriously. Indeed, para. 125 of the NPPF – which Mr Gilfillan had omitted from his proof of evidence in an "oversight"[51] - spells out that where (as here) there is an existing shortage of land for meeting identified housing needs, it is especially important that planning decisions (i) avoid homes being built at low densities; and (ii) ensure that developments make optimal use of the potential of each site. There is nothing whatsoever objectionable about the Scheme's density. It is an appropriate response to national policy requirements that it is common ground apply here.

[49] P. 5.
[50] Payne cross-examination.
[51] Gilfillan cross-examination.

10. It is telling – and unfortunate – that Mr Payne's proof of evidence refers[52] only to (d) and (e) within NPPF para. 124, omitting any reference to (a) ("the identified need for different types of housing and other forms of development, and the availability of land suitable for accommodating it") and (c), which refers *inter alia* to "the scope to promote sustainable travel modes that limit future car use".

11. Similarly, Mr Payne explains in his proof of evidence[53] that he has emphasised the text of para. 130 of the NPPF "where I believe it is relevant to the refusal reasons". It is again telling that that emphasis does not include parts of para. 130 (c) and (e) that are – as he conceded in cross-examination – of equal relevance to the determination of this appeal as are the elements that he has emphasised. Thus, the end of (c) – which warns against "preventing or discouraging appropriate innovation or change (such as increased densities)" is not emphasised; neither is the reference within (e) to "optimising" site potential; nor the reference later in (e) to the need to "support local facilities".

12. The Council's position on para. 134 of the NPPF is unclear: the question put to Mr Moir[54] was that "all else being equal" (what does that mean?) a conclusion under para. 134 that development is not well designed "is the sort of thing that normally would justify" a consequent conclusion - with reference to NPPF para. 11d(ii) - that the adverse impacts of the development do significantly and demonstrably outweigh the benefits of granting planning permission for it. The Scheme is well designed and so this point goes nowhere. Moreover, para. 134 does not enjoy any special status or effect in relation to the tilted balance in NPPF para. 11d(ii). Had the Government wished to give it the effect for which the Council apparently contends (that is, had the Government wanted para. 134 to dictate the outcome of the tilted balance to any degree) it would have included para. 134 in the "footnote 7" policies; or it would have worded the NPPF expressly to that effect. See, in contrast, para. 14 of the NPPF, which is expressly worded as follows: "In situations where the presumption (at paragraph 11d) applies to applications involving the provision of housing, the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits, provided all of the following apply…".

[52] At para. 3.4.5.
[53] Para. 3.4.11.
[54] Cross-examination.

13. Finally on density, it is common ground[55] that by reason of its location within the existing built-up area the Scheme will preserve the spatial landscape qualities of the National Park and the AONB (in accordance with Policy STR2 of LPP1). It is important to keep in mind that the greater the number of units that come forward on the Site, the greater the contribution to preserving those spatial landscape qualities. Para. 176 of the NPPF states expressly that National Parks and AONBs "have the highest status of protection" in relation to conserving and enhancing landscape and scenic beauty; the paragraph requires great weight to be given to those issues. In contrast, the Site does not benefit from that level of protection under national policy and the NPPF does not mandate the weight to be given to conserving and enhancing the landscape character of the Site.

14. The Council complains that the Scheme will fail to respect the "spacious sylvan character of the prevailing pattern of development in the area"[56]. That complaint is not well founded. As to whether the Scheme is sufficiently "spacious", the Council has acknowledged that the proposed density is acceptable for the Site. The density of the Scheme itself is similarly appropriate, for the reasons summarised above.

15. As to the sylvan character of the area, it is obvious that the Scheme will respect this. Mr Payne agreed that the interior of the paddock within the Site is not sylvan at present. He also agreed that the character of the area is sylvan in the sense that one experiences trees together with built form - as opposed to experiencing nothing but trees / greenery; or experiencing trees in open countryside. Given that (i) the Council accepts the principle of residential development at a density of 27.8 dph on the Site and (ii) the Council agrees that visibility of the Scheme from surrounding streets will be limited, it cannot be said that the Scheme will have any material adverse effect on the area's sylvan character. It is important to note that in the present context, trees are commonly visible behind two storey dwellings: see e.g. Mr Payne's Fig. I, Fig. K and Fig. P. Mr Harrington was plainly correct to observe[57] that "it is perfectly acceptable to have roofs seen behind other roofs interspersed with trees".

[55] Harrington proof of evidence (CD4-2) para. 4.4.3 and Payne cross-examination.
[56] RfR 1.
[57] Evidence-in-chief.

16. Indeed, the effect of the Scheme on sylvan character will be positive:

16.1. Existing trees have been retained and incorporated within the layout to the extent possible. Mr Harrington explained[58] that a very, very clear and distinct design decision had been made to place the majority of those trees within the Scheme's public domain (as opposed to placing them in back gardens). Experientially, those trees will belong to everyone rather than being the preserve of the private domain. In this respect the Scheme's design takes advantage of a benefit that is not available to many new housing schemes.

16.2. It is common ground[59] that there will be no need to remove a significant number of trees (or lengths of hedgerow) to facilitate the Scheme: only nine trees (from a surveyed number of 40) have been identified for removal and it is common ground that none of the trees proposed for removal are in good health or make a high value contribution to the character of the area (such that their loss would be resisted).

16.3. It is also common ground that 27 new trees will be planted[60]. Whilst Mr Payne demurred on this point in cross-examination, it is simply not realistic for the Council to contend that a residential scheme that will in fact increase the number of trees on the Site by 18 (and will also provide a 27.51% gain in hedgerow units[61]) will in any way fail to respect the sylvan character of the Site's surroundings.

17. Surprisingly, Mr Payne explained in cross-examination that he had not actually counted how many new trees were proposed. It is plainly unreasonable for the Council to have sought to defend RfR 1 and 7 at appeal without its landscape and design witness having taken the time to understand – either at application stage or on appeal – the quantum of new tree planting proposed. Indeed, Mr Payne's evidence on this point undermines RfR 7 entirely.

18. Mr Payne's reluctance to accept that the Scheme will not have an adverse effect on sylvan character was founded upon his conviction that there was uncertainty as to whether the trees

[58] Evidence-in-chief.
[59] Main SoCG para. 8.15.
[60] *Ibid.* para. 8.16.
[61] *Ibid*. para. 8.15.

would be kept on Site[62]. He accepted that if the trees and hedgerow do remain *in situ* a decade hence, the Scheme will have had a positive effect on sylvan character. There is no uncertainty over whether the trees and hedgerow will remain. There is – as Mr Payne accepted – no RfR on arboricultural grounds. Indeed, other than Mr Payne no-one who has considered the Scheme – including the Council's own arboricultural officer – has made even the slightest suggestion that there is any future danger to either existing or proposed trees[63]. Nor does the Council's arboricultural officer now suggest that the proposed new trees are too small (as Mr Payne contends).

19. Proposed Conditions[64] 3 and 4 in effect ensure that both the existing and the proposed new trees will be retained on Site. Proposed Condition 5 will ensure the protection of existing trees during construction of the Scheme.

20. As to para. 131 of the NPPF, Mr Payne confirmed that he was not contending that the new streets within the Scheme will not be "tree lined". The remainder of para. 131 is satisfied. In particular, opportunities have been taken to incorporate trees and appropriate measures are in place to secure their long-term maintenance (above). Existing trees have been retained wherever possible (Mr Payne clarified that he was not contending otherwise).

21. Mr Payne's evidence on "rear garden islands"[65] does not advance the Council's case. Fig. 6 in his proof of evidence does not relate to the Site or its context. Indeed, at Lime Close (which is within the Site's context) one finds the opposite to a "rear garden islands" approach, the bungalows (rather than their rear gardens) being sited centrally. In any event, as Mr Harrington explained[66] the siting of the proposed homes in the north and west of the Scheme will essentially create the "rear garden islands" desired by Mr Payne.

22. The gardens within the Scheme are not too small. They are proportionate to the proposed homes, which (like the gardens) are smaller than existing surrounding properties. There is neither any Council policy nor even any Council guidance on minimum garden sizes. Mr Harrington's

[62] See his proof of evidence (CD4-6) at para. 3.4.18.
[63] As Mr Payne acknowledged, the "safe distances" identified in Appendix G to his proof of evidence are not in every instance observed in the existing context. Mr Harrington's evidence was that the Scheme's design did not place any additional pressure on trees within the Site; indeed any existing pressure will be reduced where it is proposed to bring an existing tree into the public domain (as part of the Scheme).
[64] ID6.
[65] Proof of evidence (CD4-6) para. 6.3.6 ff.
[66] Evidence-in-chief.

unchallenged evidence[67] was that each garden would provide a reasonable amount of amenity. There is nothing in the Council's point that some of the gardens are less than 100 sq m. As Mr Harrington explained, the Essex Design Guide[68] identifies a minimum 100 sq m garden size for houses with three or more bedrooms; the identified minimum for houses with one or two bedrooms is 50 sq m. In any event, garden size is not determinative of the ability of a garden to afford amenity: shape, orientation and ease of access from the associated house are also important.

