LAND AT SANDOWN PARK RACECOURSE, PORTSMOUTH ROAD, ESHER

PLANNING INSPECTORATE REFERENCE: APP/K3605/W/20/3249790

INQUIRY PURSUANT TO SECTION 78 TOWN AND COUNTRY PLANNING ACT 1990

CLOSING SUBMISSIONS

ON BEHALF OF THE LOCAL PLANNING AUTHORITY

INTRODUCTION

1. The effect of the allowing this appeal would be to caustically erode public confidence in the planning system. It would lend credence to the notion that the planning system may be wrought, to serve the private interests of a private limited company, at the expense of the community's local vision. The appeal scheme would indeed deliver some public benefits but, there again, there is not a single development proposal which would not deliver at least some economic and social benefits. Our system is however better than that. Our small Island demands a more sophisticated land-use response to the competing economic, social and environmental demands of its citizens. The administrative discretion to grant or refuse planning permission must be operated in the interest of the **whole** community, expressed through the promulgation and application of planning policy.

2. Against that context we turn to address the main issues identified by the Inspector in opening:

    a. the effect of the proposal on the Green Belt, including any effects on openness and the purposes of including land within the Green Belt;

b. the effect of the proposal on the character and appearance of the area;

c. whether the proposal would make sufficient provision for affordable housing;

d. the effect of the proposal on transport networks and the extent to which it would support the objective of promoting sustainable transport;

e. the nature and extent of any economic, social and environmental benefits which would result from the proposal; and

f. if the proposal (or any part of it) is found to amount to inappropriate development in the Green Belt, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations such as to provide the very special circumstances required to justify development in the Green Belt.

ISSUE 1 – THE EFFECT OF THE PROPOSAL ON THE GREEN BELT

Approach to Inappropriate Development Generally

3. It is the Council's case that the development of Sites B and 1-5 would have a substantial adverse effect on the openness of the Green Belt, in both spatial and visual terms. As the Appellant candidly says *"it is accepted that Sites 1, 2, 3, 4, 5 & B will introduce, through the proposed development, larger footprints and volumetric areas"* (Clarke RPoE, para.3.6). In addition, the development of Sites 3, 4 and D would also have an adverse effect on the contribution the land makes to the purposes of the Green Belt.

4. Accordingly, it is the Council's position that judged overall, the scheme amounts to inappropriate development, against which, both the local and national policy is firmly set and is harmful by definition. Whilst the Council acknowledges that Sites A, C, E (1&2) and F would be not inappropriate development, the assessment (for the purposes of applying local and national Green Belt policy) is against the scheme as a whole, see: **R(Luton BC) v Central Bedfordshire Council** [2014] EWHC 4325 (Admin) (CD4.13) *per* Holgate J at [167]. It follows that if any part of the proposal is found to be inappropriate, the development should not be approved unless very special circumstances are advanced which clearly outweigh the harm to the Green Belt and any other harm.

5. Mr Steel QC's submission that **Luton** established only that it was legally *permissible* for a decision maker to treat a mixed-use scheme as a whole, was wrong. Holgate J found at [167] as follows:

> "… The NPPF does not require the planning authority to chop up a mixed use proposal into separate components and to apply the very special circumstances test separately in relation to each such component. No authority was cited to support that interpretation and **I do not think that it is justifiable on the language used in paragraph 88 of the NPPF**" [emphasis added]

6. That was a clear finding on the meaning of the NPPF in this respect. It is now well established that the interpretation of planning policy is a matter of law for the Courts, not a question of judgment for a decision maker. It follows that Holgate J's interpretation of the NPPF in this respect is binding on the Secretary of State. To approach the appeal scheme on any other basis would give rise to an error of law and therefore a high risk of legal challenge from an aggrieved party.

Is the scheme not-inappropriate development as a whole?

7. The Appellant advances two arguments on which the appeal scheme is said to be not-inappropriate development judged as a whole:

    a. **First**, under paragraph 145(b) NPPF, it is said that the whole scheme is a facility for outdoor sport or outdoor recreation (and the facilities preserve the openness of the Green Belt and do not conflict with purposes); or

    b. **Second**, under paragraph 145(g) NPPF, it is said the scheme amounts to the redevelopment of previously developed land and contribute to meeting an identified need for affordable housing (without causing a substantial harm on the openness of the Green Belt).

8. Both arguments are, with respect to those who thought them up, so hopeless in their application to this scheme that they merely require saying aloud to reveal their baselessness.