23. Mr Harrington also explained that each proposed home will have "defensible" front space, which is simply a reference to a "buffer" between the front door and the street. In accordance with the NDG, the Scheme design offers variety in the treatment of those spaces.

24. As to the Council's complaint that the Scheme design affords insufficient greenery between the proposed homes, that fails to recognise the considerable visual benefit offered by the existing mature trees on site, which will (as Mr Harrington explained[69]) be viewed between the dwellings, as a backdrop.

25. As regards storey heights, Mr Payne's claim that "[o]ver 70% of local dwellings are below full two storey in scale" is inaccurate: by the Appellant's calculation, the correct figure is 60% if one considers the 57 existing properties that were referred to by Mr Payne in his oral evidence[70]. Mr Payne conceded that he was not suggesting that two storey dwellings are not a key characteristic of Dibden Purlieu as a whole. The 57 existing properties to which he referred did not include any of the dwellings on the other side of Noads Way from the Site, where there are numerous two storey dwellings. Moreover, Mr Harrington explained[71] the detailed consideration that had been given to the design in order to create a hierarchy and a streetscape.

[67] Evidence-in-chief.
[68] This is referred to in Mr Payne's rebuttal but of course does not actually apply to the Site, which is not located in Essex.
[69] Evidence-in-chief.
[70] With reference to Appendix D to his proof of evidence.
[71] See e.g. p. 48 of his proof of evidence (CD4-2) and Image 54. Orientation, garden walls, projecting bay windows, car ports are used to introduce a hierarchy and the impression of outbuildings. The buildings set back and pull forward of each other; there will not be an intensively developed two-storey terrace without relief. The larger scale buildings front the central green space and will be viewed across that. Careful consideration has been given to the variation in materials e.g. the use of cladding.

26. The Council's contention that there is a "dominance of car parking" within the Scheme is without foundation. It is common ground that the Scheme does not include an excessive number of car parking spaces per unit[72]. Whilst Mr Payne argues that "fewer houses would lead to proportionately more greenspace and far less hard standing", it cannot seriously be contended that this point should trump the serious need to provide more housing within the Council's area. In any event, the Council accepts that a density of 27.8 dph is acceptable for the Site. Furthermore, the alleged difficulties with "tandem spaces"[73] are illusory: it is common ground[74] that the proposed car parking spaces satisfy the relevant technical standards. It is also agreed[75] that the proposed level of parking will neither compromise highway safety in the area, nor lead to overwhelming demand for kerbside parking along Noads Way or other surrounding roads. Finally, Mr Payne accepted that the proposed parking will be generally concealed from the public view along Noads Way.

27. To conclude on RfR 1 and 7, the Council's insistence – maintained by Mr Payne throughout his oral evidence – that the Scheme will be "completely at odds" with its context serves only to emphasise how unrealistic its approach to design and character has been. The Scheme will not be at odds with its context at all, never mind "completely". That context is defined by the Council's own *Landscape Character Assessment SPG* as a "dense urban area". It includes numerous examples of comparable densities, plot sizes and separation distances within the vicinity of the Site. Both the Scheme's architecture and its frontage layout are – as the Council agrees – appropriate. The Scheme is proposed at a density that the Council considers to be acceptable for the Site. The Scheme will increase both the number of trees and the amount of hedgerow on the Site. It will have a positive effect on the sylvan character of the area.

28. The Scheme's design is well planned, high quality and will contribute positively to local distinctiveness, enhancing the character and identity of the locality. The Scheme accords with LPP1 Policies STR1, ENV3 and ENV4, with Policy D1[76] of the NP, with the 2006 SPD and with the relevant policies of the NPPF.

[72] Payne proof of evidence (CD4-6) at 7.1.4 and cross-examination.
[73] *Ibid.*, final paragraph.
[74] Payne cross-examination.
[75] Harrington proof of evidence (CD4-2) para. 6.6.14 and Payne cross-examination.
[76] Mr Payne mentions Policy D3 of the NP at para. 3.3.4 of his proof of evidence but there is no reference to that policy in the decision notice, the officer's report ("**OR**"), the Council's statement of case or Mr Gilfillan's proof of evidence.

Public open space and play space[77]

29. There is no dispute between the Council and the Appellant as regards formal public open space ("**POS**"): the Council accepts[78] that the proposed financial contribution towards off-site formal POS satisfactorily addresses the expectation that the Scheme will make provision for 0.09ha[79] of formal POS.

30. In respect of informal POS and play space, it is common ground[80] that based on the minimum level of provision of 3.5ha per 1000 population referenced in Policy CS7(b) of the Core Strategy ("**Policy CS7**" and "**the CS**", respectively) the Scheme is expected to provide (i) 0.15ha of informal POS and (ii) 0.02ha of play space.

31. The Appellant's position is that Policy CS7 allows that provision to be made either (i) through on-site provision; (ii) by financial contribution to enhance or create off-site provision; or (iii) through a combination of both on-site provision and financial contribution.

32. The Council's stance is that Policy CS7 requires the full 0.15ha of informal POS and 0.02ha of play space provision to come forward on-site.

33. That stance is premised on an incorrect interpretation of Policy CS7. Only Policy CS7(b) refers to any minimum level of provision – and Policy CS7(b) expressly states that the provision can be made either on-site or by financial contribution towards off-site provision. Policy CS7(c) requires all new residential developments on sites of 0.5ha or over to provide "appropriately designed" informal POS on-site and to include the provision of "designed good quality play spaces". Policy CS7(c) does not require that on-site provision to attain any minimum level. Were it to do so it would cut across the flexibility that is expressly afforded to applicants by Policy CS7(b). It should be noted that Mr Payne agreed that Policy CS7(c) did not require any minimum quantum of play space to be provided on-site.

34. Properly interpreted, Policy CS7(c) simply requires the Scheme to provide "appropriately designed" informal POS and "designed good quality play spaces" on-site.

[77] RfR 5.
[78] Gilfillan cross-examination.
[79] Main SoCG (CD8-1), para. 8.34.
[80] *Ibid.*

35. Addressing the Scheme's informal POS provision first: the Scheme makes on-site provision for 0.075ha of informal POS. That on-site provision satisfies the Policy CS7(c) requirement that "appropriately designed" informal POS be provided on-site.

36. Mr Payne maintained (in his oral evidence) his argument that the central area of informal POS "offers a sense of being fenced-off for many"[81]. That argument is divorced from the reality of what is proposed, which is (as Mr Payne accepted) accurately depicted in Images 47 and 48 within Mr Harrington's proof of evidence. True it is that a "fence" (albeit one comprised of slim railings so as to present almost no visual obstacle) is proposed along part – but only part – of the edge of the central area of informal POS. The contention that what is proposed results in a "sense of being fenced-off for many" serves only to underline the unrealistic and overly critical approach that Mr Payne has taken to this application.

37. Mr Payne also complains[82] that the second area of informal POS (south of plot 22) "is secluded, shady and has nothing to encourage social interaction". That complaint is misconceived: as he conceded in cross-examination, some occupants of the Scheme might enjoy and indeed seek out informal POS that has those characteristics.

38. The remaining question as regards informal POS is whether the absence of any financial contribution in respect of the 0.075ha of informal POS that is outstanding (if one applies the 3.5ha/1000 population level of provision) means that there is a partial conflict with Policy CS7(b). In the Appellant's submission it is obvious that there is not. As Mr Moir emphasised, Policy CS7 expressly states – right at the outset – that the aim is to provide the equivalent of 3.5ha of POS *per* 1000 population as a minimum. At para. 29 of its closing submissions the Council argues that "even if Mr. Moir were right to read the use of the word "aim" as implying that the policy will not necessarily require the standard to be met in every case, on any sensible reading such flexibility could only be available where there *[sic]* some overriding for failing to do so…". There is a completely obvious justification for the approach taken by the Appellant to informal POS provision here, which is that it is common ground that the open space needs of the Scheme's residents will be met[83] (see further below).

[81] Proof of evidence (CD4-6) para. 4.3.12.
[82] *Ibid*.
[83] Gilfillan cross-examination.

39. Turning to play space provision, the Scheme proposes a financial contribution in respect of the requisite 0.02ha (the Council accepts[84] that quantum of the financial contribution is adequate). The central area of informal POS can also function as good quality play space. On the ability of that area to do so, it is common ground (Mr Payne having accepted these points in cross-examination) that:

    39.1. The Fields in Trust ("**FiT**") guidance[85] is neither Council policy nor Council guidance; it is not referred to in Policy CS7. FiT is a charity whose sole mission is to safeguard and improve outdoor space.

    39.2. Contrary to the suggestion made by Mr Payne in his rebuttal[86], the FiT guidance does not "only sugges[t] that we can do without the play on site if residents are within 100m of an existing facility". The FiT guidance[87] is that there should be a "LAP" (Local Area for Play) within 100m of the proposed new homes; there is no need for a "LEAP" (Locally Equipped Area for Play) within 100m. (The requirement in respect of LEAPs is 400m and this is met by the existing recreation ground[88]. It is common ground[89] that the Site is within "easy walking distance" of the latter).

    39.3. LAPs are "aimed at very young children"[90]. A LAP "requires no play equipment as such".[91] The central area of informal POS within the Scheme meets the FiT's recommended minimum size requirements for LAPs[92].

40. The central area of informal POS within the Scheme satisfies the FiT guidance in relation to LAPs. It follows that the Policy CS7(c) requirement to provide "designed good quality play spaces" on-site is also met. Given that it is agreed[93] (i) that the dispute between the Council and the Appellant in relation to play space is confined to whether adequate provision will be made for very young children; and (ii) that the requisite provision for that age group requires no play equipment as

[84] *Ibid*.
[85] CD7-28.
[86] CD4-11, p. 2.
[87] CD7-28, p. 6.
[88] As Mr Harrington explained in evidence-in-chief, the existing recreation ground provides formal POS, informal POS and play space.
[89] Harrington summary (CD4-2) para. 6.3.
[90] *Ibid.* p. 5.
[91] FiT FAQs (CD7-28).
[92] *Ibid.* p. 9.
[93] Payne cross-examination.

such, there is no need for the central area of informal POS to be more heavily "designed" as play space. The Appellant notes that the Council's pre-application advice[94] was that subject to drainage design and calculations "the large greenspace in the centre of the site […] would provide space for informal recreation and play" (emphasis added). It should also be noted that Mr Gilfillan conceded that there is neither policy nor guidance that states that an area of space cannot function as and contribute towards both informal POS and play space requirements.

41. Mr Payne's SuDS point[95] is, as he conceded, unsupported by any reference in the decision notice or the Council's statement of case. Mr Harrington's unchallenged evidence in response[96] was that SuDS considerations will not prevent tree planting as indicated, not preclude any form of informal play within the central area of POS.

42. The Council's continued insistence that the requirements of Policy CS7 in relation to play space cannot be satisfied through a financial contribution is flatly inconsistent with its acceptance[97] that the proposed financial contribution (see para. 8.36 of the Main SoCG[98]) complies with reg. 122 of the Community Infrastructure Levy Regulations 2010 ("**Reg. 122**"). In accepting that the proposed financial contribution complies with Reg. 122 the Council has accepted (*inter alia*) that it is necessary to make the Scheme acceptable in planning terms: see Reg. 122(2)(a). That acceptance cannot sit with the Council's assertion that the 0.02ha of play space must be provided in full on-site such that it is not open to the Appellant to meet the requirements of Policy CS7 by way of a financial contribution.

43. Even if there is (contrary to the above submissions) partial conflict with Policy CS7, it should be given limited weight in the overall planning balance:

    43.1. Any breach of the policy is very partial. Moreover in practical terms, taking the Council's case at its highest the alleged conflict with policy equates to a shortfall of 0.075ha of informal POS provision and of 0.02ha of play space provision. Mr Gilfillan conceded that it would be wrong to describe any breach of the policy as "significant" simply because the 0.075ha amounts to half of the 0.15ha figure.

[94] CD5-1.
[95] *Ibid.* para. 3.1.11.
[96] Evidence-in-chief.
[97] Gilfillan cross-examination.
[98] CD8-1.

43.2. It is common ground[99] that the "minimum level of provision of 3.5ha per 1000 population" that is referenced in Policy CS7(b) results from a PPG17 study. PPG17 was replaced over 11 years ago by the first version of the NPPF. Policy CS7 is itself 14 years old and does not accord with para. 98 of the NPPF, which states clearly that "[p]lanning policies should be based on robust and up-to-date assessments of the need for open space, sport and recreation facilities (including quantitative or qualitative deficits or surpluses) and opportunities for new provision". It is wholly unrealistic for the Council to contend that a policy that was adopted 14 years ago is "based on robust and up-to-date" assessment work. Policy CS7 is based on assessment work that is more than 14 years old, as Mr Gilfillan acknowledged. The Council's apparent suggestion[100] that it is acceptable for it to sit on its hands whilst insisting that the assessment work – which has not been considered at all since 2018-2019 – remains "robust and up-to-date" and that the onus is on applicants to commission evidence to counter that insistence is both surprising and unattractive.

43.3. The reference to ***Peel Investments North Ltd v SSHCLG*** [2020] EWCA Civ 1175 at para. 30 of the Council's closing submissions is inapt. The passage that is cited from ***Peel*** is discussing the circumstances in which a policy will be out-of-date for the purposes of (what is now) para. 11d of the NPPF. CS7, as one of the "most important" policies for determining the application, is deemed out-of-date here through the operation of footnote 8 to the NPPF because the Council does not have a 5Y HLS. (This point is discussed in more detail below in relation to the ***Wavendon*** judgment.) The passage cited from ***Peel*** is not discussing the circumstances in which open space assessment work will be "robust and up-to-date" for the purpose of para. 98 of the NPPF.

43.4. It is also common ground[101] that the purpose of having policy on POS is to ensure that the needs of residents are met; that if there is a partial breach of Policy CS7 (as the Council contends) then in deciding what weight to give to that breach in the overall planning balance, the Inspector should consider to what extent the needs of the Scheme's residents will be met; and that the open space needs of the Scheme's residents will be met. Mr Gilfillan's suggestion that the needs of the Scheme's residents will be met to the detriment of those of existing residents does not bear scrutiny. At most, the shortfall is 0.095ha. The nearby recreation ground provides formal POS, informal POS and play space. The degree

[99] Main SoCG (CD8-1) para. 8.35.
[100] Moir cross-examination.
[101] Gilfillan cross-examination.

to which existing residents benefit from gardens can be appreciated from the evidence. Finally, the New Forest is close at hand. (In the light of the questions put to Mr Moir in cross-examination it bears repeating that it is common ground[102] that the "Habitats" financial contributions secured by the s. 106 obligation[103] are of an appropriate quantum and will fully mitigate any recreational impact that the Scheme might have on the New Forest. Those financial contributions are separate from and additional to the POS and play space financial contribution[104]. Thus, even if the conclusion reached (contrary to the Appellant's position) is that there is a shortfall in the Scheme's POS / play space provision, no additional pressure will be placed on the New Forest as a result. To the extent that it was suggested in cross-examination of Mr Moir that there is a link between LPP1 Policy ENV1 and Policy CS7: that suggestion was belatedly made, is incorrect and is also unsupported by the evidence of any Council witness.)

44. Having regard to the above, it is plain that Mr Gilfillan was correct to concede that RfR 5 would not by itself have justified a refusal of planning permission.

Affordable housing / viability

45. It is common ground that if the Inspector is satisfied that the Scheme's offer of three affordable housing ("**AH**") units is justified in viability terms, there will be no breach of either LPP1 Policy HOU2 or LPP1 Policy IMPL1 - i.e. the Scheme will be policy-compliant from a viability perspective[105]. It is also common ground that the dispute between the Appellant and the Council on AH / viability grounds is confined to the question of the number of AH units that can viably be provided. The Appellant's position is that the Scheme's offer of three AH units (representing 12% AH provision) exceeds the number of AH units that the Scheme can viably provide – with three AH units the Scheme's residual land value ("**RLV**") is £948,614, which is beneath the Scheme's benchmark land value ("**BLV**") of £1.15m. The Council's position is that the Scheme can viably provide nine AH units (representing 35% AH provision).

46. As regards para. 58 of the NPPF, that paragraph provides that "[w]here up-to-date policies have set out the contributions expected from development, planning applications that comply with

[102] Gilfillan cross-examination.
[103] I.e. the "Habitats Mitigation (Access Management and Monitoring) Contribution"; the "Habitats Mitigation (Bird Aware Solent) Contribution"; and the "Habitats Mitigation (Infrastructure) Contribution": see the definition of "Contributions" within the s. 106 obligation (ID8).
[104] See the definition of "Contributions" within the s. 106 obligation (ID8).
[105] *Ibid*.

them should be assumed to be viable". It is however common ground[106] that LLP1 Policies HOU2 and IMPL1 are out-of-date for the purpose of applying this part of NPPF para. 58. It is also common ground that the only respect in which para. 58 of the NPPF places the "onus" on the applicant is that it states that it is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The need for such an assessment here is not disputed[107].

47. It is important to recognise that the viability work undertaken by Three Dragons in 2018 in support of the Council's "*Whole Plan Review*" ("**the 3D Report**"[108]) did not expect the Site to be viable with 35% affordable housing ("**AH**") at the density that is proposed for the Scheme:

    47.1. Waterside (the area in which the Scheme is located) was identified[109] even back in 2018 as one of two "lower value areas" where "the delivery of new housing will require a different and more flexible policy approach" (emphasis added)[110]. 35% affordable housing was identified as "achievable in most cases" (compared to 50% affordable housing being identified simply as "achievable" outside of Totton and the Waterside, the two lower value areas)[111]. The advice to the Council[112] was that "[d]ensity plays a crucial role in achieving policy compliance and the council needs to be aware that where applications are made for a density of less than 30dph, viability will be lessened; this will be of particular importance in the Totton and the Waterside value area" (emphasis added). The effect of recreational mitigation as a cost on smaller sides was also identified as "significant". The 3D Report went on to advise[113] that "[t]he eastern band of Totton and the Waterside has the lowest headroom for residential viability, therefore the balances between affordable housing and infrastructure will be at their most sensitive" and that "[w]hilst there may be a temptation to maximise affordable housing targets across the study area, this does have to be balanced with other infrastructure requirements".