Is the appeal scheme a facility for outdoor sport or outdoor recreation within paragraph 145(b) NPPF?

9. Policy DM17 Development Management Plan (2015) provides further policy guidance on the application of this Green Belt exemption. It explains that to be a facility for outdoor sport or outdoor recreation, the facility must be "ancillary". Eventually, Mr Clarke accepted that Sites 1-5 and B were not ancillary to the Racecourse (even if that were to be considered a facility for outdoor sport or outdoor recreation) and thereby did not comply with policy DM17 Development Management Plan.[1] There would be no enduring relationship between Sites 1-5 and B and the Racecourse, no planning condition

[1] Clarke XX, Day 9.

requiring them to be used in connection with the Racecourse, they would be in separate ownership and not function as part of the Racecourse.

10. Even ignoring policy DM17, paragraph 145(b) NPPF required the facilities must be *"for outdoor sport, outdoor recreation".* It cannot be said that housing or the hotel, which is to be sold to a third-party and occupied by others on an unrestricted C1 and C3 basis, can be possibly be said to be *"facilities for outdoor sport, outdoor recreation".* Mr Clarke's reliance on the words "in connection with" is a total red-herring. Those words were inserted to deal with the lacuna in the 2012 NPPF, which meant that changes of use to an appropriate use in the Green Belt would be inappropriate development, see: **Timmins v Gedling BC** [2015] EWCA Civ 10 *per* Richards LJ at [29]-[35]. The differences in wording between the 2012 and 2019 NPPF are therefore nothing to the point.

11. Setting that context aside and reading the paragraph syntactically, the words *"in connection with"* are referable to the use of the *"appropriate facility",* but that *"appropriate facility"* must be *"for"* outdoor sport or outdoor recreation. When judged against that correct interpretation, it cannot be said that the hotel at Site B and the housing scheme at Sites 1-5 are facilities ***for*** outdoor sport or recreation. Mr Clarke was therefore right to accept that Sites 1-5 and B could not be said to be facilities *for* outdoor sport or outdoor recreation and therefore expressly retracted his opinion evidence that paragraph 145(b) NPPF applied to this appeal scheme as a whole, because it could not capture the hotel or the housing sites which are part of the proposal.[2]

12. Given that, it is not sustainable to suggest policy DM17 is inconsistent with the NPPF. This novel point arose in the re-examination of Mr Clarke by Mr Steel QC. It was not said in any of the material before the inquiry up until that point.

[2] Clarke XX, Day 9.

Indeed, Mr Clarke expressly said he was not suggesting DM17 was inconsistent with the NPPF in cross-examination. The Council was thereby deprived of the opportunity to deal with that point in evidence. That is most unfortunate given that a finding that a policy is inconsistent, will have wide-ranging consequences for the Council in the exercise of its development management functions. Happily, the point is so hopeless as to not give rise to substantive unfairness because it should so obviously be rejected. Policy DM17 requires that the proposals be "ancillary", that is plainly consistent with the wording of paragraph 145(b) NPPF, which provides that the facilities may be "in connection with" the existing use of land or a change of use, but they must also be "for" (as in, ancillary to) the use of the land for outdoor sport or recreation etc.

13. Finally, taken to its natural conclusion, it would lead to the absurd result that a person could propose a market housing scheme in the Green Belt as not inappropriate development, simply because they made a financial contribution to a sports club (and did not affect the openness or purposes of the Green Belt).

14. Mr Clarke was therefore right to make the concession he did in cross-examination.

15. However, in re-examination the point was resurrected and Mr Clarke appeared to retract his concession. It was suggested by Mr Steel QC that the concession had been obtained unfairly or otherwise improperly because the point had not been raised before and Mr Clarke was thereby deprived of the opportunity to consider the point in advance of giving his evidence and take legal advice upon it. That suggestion is **strongly** rejected by the Council for the following reasons:

    a. Contrary to the premise of the question put by Mr Steel QC and the answer he elicited from Mr Clarke in re-examination, Mrs Hyde **expressly**

said in her rebuttal proof that paragraph 145(b) NPPF could not apply to the scheme as a whole because the hotel and houses were not facilities *for* outdoor sports or recreation.[3]

b. The first time that the Appellant clearly suggested that paragraph 145(b) NPPF applied to the whole development was in the proof of Mr Clarke.[4] At no point prior to the exchange of evidence had the Appellant suggested that paragraph 145(b) NPPF applied to the entire scheme. Within its Green Belt Statement, the Appellant contented that paragraph 145**(g)** NPPF applied to the whole scheme[5] (on which more later) but not paragraph 145(b) NPPF. The Appellant's Statement of Case suggested that the "enhancement elements" only were facilities for outdoor sport.[6] It will be recalled that those elements are clearly laid out in the Viability Assessment and do **not** include the hotel or the housing elements.[7] It follows that the Council responded at the earliest possible opportunity to make plain that the contention that paragraph 145(b) NPPF applied to the whole scheme was firmly in issue.