[106] *Ibid*.
[107] Castle and Gilfillan cross-examination.
[108] Appendix F to Newman proof of evidence (CD4-3).
[109] *Ibid.* at 4.2.
[110] *Ibid.* at 4.3.
[111] *Ibid.* at 4.6.
[112] *Ibid.* at 4.9.
[113] *Ibid.* at 4.13.

47.2. The "CS2 – 25 unit case study"[114] was shown as unviable with 35% AH at densities of 25 dph and 30 dph, becoming viable at a density of <30 dph to 35 dph. The Scheme's density is 27.8 dph.

48. Turning to the evidence, Mr Newman's evidence should be preferred to that of Mr Castle:

48.1. Mr Newman's assessment of the Site's BLV has been informed by two site visits. Mr Castle has never visited the Site. Without having visited the Site, it was not appropriate for Mr Castle to suggest that the increase in the existing use value ("**EUV**") for the existing dwelling on the Site that is indicated by the House Price Index ("**HPI**") might be negated by a need to refurbish the dwelling (below). Mr Castle had not troubled to check whether Mr Newman's evidence in relation to the HPI was correct, despite having had three weeks to do so prior to giving oral evidence.

48.2. Mr Castle revised his BLV for the Site down to £990,000 (from the £1.15m previously agreed with Mr Newman) on the sole ground that an additional cost for off-site drainage infrastructure (at £401,238) had been introduced. He was unable to give any satisfactory answer as to why the BLV should not revert to the previously agreed £1.15m now that the off-site drainage infrastructure cost has been removed.

48.3. It is common ground that Mr Newman has provided the most recent evidence from the agent for St Jude's and also that Mr Newman has provided better evidence on the abnormal development costs for Beckley Walk. It was unhelpful for Mr Castle to purport to provide an analysis of gross land value ("**GLV**") for St Jude's in circumstances where he did not actually know what abnormal development costs apply to that scheme.

48.4. Mr Castle's analysis of second-hand property transactions relies heavily on the application of a "new build premium" to the Scheme. There is not a strong case for applying such a premium (below).

48.5. Mr Castle's evidence does not completely align with that presented by Mr Payne on behalf of the Council (below).

[114] *Ibid.* at Figure 3.8 (p. 32).

48.6. Mr Castle's evidence on interest charges was premised on the Scheme being phased, which it is not.

BLV

49. Turning to benchmark land value ("**BLV**") for the Site, Mr Newman considers the appropriate figure to be £1.15m whereas Mr Castle contends for a figure of £990,000. Mr Newman's BLV should be preferred for the following reasons:

49.1. Mr Newman visited the Site on initial instruction and again prior to providing evidence to this inquiry. Mr Castle has never visited the Site.

49.2. It is common ground[115] that to calculate the BLV for the Site, it is appropriate to establish the existing use value ("**EUV**") for the dwelling, to establish the EUV for the paddock and to add a premium for the paddock. (It is agreed that no premium should be added for the dwelling.)

49.3. The EUV for the dwelling was previously agreed between Mr Newman and Mr Castle as £510,000. That figure was identified by Mr Newman in July 2021, over two years ago. Mr Newman is plainly correct to observe[116] that the House Price Index ("**HPI**") suggests that the EUV for the dwelling has increased by 17% since July 2021, such that the present EUV for the dwelling is c. £597,000. Mr Castle conceded that it "could be" right to have regard to the HPI and that the latter "may well be correct". He had not checked whether it was (despite having been in receipt of Mr Newman's rebuttal for three weeks prior to giving oral evidence). Mr Castle initially suggested that the potential need for refurbishment of the dwelling might negate the increase in EUV indicated by the HPI, before conceding that he was not actually in a position to understand whether there is a greater need for refurbishment now than there was in July 2021 (which concession is unsurprising given that Mr Castle has not been to Site).

49.4. If the EUV for the dwelling is £597,000 (rather than £510,000 as contended for by Mr Castle), the Scheme is not viable with 35% AH even if Mr Castle's assessment of residual land value ("**RLV**") is accepted in full; and irrespective of whether the paddock is measured

[115] Confirmed in Castle cross-examination.
[116] Rebuttal (CD4-10) at paras. 1.4 and 1.5.

as 1.6 acres or 1.9 acres. Mr Castle accepted this point. If the EUV for the dwelling is £597,000, the BLV for the Site is £1,077,000 if the paddock is 1.6 acres and £1,167,000 if the paddock is 1.9 acres[117]. Mr Castle's RLV for the Scheme with 35% AH is £1,017,809[118], which is below both BLVs.

49.5. In the Appellant's submission the most obvious reason why Mr Newman's BLV should be preferred is this: Mr Castle confirmed in cross-examination that the sole reason that he had revised his BLV down to £990,000 (from the figure of £1.15m previously agreed with Mr Newman) was because an additional cost for off-site drainage infrastructure (at £401,238) had been introduced[119]. There is no longer any need for £401,238 for off-site drainage infrastructure. The logical consequence of that cost having been removed is that the BLV should revert to £1.15m. Mr Castle frankly acknowledged that he would not have "reopened" the BLV and "would have gone with the £1.15m" if the off-site drainage cost had not been introduced. He also recognised that there was "a case" for saying that the BLV should revert to £1.15m: "it was agreed at that level before the costs were brought in, those costs have gone away". It should be noted that in cross-examination Mr Castle acknowledged that he had put his revised BLV "absolutely at the bottom" of the range that he had initially identified (£990,000 to £1,295,000: see para. 7.1 of his proof of evidence[120]).

49.6. Mr Castle sought to justify his continued reliance on the revised BLV of £990,000 by reference to the Rapleys *Financial Viability Assessment* for Land North of the Hollies ("**the Rapleys FVA**"[121]). That document however does not even begin to justify Mr Castle's revised BLV (and Mr Newman was correct to contend that it should not be given any weight):

49.6.1. It is heavily redacted. Its author, Simon Corp, does not have the same qualifications as Mr Newman and Mr Castle[122].

[117] Newman rebuttal (CD4-10) para. 1.11 (agreed by Mr Castle in cross-examination).
[118] Castle cross-examination.
[119] That this was the sole reason for Mr Castle's revision to his BLV is also apparent from paras. 7.3.3, 7.3.4, 7.4.1 to 7.4.2, 12.1.1 and 12.1.3 of his proof of evidence (CD4-7).
[120] CD4-7.
[121] CD7-27.
[122] Newman re-examination.

49.6.2. It has been produced on behalf of an applicant in support of an application for planning permission. That application has not yet been determined.

49.6.3. The proposed development at the Hollies comprises nine dwellings. The Hollies site is a piece of farmland in open countryside, not near to any existing settlement; Mr Newman's unchallenged evidence was that it is "completely different" to the appeal Site. He explained that as a result of the unique nature of the latter he had committed a significant amount of time to try and understand and evidence its EUV.

49.6.4. It is clear from para. 14.4 of the Rapleys FVA – and Mr Castle acknowledged – that the BLV of £500,000/ha arrives in the document as a proposed cap. It is also plain that Rapleys do not actually agree "in capping the value at a lower level" – they appear to have adopted the £500,000/ha (as opposed to an alternative, higher BLV of £617,750/ha) out of expediency.

49.6.5. In any event, the Rapleys FVA does not even support a BLV of £990,000 for the Site. On Mr Castle's own evidence[123], applying the Rapleys FVA BLV of £500,000 per hectare (being £202,500 per acre) to the paddock on the Site indicates a BLV for the Site in the order of £834,000.

49.7. The points that Mr Castle makes at para. 2.16 ff. of his rebuttal[124] in respect of Green Acres, Racecourse Cottage and Orchardleigh do not withstand scrutiny:

49.7.1. Mr Castle conceded that Mr Newman's approach to both Green Acres and Orchardleigh did <u>not</u> have the effect of applying a premium to the existing dwelling on the Site (contrary to Mr Castle's assertion at paras. 2.18 and 2.33 of his rebuttal). Para. 40 of the Council's closing submissions ignores the concession made by Mr Castle;

49.7.2. At para. 2.21 of his rebuttal Mr Castle relies on an alleged difference in condition between Racecourse Cottage and the existing dwelling on the Site - but he

[123] Proof of evidence (CD4-7) para. 7.4.6
[124] CD4-12.

confirmed in cross-examination that he had not actually inspected either property; and

49.7.3. Mr Castle's criticism (at para. 2.22 of his rebuttal) of Mr Newman for having disregarded any value attributable to the woodland adjoining Racecourse Cottage goes nowhere, Mr Castle having agreed that omitting the woodland would not have a significant effect on the overall EUV for that site.

49.8. The 3D Report in 2018 indicated a BLV for the Site of £1,080,000[125]. That figure is nearer to Mr Newman's BLV (£1.15m) than to Mr Castle's BLV (£990,000) and is in any event an underestimate given that (as Mr Castle agreed) the 3D Report did not take into account the existing dwelling on the Site[126]. It is also important to note that (as is common ground[127]) the BLV values in the 3D Report are an estimate of the lowest values that landowners may accept[128]. Mr Castle is simply wrong to contend[129] that paras. 2.9 and 2.10 of the 3D Report show that 3D consider a sum in the order of £1.2m/ha "to apply equally to greenfield and brownfield sites" and "that lower values might be expected to apply to greenfield sites". It is clear from those paragraphs that £1.2m is the estimate of the lowest value for greenfield sites – higher values can be expected to apply to brownfield sites and also to sites that are, like the appeal Site, part-greenfield and part-brownfield.

49.9. In cross-examination Mr Castle's evidence was that he "would expect that arguably both BLV and RLV are higher for the Site" than in 2018. If that evidence is correct, it does not support a current BLV of only £990,000 for the Site. Mr Castle's own evidence[130] is that the 3D Report in 2018 indicated a BLV for the Site of £1,067,000.

50. It is common ground[131] that if Mr Newman's BLV of £1.15m is preferred, the Scheme is not viable with 35% AH (9 units). Even if one accepts all of Mr Castle's inputs, at 35% AH the residual land value ("**RLV**") for the Scheme is £1,017,809[132]. The RLV being lower than the BLV, the Scheme is unviable.

[125] £1.2m per hectare; the Site is c. 0.9 hectare (Castle proof of evidence para. 3.2).
[126] Newman proof of evidence (CD4-3) paras. 4.9 to 4.11.
[127] Castle cross-examination.
[128] Appendix F to Newman proof of evidence (CD4-3), para. 2.10.
[129] Rebuttal (CD4-12) para. 2.4.
[130] Rebuttal (CD4-12) para. 2.1.
[131] Castle cross-examination.
[132] Castle cross-examination.

RLV

51. Turning to the Scheme's RLV, Mr Newman identifies a figure of £948,614[133] whilst Mr Castle contends for £1,537,038[134]. The difference between those two figures is chiefly explained by the witnesses' positions on private revenue[135], being £425/sq ft (Mr Newman[136]) and £452/sq ft (Mr Castle[137]). Mr Newman's evidence on both (i) private revenue and (ii) overall RLV should again be preferred, for the following reasons.

52. Addressing new build developments first:

    52.1. Mr Newman's evidence in respect of the nearby St Jude's development is more recent than that provided by Mr Castle. The latest evidence from the agent for St Jude's is that as at September 2023 they would not have been able to secure a sale for the three-bedroom semi-detached house within the development for a value exceeding £427/sq ft[138]. Whilst one of the three-bedroom semi-detached houses sold in November 2022 at £492/sq ft, Mr Castle acknowledged that the market "probably peaked in 2022 and has been falling since". The remaining sales that were agreed at St Jude's had fallen through by December 2022[139].

    52.2. The contention at para. 52 of the Council's closing submissions that "no or only very limited weight" can be given to the agent's view is completely unpersuasive: Mr Castle relies on the views of both Enfields and Fox & Sons in his own evidence.

    52.3. St Jude's is located in the prime residential location for Dibden Purlieu and a more sought-after location than the appeal Site. Views/direct access to the National Park are available and the development includes garages[140]. Mr Newman explained[141] the higher quality specification of the St Jude's development in detail[142]; there was no challenge to his evidence that the specification is "as high as you'll see" and that "people will pay a premium for that". Given the differences between the St Jude's development and the

[133] ID9 – Appendix T.
[134] Rebuttal (CD4-12) para. 12.3.
[135] I.e. revenue from private sales – of the 22 market housing units.
[136] Rebuttal (CD4-10) para. 2.4.
[137] Proof of evidence (CD4-7) para. 9.5.2.
[138] Newman proof of evidence (CD4-3) para. 7.31.
[139] Newman proof of evidence (CD4-3), Appendix D, p. 4.
[140] *Ibid.*
[141] Evidence-in-chief.
[142] Anthracite windows, oak staircases, engineered flooring, downlighters etc.

Scheme, Mr Newman is clearly correct to identify that an adjustment has to be made to the St Jude's values when considering the Scheme.

52.4. Mr Castle criticises[143] Mr Newman for identifying a value of £419/sq ft for the Forest Edge development on the basis of a single three-bedroom semi-detached house that was for sale when Mr Newman produced his proof of evidence. However, the additional Forest Edge example that Mr Castle provides (Unit 54) analyses at £434/sq ft. The mid-point between those two values is £427/sq ft, which is obviously much closer to Mr Newman's private revenue figure (£425/sq ft) than that of Mr Castle (£452/sq ft).

52.5. As to Whitsbury Green[144], the property details that Mr Castle refers to have not been provided. Nor has any explanation been provided of how the asking price of £492/sq ft that he identifies results in his proposed value of £467/sq ft.

52.6. Oak View[145] is not an apposite comparator, as is obvious from consideration of the details provided at Appendix 9 to Mr Castle's proof of evidence. It is a development comprising only four dwellings, each of which is a four-bedroom house with a double garage in a plot that is described by Mr Castle himself as "a good size".

52.7. Conversely, Mr Castle argues that Ashlett Road[146] does not provide good evidence for valuation purposes on the basis *inter alia* that the site is "relatively cramped" and the gardens "relatively small". Mr Castle's argument in this regard fails to recognise that the Council is taking exactly those points against the appeal Scheme as part of its Design case.

52.8. As to Beckley Walk[147], the Council identifies present values of £419/sq ft to £440/sq ft for two-bedroom houses and £366/sq ft to £410/sq ft for three-bedroom houses. Those values are higher than the value identified by the Appellant for Beckley Walk (£334/sq ft) but even if the Council's Beckley Walk values are preferred, they do not support a private revenue figure for <u>the Scheme</u> of £452. Beckley Walk is not a significantly less desirable location than the Site: as Mr Newman explained[148], whilst proximate to the railway line it is a

[143] Rebuttal (CD4-12) para. 9.7.
[144] Castle rebuttal (CD4-12) para. 9.9.
[145] Castle proof of evidence (CD4-7) para. 9.4.16.
[146] *Ibid.* para. 9.4.19.
[147] Castle proof of evidence (CD4-7) para. 9.4.22 ff.
[148] Evidence-in-chief.

popular residential site with good access to transport services and is a very popular location because of its access to the town centre.

53. Turning to the evidence in relation to sales of second-hand property:

53.1. There is not a strong case for adjusting second-hand property sales values by applying a "new build premium" to the Scheme. As Mr Newman explained, existing properties often perform well for reasons such as their design, their large plot sizes and their location. Moreover, even if it were appropriate to apply a new build premium, Mr Castle does not at any point provide any justification for the figure applied in each instance.

53.2. Furthermore many of the second-hand property sales took place in the extreme market conditions of 2021 to 2022. They should be used as evidence with caution as a result[149].

53.3. As noted by Mr Newman[150] and as Mr Castle agreed, the second-hand property transactions upon which Mr Castle relies typically include for larger plots with garages and in-curtilage parking. The value of those properties will be enhanced by those elements, whilst that of the Scheme's properties will not.

53.4. The Appellant draws the Inspector's attention to the following points in respect of the properties that are discussed in Section 9.3 of Mr Castle's proof of evidence:

53.4.1. 37 Cordelia Close transacted at only £379/sq ft back in May 2022.

53.4.2. The date at which 21 Carpenter Close was put under offer at £485/sq ft is unclear; the property benefits from a garage.

53.4.3. 15 Redwood Close is a larger property than the Scheme's three-bedroom houses and benefits from both a "large" conservatory and a double garage. It sold very recently (August 2023) for only £445/sq ft.

[149] Newman evidence-in-chief.
[150] Rebuttal (CD4-10) para. 2.1.

53.4.4. It is not known whether 18 Redwood Drive ultimately sold at the asking price of £444/sq ft. The property benefits from a garage.

53.4.5. 17 Redwood Drive sold at £451/sq ft in March 2023 but benefits from a garage.

53.4.6. 24 Peartree Road sold at only £407/sq ft in January 2023.

53.4.7. 4 Pentland Close sold at £488/sq ft, however that was back in April 2022. The property benefits from both a conservatory and a converted garage that now provides a workshop, utility room and shower room.

53.4.8. 15 Roman Way transacted at only £405/sq ft in December 2022 despite having a garage. Mr Castle's suggestion that a significantly higher value can be expected to apply to the Scheme to reflect *inter alia* "views over the central green and more open form of development" is at odds with the evidence of Mr Payne for the Council.