c. The proposal was also expressly said to be in conflict with policy DM17 Development Management Plan (2015) within the decision notice. The Appellant deals with that policy in the Statement of Case and represents that the proposals comply with it.[8] Mr Clarke's written evidence was that the scheme complied with the development plan[9] which must have embraced consideration of policy DM17 Development Management Plan given its inclusion in the reasons for refusal.

[3] Hyde RPoE, para.3.
[4] Clarke PoE, para.6.3.
[5] CD 5.51, para.8.12
[6] SoC, para.12.4.
[7] CD 5.38 p.28.
[8] SoC, para.15.5.
[9] Clarke PoE, para.3.3.

d. Given that, it is simply not credible to suggest that Mr Clarke did not have fair warning of the Council's position that: (i) paragraph 145(b) NPPF did not apply to the scheme as a whole (for the specific reason that the hotel and housing sites were not facilities *for* outdoor sport or recreation) or (ii), that there was a conflict with policy DM17 Development Management Plan (2015). Accordingly, he had ample opportunity to discuss the matter with his advocate and professional team. Indeed, the Appellant's advocate could have cross-examined Mrs Hyde on the content of her rebuttal proof on this matter.

e. Even setting all that aside, Mr Clarke is an experienced witness.[10] If he felt he was taken by surprise by a point in cross-examination he could have asked for more time or said he could not deal with the point (as indeed he said to the Inspector when asked about air quality at the conclusion of his evidence on Day 10 of the Inquiry). Alternatively, his highly-experienced advocate could have intervened either when the questions were put, or before the inquiry adjourned at the end of the Day 9, or at the commencement of Day 10 before the resumption of Mr Clarke's cross-examination. The fact none of that occurred reveals that the allegation of unfairness is totally unmerited.

f. Finally, no earthly power could have compelled Mr Clarke to offer the bizarre explanation which he did. It was not credible to have suggested that the hotel and sites 1-5 were ancillary to the racecourse because the "occupiers would have the opportunity to use the racecourse".[11] That opinion could not have been Mr Clarke's bona fide professional opinion because: (i) he ultimately withdrew it when it was put to him that it was

[10] Note Clarke PoE, Appendix 1: He is a Senior Partner in Rapleys in practice as a town planner since 1991.
[11] Clarke XX, Day 9.

not consistent with his professional obligations to the inquiry and (ii), he said that it did not accord with his "planning" understanding of the term but rather what he volunteered was a "real world sense of the word". It also took up a needless amount of inquiry time on a wholly nonsensical argument.

16. Paragraph 145(b) NPPF cannot apply to the scheme as a whole.

Is the appeal scheme within paragraph 145(g) NPPF?

17. The scheme falls at the first hurdle here.

18. Even on Mr Clarke's own evidence, the appeal scheme does not involve land which is "previously developed", 15% of the land to be developed is not previously-developed.[12] Mr Clarke did agree that paragraphs 144-145 NPPF were closed lists and that a proposal must fit wholly within an exception in order to be considered not inappropriate. Curiously, he would not accept that the scheme therefore failed to fit within paragraph 145(g) NPPF. Amongst the many mysteries of Mr Clarke's Byzantine reasoning, this will have to remain one aspect which we will never truly know how it was rationalised against reality. However, on the undisputed evidence before the inquiry the scheme as a whole does not involve the "re-use of previously developed land" and so paragraph 145(g) NPPF cannot apply to the scheme as a whole.

19. Even if, as appeared to be suggested in re-examination, one could approach the wording of paragraph 145(g) as a question of "fact and degree", it fails for three reasons:

[12] Clarke PoE, Appendix 4.

20. **First**, because 15% is not *de minimis.* It cannot be legally ignored. Indeed, it is just 5% shy of the 20% of the affordable housing offered by the Appellant, upon which the Secretary of State is invited to attach significant weight in the appeal. To conclude that as a matter of fact and degree the scheme is one which is the re-development of previously developed land would be irrational. Moreover, it would be inconsistent with the Government's objective that, in the context of the Green Belt, brownfield land be used "as much as possible", see: paragraph 137 NPPF.