53.4.9. Mr Castle expressly acknowledges that Wells Tye (£522/sq ft in October 2022) is "not directly comparable". Para. 50 of the Council's closing submissions fails to reflect Mr Castle's stance. The property is detached and sits within a significantly larger plot[151]; the Council's case on RfR 1 and 7 is that the Scheme would be "completely at odds" with this form of development.

53.4.10. Craigmoor does not have a garage but does benefit from a large conservatory; it is a larger property than Plot 1 within the Scheme. It sold in "very good condition" in April 2022 for only £366/sq ft.

53.4.11. Similarly, 63 Highlands Way (no garage) sold in "very good condition" in April 2022 for only £346/sq ft.

54. In his written evidence Mr Castle criticises Mr Newman for not having sought to establish the gross land value ("**GLV**")[152]. As Mr Castle recognised in his oral evidence, Mr Newman subsequently

[151] This can be seen within Appendix D to Mr Payne's proof of evidence.
[152] Proof of evidence (CD4-7) Section 8.2 and rebuttal (CD4-12) para. 11.8.

undertook the exercise suggested by Mr Castle[153]. Mr Castle's criticism was in any event without foundation: as Mr Castle accepted, nothing in either the Government's *Planning Practice Guidance* ("**PPG**") or any RICS document requires GLV to be established. Mr Newman's evidence[154] was that Mr Castle was the only surveyor who had ever asked him to undertake that exercise and that no other viability professional had ever asked him to do so.

55. Mr Castle's analysis of the GLV for St Jude's[155] is flawed because he does not know what abnormal development costs apply to that scheme. He conceded that he had not been able to do a proper GLV analysis for St Jude's. Mr Castle also acknowledged[156] that Mr Newman had provided better evidence on the abnormal development costs for Beckley Walk. Even if one were to accept the GLV figures identified by Mr Castle (£129 for the Scheme; £114 for Beckley Walk; £184 for St Jude's[157]), those figures do not support Mr Castle's argument that St Jude's is a better comparator than Beckley Walk – the GLV identified for the Scheme by Mr Castle is much nearer to the Beckley Walk GLV than the St Jude's GLV.

56. At para. 11.2 of his rebuttal[158] Mr Castle states that "[t]he requirement to stand back can best be achieved by comparing the residual derived by reference to a residual appraisal with evidence from the sale of comparable development land transactions" and that "[i]t is not therefore sufficient in seeking to determine the RLV to rely solely on a residual appraisal based upon not unreasonable assumptions". Mr Newman has not relied solely on a residual appraisal. He has compared the RLV derived from such an appraisal with sale evidence: see para. 8.9 ff. of his proof of evidence. This was accepted by Mr Castle.

57. The Council's sustained criticism of the Appellant for having allegedly "failed" to disclose the purchase price is entirely unwarranted. The short answer to that criticism is that there is not yet any purchase price to disclose. The sale contract that is referred to at Recital (E) of the s. 106 obligation[159] does not contain any fixed purchase price; purchase price is subject to a number of formulas[160].

[153] Newman rebuttal (CD4-10) para. 4.1 ff.
[154] Evidence-in-chief.
[155] Proof of evidence (CD4-7), Section 8.2.
[156] Evidence-in-chief.
[157] Proof of evidence (CD4-7), Section 10.1.
[158] CD4-12.
[159] ID8.
[160] Oral evidence of Mr Moir.

58. The Council's closing submissions at para. 57 refer to the following RICS guidance: "a transaction in the property being valued can provide some of the best evidence available for a valuation, provided it is a recent transaction". That guidance cannot apply where the purchase price within the transaction is not yet fixed.

59. Furthermore, the Council is wrong to contend that the fact that no purchase price has been disclosed means that the requirements of the PPG have not been met. (The Appellant notes that Mr Castle confirmed that he was not alleging any other failure to satisfy the requirements of the PPG.) The PPG is guidance, not policy. Para. 016 of the PPG states simply that "Local authorities can request data on the price paid for land (or the price expected to be paid through an option or promotion agreement)". As Mr Castle accepted, it does not state that an applicant must provide the requested data, nor even that it should do so. Nor does the PPG state that any inferences must or should be drawn if the requested data is not provided.

60. As to the RICS documents, the 2021 *Professional Standard*[161] states expressly (p. 10) that the "authoritative requirement" of the PPG "takes precedence over any other RICS professional standards". The May 2019 *Professional Statement*[162] adds nothing to the PPG[163]. The October 2019 *Professional Standard*[164] does not expressly address para. 016 of the PPG. The 2021 *Professional Standard*[165] at 4.2.33 states that "LPAs can request data on the price paid for land (or the price expected to be paid through an option or promotion agreement) <u>if they feel it is appropriate</u>" (emphasis added). As Mr Castle acknowledged: the LPA does not have to request and the applicant does not have to provide.

61. In short: nothing in the PPG nor any RICS document requires data on the price paid / expected to be paid to be provided. Mr Castle conceded that those documents similarly do not state that the decision-maker should draw any inferences at all – still less any adverse inferences – if the data is requested but not provided.

[161] CD7-11. It is common ground that this was originally published in March 2021 as a RICS guidance note and subsequently reissued in April 2023 as a RICS professional standard.
[162] CD7-10.
[163] It states simply at 2.7 that "the price paid for the land (or the price expected to be paid through an option or conditional agreement), should be reported as appropriate (see PPG paragraph 016 reference ID: 10-016-20190509) to improve transparency".
[164] CD7-12.
[165] CD7-11.

62. There are no grounds for drawing any adverse inferences here:

62.1. The Council in cross-examination made much of the fact that the Appellant did not provide any purchase price to Mr Newman. It was impossible for the Appellant to do so: the purchase price does not yet exist.

62.2. The suggestion[166] that the Appellant's representative ought to have interrupted Mr Newman's cross-examination when Mr Newman stated that he did not know of any sale contract is risible. First, any such interruption would have been wholly inappropriate. Secondly, Mr Newman's evidence was not in any respect incorrect. Despite the numerous subsequent suggestions from the Council to the contrary, at no point did Mr Newman ever say that there was not a sale contract. He simply said that he did not know of any such contract. The Appellant has obviously not sought to conceal the existence of the sale contract: it is referenced in the s. 106 obligation.

62.3. Disclosing the terms of the sale contract to Mr Newman would have served no purpose. It would not have enabled Mr Newman to provide Mr Castle with the information sought (i.e. a purchase price).

62.4. Mr Moir's unchallenged evidence was that purchase price was simply not something that his planning practice would seek to find out[167].

63. Turning to interest charges, Mr Newman's approach is correct for the reasons that he gives at paras. 5.4 and 5.5 of his rebuttal[168] and within the addendum to his proof of evidence[169]. Whilst Mr Castle would not agree that build expenditure will be front-loaded (see para. 1.5 of Mr Newman's addendum[170]), Mr Castle's stance on this point was premised on the Scheme being phased (i.e. on there being "phased delivery of units"[171]). The Scheme will not be phased. Moreover, Mr Castle did concede that Mr Newman was correct to have identified[172] that the Argus wrongly and unrealistically links sales and marketing costs directly to the sale date of properties,

[166] Made in cross-examination of Mr Moir.
[167] Cross-examination.
[168] CD4-10.
[169] ID9.
[170] *Ibid.*
[171] Castle cross-examination.
[172] ID9, para. 1.6.

when in reality those fees will in part be incurred at an earlier point (thus increasing the interest charge).

64. There are a number of smaller points of dispute between Mr Newman and Mr Castle. It is common ground[173] that it is improbable that any of these points individually makes a material difference to the number of AH units that the Scheme can viably provide. Mr Newman's position on each of these points should be preferred to that of Mr Castle:

64.1. Bank monitoring fees and QS: the figure included by Mr Newman (£10,000) is a reasonable mid-point between (i) Mr Castle's insistence that the majority of financial viability appraisals ("**FVA**") adopt an inclusive fee and (ii) Appendix K to Mr Newman's proof of evidence[174], which (as Mr Castle accepted) is an example of both interest and an arrangement fee (of £15,000) being charged. There was no challenge to Mr Newman's evidence[175] that the bank fees described in Appendix K resulted in fees in excess of £22,000 for a £1,000,000 loan.

64.2. Management company: the inclusion of £5,000 is reasonable. Mr Castle confirmed that he was not suggesting that there would not be a management company.

64.3. Covenant insurance: the restrictive covenant itself is now in evidence[176]. Mr Castle's reasons for maintaining his argument that no sum should be included in respect of it are – as he conceded – unsupported by any documented examples of the approach for which he contends having been taken previously.

64.4. Void council tax: it is common ground that the Council will charge council tax from one month after any of the Scheme's dwellings becomes complete and ready for occupation. As Mr Newman notes,[177] it is entirely reasonable to expect that completed dwellings remain void for a couple of months prior to sale; and there are also insurance costs and utility charges to be paid. The basis on which Mr Castle continued to contend that no sum should be included for this item is simply not understood.

[173] Castle cross-examination.
[174] Lloyds Bank plc letter.
[175] Rebuttal (CD4-10) para. 3.6.
[176] Newman proof of evidence (CD4-3), Appendix L.
[177] Rebuttal (CD4-10) para. 3.3.