21. **Second**, even if it were possible to say that 15% was legally irrelevant, the scheme is not solely for the purpose of contributing to affordable housing. Indeed, its primary purpose is to raise money for improvements for the Racecourse. Here, again, Mr Clarke offered an opinion which was unarguable. He suggested that the words "contribute to" meant that one could have 100% market housing scheme on the Green Belt which would be appropriate development (provided it was on PDL, did not have a substantial impact on openness and made a policy compliant contribution towards affordable housing). Even though that was wrong, he was compelled to accept that on his reasoning, should the Secretary of State conclude that the affordable housing here were below that required by policy, the scheme could not fall within paragraph 145(g) NPPF. The Council maintains that is a false distinction in any event, and that the natural conclusion of Mr Clarke's interpretation is that <u>any</u> contribution (however small) would bring a scheme within paragraph 145(g) (second intent). That absurd result reveals the construction favoured by Mr Clarke is wrong.

22. **Third**, as outlined below, the scheme, viewed as a whole, would cause substantial harm to both the spatial and visual openness of the Green Belt.

Approach to openness

23. Openness means *"the state of being free from built development, the absence of buildings – as distinct from the absence of built development"* see: **R(Lee Valley Regional Park Authority) v Epping Forest DC** [2016] EWCA Civ 404 (CD 4.2) *per* Lindblom LJ at [7].

24. The assessment of openness is **not** limited to a simple volumetric or spatial assessment but is capable of also including the comparative visual impact of a proposal, see: **Turner v SSCLG** [2016] EWCA Civ 466 (CD4.3) *per* Sales LJ at [13]-[16].

25. The question of whether a decision maker is obliged to have regard to visual impact when assessing the impact on openness of a particular proposal, is a matter of planning judgment, see: **R(Samuel Smith Old Brewery) v North Yorkshire CC** [2020] PTSR 221 (CD 4.11) *per* Lord Carnwath JSC at [39].

26. In **Samuel Smith**, Lord Carnwath JSC expressly **rejected** of the approach of Green J in **Timmins v Gedling BC** [2014] EWHC 654 (Admin), that "it was wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact" see: [24]-[25]. The correct legal test is whether the visual impacts on openness, in a given case, are *"so obviously material as to require direct consideration"* (**Samuel Smith** at [32]).

27. Accordingly, in **Samuel Smith**, the council did not err in law by failing to consider the visual impact of a quarry extension because the visual impact would be so "limited" as not to be obviously material (see **Samuel Smith** at [41]). By contrast, the inspector in **Turner** was entitled and right to have regard to the visual impact on openness when replacing a mobile home and storage yard with a residential bungalow.

28. In this case, the visual impacts are ***"so obviously material"*** as to require ***"direct consideration"***. They cannot sensibly be said to be ***"limited"***. A failure to consider the substantial visual impacts in the assessment of the impact on openness here would be irrational.

29. Mr Clarke accepted that visual or perceptual impacts on openness could be taken-into-account but suggested they should carry "limited weight" because, in his view, the scheme was not largely visible. However, properly, he accepted that the visual impacts on openness was a matter upon which he relied on the expertise of Mr Connolley.[13]

The Green Belt Context

30. Whilst not part of the development plan, the work undertaken by Arup (CD3.8 – 3.9) is an important material consideration in applying the local and national Green Belt policy. It is undertaken by an experienced national consultancy applying a logical methodology. It should be afforded substantial weight.

31. However, it needs to be read in the context of the purpose for which it has been prepared. It has been prepared to inform a local plan making process. It has been prepared on the premise of removing Green Belt and to inform which parts of the Green Belt should be released. Here, however, the test is different. The question is whether very special circumstances exist which clearly outweigh the harm to the Green Belt and any other harm. That is a *"stricter test",* than the plan-making test, see: **Luton v Central Bedfordshire** [2015] EWCA Civ 537 *per* Sales LJ at [54]. Recommendations about sites for "further consideration" need to be therefore judged with great care when being read across as a material consideration to this development management context.

[13] Clarke XX, Day 9.

32. The March 2016 Review found the site to fall within Strategic Area A which is a *"narrow but essential arc of Green Belt preventing the sprawl of Greater London built-up area and its coalescence with towns in Surrey"* (CD3.8 Annex 1, Strategic Area A). This Strategic Area performs strongly against purposes 1 & 2 and weakly (but still nevertheless performs) against purpose 3.

33. At the more local level the site falls within Local Area 52 (CD3.8 Annex 2, Local Area 52). The scale of this area is pretty much aligned to the red line of the appeal site. This reveals that, as part of the important arc of Green Belt, the appeal site is of critical importance to the purposes of the Green Belt because:

    a. It functions moderately **to check the unrestricted sprawl** of the Greater London built-up area:
        i. The parcel is at the edge of a large built-up area of Thames Ditton (which forms part of the Greater London built-up area).
        ii. The boundary of Lower Green Road, the properties on its northern side and the railway line are a "durable and permanent" boundary.

    b. It functions strongly/very strongly **to preventing neighbouring towns from merging into one another** and the Greater London area:
        i. The land parcel forms part of "an essential gap" between Greater London and Esher.
        ii. It has an "open character", provides an "important visual gap" between the two settlements (Greater London and Esher in Surrey), accordingly "development in the land parcel would likely lead to their coalescence".
        iii. The function of the Racecourse to *"separate Esher from its train station and Lower Green"* is noted in the SPD and More Lane and Lower Green are in separate character areas (CD. 3.2, 2 of 2 pp.4

& 6). The separation function of the Racecourse is also noted in the Arup Sensitivity Study (2019) *"its large scale contributes to the perceived gap between settlements, and acts as a buffer between Esher and the South Western Main Line"* (CD 3.25 2 of 2, Table 32). Whilst Sites 3 and 4 were excluded from UW6 in the 2015 Landscape Character Assessment (CD 3.19), they were included within the 2019 Sensitivity Study landscape unit and ascribed a "moderate-high" sensitivity.

c. Whilst functioning "relatively weakly", it still functions to **safeguard the countryside from encroachment:**

   i. The principal contributor to this is the Racecourse itself. Whilst it is "managed private open space" it still displays a "high level of openness".

34. Further work was undertaken by Arup in December 2018 (CD.3.9) to refine the conclusions of the 2016 Review in respect of sub-areas within the local areas assessed in that document. Two sub-areas of relevance to the appeal site were analysed: Site 3 (SA-70) and Site 4 (RSA-35/SA-69)

    a. **Site 3** was considered to perform strongly against purposes and 1 & 2 (scoring full marks for purpose 2) and less strongly against purpose 3. It was described as an area of *"semi urban character"* which *"plays an important role in maintaining the physical integrity of the Green Belt",* in particular preventing actual and perceived merging of Esher with Greater London. Development on this site would promote ribbon development in a *"sensitive"* area of the Green Belt and harm its wider performance. It was not recommended for further consideration. (CD3.9 p.55, and Annex 1C). Whilst the Council recognises Site 3 is smaller than SA-70, it makes no difference to the point. As Arup note of Local Area

52, *"any development within the land parcel"* would likely result in merging (CD 3.8 3of3, pdf p.164).

b. **Site 4** was considered to perform weakly for purposes 2 and 3, however it was noted that release would result in a *"weaker Green Belt boundary".* Whilst it was recommended for further consideration, it has not been suggested for removal by the Council (CD3.9 pp.108-109 and Annex 1C).

35. The Council performed its own review in June 2019 to assess boundary lines for the Green Belt (CD3.10). The salient points are these:
    a. The Council will promote an extension of the Green Belt boundary, to encompass More Lane to its western side and Lower Green Road to its northern side (p.56).

    b. The Council will also promote an extension to the north of Site 4 and to include Station Road (p.57). There was no suggestion that Site 4 be removed from the Green Belt.

Site B – 6-storey c.150 bed hotel

36. According to the Appellant, the open boundary of the site fronting the Portsmouth Road offers *"a sense of openness"* (CD.5.50 Plan EDP 2). We agree. To the east of the Grandstand, where Site B is proposed, there is a distinct and readily appreciable absence of buildings.[14]

37. The proposed development would see the introduction of a six-storey, 27,950 m3, building to a site which presently functions as a surface level overflow car park. As the Appellant concedes, *"[t]here would be an increase in built form within the site … development of the site would restrict views of the northern*

[14] Connolley XX, Day 7.