64.5. Valuation fee: it is common ground[178] that in the neighbouring local planning authorities of BCP Council and Southampton City Council it is adopted policy to allow for the inclusion of the costs of valuation (in undertaking and reviewing the viability assessment), including the fees for both the local planning authority and the applicant. It is also common ground that those costs are separate to the professional fees that relate to pre- and post-contract fees[179] (i.e. that they do not fall within the "professional fees" budget). There was no challenge to Mr Newman's evidence that he had recently agreed this cost within his evidence for an uncontested appeal in West Sussex[180].

65. Any suggestion from the Council that there is conflict with LPP1 Policies HOU2 and IMPL1 because the Appellant has failed to demonstrate that the Scheme would not be viable with somewhere between four and eight AH units should be entirely rejected:

65.1. The Appellant has robustly evidenced that the Scheme is not even viable (in the sense of RLV equalling or exceeding BLV) with three AH units – let alone four or more.

65.2. The suggestion that the Scheme might be viable with more than three but fewer than nine AH units was developed[181] by the Council for the first time during cross-examination of Mr Newman. In the Appellant's submission the timing of that suggestion on the Council's part is very telling. The suggestion only having been developed after Mr Castle had finished giving evidence, the Appellant was deprived of the opportunity to cross-examine him on it. Coming shortly after Mr Castle's oral evidence, the timing also suggests that having heard that evidence, the Council no longer felt confident in successfully defending its argument that the Scheme is viable with nine AH units.

65.3. If the Council's argument is that is open to the Inspector to adopt a BLV for the Site that falls somewhere between Mr Castle's £990,000 and Mr Newman's £1.15m, the Appellant does not agree. There is no evidential basis for doing so. The inquiry has heard from two professional viability witnesses, each of whom has given his professional view on the

[178] Newman proof of evidence (CD4-3) para. 7.15 and Castle cross-examination.
[179] *Ibid.*
[180] Newman rebuttal (CD4-10) para. 3.4.
[181] For the avoidance of doubt the Appellant does not accept that this suggestion has been either adequately or properly developed by the Council at any point during this appeal.

appropriate figure. The same goes for each of the disputed RLV inputs (private revenue, interest charges etc.) – there is no justification for adopting an intermediate figure that is neither contended for nor otherwise supported by either of the professional witnesses.

65.4. Mr Castle's view[182] is that the inputs to RLV appraisals can be adjusted by up to 3.5% whilst remaining within "reasonable ranges for valuation error". His evidence indicates that that "reasonable range" extends to over £300,000[183]. The difference between Mr Newman's RLV for the Scheme (£948,614[184]) and Mr Castle's RLV for the Scheme (£1,537,038[185]) is £588,424. Therefore, even if one were crudely to "split the difference" between the witnesses' RLVs, the uplift that would result to Mr Newman's RLV (£294,212 – i.e. half of £588,424) would fall within the reasonable range for valuation error. Even had Mr Newman undercalculated the RLV by that margin (which he has not), it could not seriously be suggested that the undercalculation was so material as to justify refusing planning permission.

65.5. It is very important not to lose sight of the fact that <u>as proposed</u> the Scheme is offering more AH units than are viable. The Scheme's three AH units are an offer from the Appellant (which is, as the Council has long since been aware[186], an affordable housebuilder). They do not reflect the viability position. It is therefore <u>not</u> the case that the potential to provide additional AH units will arise in the event that any of Mr Newman's figures is rejected:

65.5.1. Even if Mr Newman's BLV is rejected in favour of Mr Castle's BLV, on Mr Newman's RLV the Scheme is still unviable.

65.5.2. On Mr Newman's analysis, the Scheme is unviable by £201,386[187]. Even if Mr Castle's evidence on (i) interest charges <u>and</u> (ii) the "smaller" points of dispute[188] is preferred to that of Mr Newman, the Scheme remains unviable[189].

[182] Rebuttal (CD4-12) para. 12.8 and cross-examination.
[183] Appendix Fifteen to CD4-12, *Table of Profit on GDV% and Land Cost*: deducting £642,999 from £977,270 gives £334,271.
[184] ID9 – Appendix T.
[185] Rebuttal (CD4-12) para. 12.3.
[186] See Appendix 3 to the Main SoCG (CD8-1), minutes of 14 November 2022 meeting, para. 8b.
[187] £1.15m BLV minus £948,614 RLV.
[188] See para. 64 above.
[189] The difference between the witnesses on the "smaller" points is £74,000 (see the Viability SoCG (CD8-2) at p. 4) and the difference between them on interest charges is £97,217 (Mr Newman's total finance cost in ID9 is £432,551 whilst Mr Castle's total finance cost in Appendix Twelve to his rebuttal (CD4-12) is £335,334).

66. Finally, even if (contrary to the above submissions) the Council's case on viability is accepted in full - i.e. even if Mr Castle's position on both BLV and RLV is accepted in its entirety - the difference between the Council and the Appellant is six units of affordable housing (three units are proposed in the Scheme, whilst the Council contends that nine should be provided). The absence of six units of affordable housing – if the Council's case is fully accepted – does not justify withholding planning permission for the Scheme. In this regard it is very important to note that the Council itself has recently granted planning permission for residential development even where a far greater number of AH units were "missing" as against the affordable target in Policy HOU2 (see para. 4.20 of Mr Newman's proof of evidence[190]). Thus at Burgate Acres only 14 AH units were provided against a Policy HOU2 target of 31/32 units[191] - a shortfall of 17 or 18 units. At Tinkers Cross only 12 AH units were provided against a Policy HOU2 target of 32 units – a shortfall of 20 units. The difference between the AH percentage and the Policy HOU2 target percentage was also greater in both instances: at Burgate Acres 22% AH was provided against a Policy HOU2 target of 50% (a difference of 28%) whilst at Tinkers Cross 19% AH was provided, again against a Policy HOU2 target of 50% (a difference of 31%). The Scheme as proposed will provide 12% AH against a Policy HOU2 target of 35% (a difference of 23%).

67. It must also be borne in mind that the Appellant is an affordable housebuilder. It is unable to commit at this stage to building out the Scheme as 100% AH units, for the reasons explained by Mr Moir[192] (which relate to grant funding mechanisms). Nevertheless – and as the Council has been aware since November 2022 – the Appellant's intention is to deliver the Site in partnership with a housing association as 100% AH units[193]. Unlike many applicants the Appellant is not, therefore, pursuing a viability argument with the aim of minimising the number of AH units that are ultimately built out on site.

Scheme benefits

68. It is common ground[194] that significant weight should be given to the Scheme's housing provision. The 24 (net) additional units represent 6% of the Council's annual housing requirement[195]. Mr Gilfillan's view[196] was that the Scheme is sufficiently large to be a "significant boost" to the supply

[190] CD4-3.
[191] 50% of 63.
[192] Oral evidence.
[193] See Appendix 3 to the Main SoCG (CD8-1), minutes of 14 November 2022 meeting, para. 8b.
[194] Gilfillan cross-examination.
[195] Gilfillan proof of evidence (CD4-5) para. 6.11.
[196] Cross-examination.

of homes (see para. 60 of the NPPF). He acknowledged that there was "a severe shortfall" – 3.07 years against a requirement of five years – in the Council's HLS. In the Appellant's submission, the fact that for a brief period of time following the adoption of LPP1 in July 2020 the Council did have a 5Y HLS[197] does not render inaccurate Mr Moir's characterisation of the shortage of housing land in the Council's area as long-standing. Mr Gilfillan claimed that the Council was "moving proactively to achieving" a 5Y HLS but he accepted that work on LPP2 has stalled and he did not identify any other sense in which the Council was proactively working towards achievement of a 5Y HLS.

69. The Council also agrees that the provision of three AH units is a benefit of the Scheme, irrespective of whether policy requires a greater number of AH units[198].

70. It is also common ground that the Scheme will meet the aims of the Hythe and Dibden Neighbourhood Plan 2019 ("**the NP**") to provide more smaller-sized houses (including two-bedroom properties) and housing suitable for first-time buyers and young families. In cross-examination Mr Gilfillan conceded that in the light of the view expressed by him in the OR (above[199]), moderate weight should be accorded to this benefit of the Scheme (rather than the "neutral" position for which he had contended in his proof of evidence[200]). Mr Gilfillan did not go far enough: given what is said in the NP and in the OR, Mr Moir was correct to give significant weight to the Scheme's housing mix. The surprising views expressed by Councillor Osborne[201], an elected Member of the Council ("[i]t is not just "my opinion" that the privacy and unique positions of the homes here are what most home buyers strive to buy if/when they are financially able"; "[a]t the end of the day, we all need to have a goal. We work hard to move up the housing ladder and this type of development spoils and invades a previous place we need to preserve") serve only to support Mr Moir's approach: "the most desirable part of the Waterside"[202] should not be the preserve of only a section of the community.

[197] *Ibid*.
[198] Gilfillan proof of evidence (CD4-5) para. 6.17 and cross-examination.
[199] CD5-2, pp. 6-7.
[200] CD4-5 para. 6.16.
[201] ID3.
[202] *Ibid.*

71. The Council acknowledges that significant weight should be given to the Scheme's contribution to LPP1 Policy STR1(i) (through enhanced use of land in urban areas)[203]. The Scheme will protect the countryside, the National Park and the AONB.

72. It is common ground that moderate weight should be given to the proposed off-site improvements to pedestrian routes; and that moderate weight should also be given to the financial contribution that will be made towards the provision of off-site recreational facilities[204].

73. The economic benefits of the Scheme should be accorded significant weight, in line with para. 81 of the NPPF, which states that "[s]ignificant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs and wider opportunities for development". If it were intended that NPPF para. 81 should only apply to proposals for employment development (as Mr Gilfillan contends), the reference to "wider opportunities for development" would be otiose.

74. It is common ground that moderate weight should be given to the environmental benefits associated with the provision of houses built to modern standards of insultation and energy efficiency[205].

75. The Council also agrees[206] that <u>significant</u> weight should be afforded to the benefits (air quality, reduced energy consumption, the encouragement of active travel) that will result from the reduced reliance on the motor car that the Scheme will support.

76. The Scheme's approach to trees is an additional environmental benefit. Mr Gilfillan gave significant weight to the retention of existing trees on Site and minor weight to the 18 new trees that will be introduced[207]; Mr Moir preferred to accord moderate weight to the former and significant weight to the 18 new trees together with the increase in hedgerow units.

77. Significant weight should be given to the biodiversity net gain that the Scheme will secure. Whilst Mr Gilfillan in his proof of evidence contends that "as the Appellant intends this to be achieved

[203] CD4-5 para. 6.15.
[204] *Ibid.* paras. 6.18 and 6.19.
[205] *Ibid.* para. 6.21.
[206] *Ibid.* para. 6.22.
[207] Cross-examination.

off-site it would not have the same benefit for the local area if it were on-site"[208], he acknowledged that he had not been aware (in producing his proof of evidence) that the biodiversity net gain calculator operates so that the further away the gain land is, the harder it is to achieve the 10% figure.

Overall planning balance

78. It is plain that even on the Council's own evidence – i.e. even if the Scheme conflicts with the development plan in certain respects, which in the Appellant's submission it does not – overall, the Scheme accords with the development plan. See, in particular, the contrast between the short list of policies with which the Council identifies conflict (at para. 6.28 of Mr Gilfillan's proof of evidence[209]) and the comparatively very long list of policies that the Scheme is instead identified as complying with (paras. 6.29 to 6.49 of Mr Gilfillan's proof of evidence).

79. Even if the conclusion reached (contrary to the Appellant's position) is that the Scheme does not accord with the development plan overall, it is common ground that the "tilted balance" in para. 11d(ii) of the NPPF is engaged, such that planning permission should only be refused if the adverse impacts of granting it would significantly and demonstrably outweigh the benefits of doing so[210]. The adverse impacts identified by the Council – if they are accepted – do not even equal the Scheme's benefits. They do not outweigh them and they certainly do not do so "significantly and demonstrably":

    79.1. The benefits of the Scheme are numerous and compelling (above).

    79.2. It is common ground that as against the requirement in the NPPF to maintain a 5Y HLS so as to support the Government's objective of significantly boosting the supply of homes[211], the Council is only able to demonstrate a 3.07-year HLS. Mr Moir is correct to identify[212] that the shortage of housing land in the Council's area is acute, sustained and long-standing. The HLS position in the district is very serious. There is absolutely no prospect of the position being ameliorated through the Local Plan process any time soon: whilst the Council's published Local Development Scheme proposes an adoption date of December

[208] Proof of evidence (CD4-5) para. 6.24.
[209] CD4-5.
[210] When assessed against the policies of the NPPF taken as a whole.
[211] Para. 60 of the NPPF.
[212] Proof of evidence paras. 6.1 to 6.4.

2023 for LPP2, the reality of the situation is that work on LPP2 has been paused, with no revised date yet set for the reg. 18 consultation[213].

79.3. As Mr Moir notes[214], LLP1 at para. 2.11 identifies that "much of the plan area is either an inappropriate location for built development, and/or should only be considered for development in exceptional circumstances". The Site does not fall within either category. It lies within the settlement boundary, not the countryside; it is not in the Green Belt; it is not in the National Park; it is not in the AONB; it is not in a Conservation Area nor in the setting of <u>any</u> heritage asset, whether designated or non-designated. It is not part of a "valued landscape". It is part brownfield. All of this was accepted by Mr Gilfillan. There can be few sites more capable of accommodating residential development, whether within the Council's area or elsewhere.

79.4. Against the above considerations, putting its case at its highest the Council identifies the following, limited adverse effects of the Scheme:

79.4.1. Whilst the Scheme's architecture is acceptable, the interior of the Scheme is too dense - even though the Council considers the proposed density (27.8 dph) to be appropriate for the Site;

79.4.2. The Scheme's on-site informal POS and play space provision should be 0.09ha greater – albeit that the Council accepts that the open space needs of the Scheme's residents will be met and concedes that RfR 5 would not by itself have justified a refusal of planning permission; and

79.4.3. The Scheme should provide an additional six AH units.

80. The overall planning balance has shifted considerably in the Appellant's favour during the course of this appeal. Three of the original seven RfR have fallen away. Indeed, the planning balance has shifted since Mr Gilfillan produced his proof of evidence:

[213] Moir proof of evidence para. 6.1.
[214] Proof of evidence (CD4-1) para. 3.11.

80.1. Mr Gilfillan explained that he had written his proof of evidence on the understanding that LPP1 Policies HOU2 and IMPL1 were up-to-date. They are not (as he conceded). It is common ground that those two policies are both "most important" policies for determining the application[215]. As such, they are rendered out-of-date as a result of (i) the Council not having a 5Y HLS and (ii) the operation of footnote 8 to the NPPF. The judgment in ***Wavendon Properties Ltd v SSHCLG*** [2019] PTSR 2077 does not provide any authority for an alternative analysis. In ***Wavendon*** the Secretary of State had concluded that the local planning authority did have a 5Y HLS[216]; footnote 8[217] was not engaged. There was also a 5Y HLS in ***Paul Newman***[218]. Where (as here) footnote 8 is engaged there is no scope to consider whether the "basket" of "most important" policies is out-of-date. All of the "most important" policies are deemed out-of-date through the operation of footnote 8. This interpretation of para. 11 of the NPPF does not lead to "absurd results" (para. 66 of the Council's closing submissions) – rather, it reflects the Government's view of the importance of maintaining a 5Y HLS (which the Council has signally failed to do here).

80.2. The drainage RfR has been resolved.

80.3. Mr Gilfillan in cross-examination revised the weight that he gave to the Scheme's housing mix as a benefit, from "neutral" (proof of evidence) to moderate.

80.4. Mr Gilfillan also accepted that he had failed in his proof of evidence to give any weight to the proposed new tree planting as a benefit of the Scheme.

81. As noted in opening, the position of the Council in essence is that the adverse effects that it says would result from the detail of the Scheme – there being no objection in principle to major residential development coming forward on the Site - are so harmful as to justify withholding planning permission for the Scheme notwithstanding (i) that lack of any objection in principle; (ii) the very serious housing need in the district; and (ii) the lack of progress on LPP2.

[215] See para. 11d of the NPPF.
[216] The Secretary of State concluded that there was an approximately 5.9 – 6.2Y HLS: see [31] of the judgment, quoting DL[18].
[217] Referred to as "footnote 7" in the judgment because the judgment relates to an earlier version of the NPPF.
[218] Referred to at para. 64 of the Council's closing submissions.

82. At the end of this inquiry, the Council's position has been shown to be misconceived. Para. 8a of the NPPF (discussing the first (economic) overarching objective of sustainable development) recognises the need to ensure that sufficient land of the right types is available in the right places and at the right time. The Site is the right type of land and is in the right place. Given the HLS position, it is equally clear that it is the right time for the Scheme to come forward.

Conclusion

83. By way of conclusion, the position is that the evidence establishes that the Scheme accords with the development plan overall. Planning permission should therefore be granted for the Scheme in accordance with s. 38(6) of the Planning and Compulsory Purchase Act 2004. Material considerations do not indicate otherwise. In particular, even if the Scheme were to fail to accord with the development plan overall (which it does not), it is common ground that the "tilted balance" in para. 11d(ii) of the NPPF is engaged[219]. The NPPF is an obviously important material consideration. Applying the tilted balance, even if the Council's evidence is accepted in its entirety the adverse impacts of the Scheme – which are limited – do not come anywhere close to outweighing the Scheme's benefits "significantly and demonstrably".

84. It follows that planning permission should be granted for the Scheme and the Inspector is respectfully requested to allow this appeal.

HEATHER SARGENT

Landmark Chambers
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13 November 2023

[219] Main SoCG para. 8.3.