boundary to a degree" (CD.5.50 GBR, Table EDP 2.3 p.16). Upon completion, the Appellant's conclusion is that the building would amount to a *"visible and identifiable element within the view"* from the Portsmouth Road (CD 5. 52, LTVA, Apdx EDP 6, Site B). Indeed, the Appellant tells us that the location has been chosen so as to be *"visible to passing trade on Portsmouth Road"* (Gittus PoE, para.22) and Mr Connolley explained that it was a design consideration that the hotel be visible.[15] It was also accepted by Mr Connolley that in winter months there may also be in-combination views with Site 5.[16]

38. The perception of the development would be deepened by the topography which falls away from the grandstand (approximately 3m across the site), such that the building would appear akin to a seven-storey building when viewed from the public realm (Webster PoE, para.3.31). Given that, it is unsurprising that Mr Connolley was constrained to accept that there would be a greater visual appreciation of built form than the existing situation. As he said, such a perceptual effect was *"inevitable"* when proposing development of this scale where there currently is none.[17] The case officer found Site B to result in a *"significant adverse impact on spatial and visual dimension of the Green Belt's openness"* (CD 7.3 OR, para.9.7.3.13).

39. Whilst the scheme would amount to the *"redevelopment of previously developed land"* it cannot rationally be said to *"not have a greater impact on the openness of the Green Belt than the existing development"* such as to fall within paragraph 145(g), in both spatial and visual terms the change is significant. This element of the appeal scheme therefore amounts to inappropriate development with *"significant"* effects on the openness of the Green Belt.

[15] Connolley XX, Day 7.
[16] Connolley XX, Day 7.
[17] Connolley XX, Day 7.

Site D – Car park extension

40. Only 0.50ha of this 3.5ha site is previously developed land. The proposal is that 57% is to be laid over to hardstanding (or Grasscrete) (Clarke PoE, Appendix 4). Presently, part of the site functions as a surface level car park for the golf course.

41. The proposed development would see the retention of the golf course car parking and the extension of reinforced grass to serve as overflow car parking (CD.6.7 Zoning Layout). The parameter plan shows the whole area as car parking and the illustrative layout shows the detailed extensions (CD 6.7).

42. The works themselves in addition to the greater number of days on which car parking will be available will urbanise the site (Webster PoE, para.3.36). As Mr Gittus accepted, it would be available on a greater range of occasions than presently (due to its boggy and waterlogged state on some occasions) but it would vary according to the weather.[18] The extent to which it would be in greater use was not at all clear from the Appellant. However, one imagines that a prudent organisation (especially a not-for-profit one) would not invest £1,363,000 for something which it does not envisage being used materially more often than now.[19] To the extent it is in greater use, Mr Connolley accepted that there would be an urbanising effect[20] and Mr Clarke accepted that it would be under a greater urban influence than now.[21]

43. The function of the land to safeguard the countryside from encroachment would be undermined (Webster PoE, para.3.121, also in the officer's report at para.9.7.2.12). It cannot be therefore said that the use of the land would be

[18] Gittus XX, Day 6.
[19] CD 6.63 Agreed Build Costs and CD 5.38 Viability Assessment on p.28.
[20] Connolley XX, Day 8.
[21] Clarke XX, Day 10.

consistent with the purposes of the Green Belt. The scheme therefore does not therefore fall within paragraph 146(b) NPPF.

Site 1 – 15 affordable units in a 3-storey building

44. Presently the site comprises single-storey stables, running along the northern and southern boundaries, with a split-level yard at the centre of the site. The majority of the site is surfaced and comprises previously developed land.

45. From its present 2,200m3, the proposal would represent a 3,100 m3 (141%) increase in building volume on the site (Webster PoE, para.3.43). The low-lying nature of the existing buildings means they are not visible from the public realm. On completion the 2-story western elevation would be visible on completion from opposite the existing entrance gates and from the gaps between the Wheatsheaf PH and housing on Esher Green. Mr Connolley accepted that in those views, the site would appear "more built-up than it is now".[22] Coupling the spatial uplift in built form with the perceptual increase in built form, the effect is a substantial impact on openness.

46. It follows that, notwithstanding the previously developed nature of the Site and that it is proposed to be 100% affordable housing, the development is inappropriate in the Green Belt because it does not come within paragraph 145(g) (second indent).

Site 2 – 49 affordable residential units in a 4-storey building

47. Presently, the Site lies behind a filtered vegetated boundary when viewed from Esher High Street. Whilst views of the low-lying single storey stables to the west of the site and the Lodge building in the centre are visible from the west, the lack of built form across most of the Site is evident.

[22] Connolley XX, Day 7.

48. The volumetric increase in built-form would be substantial. From the present 2,800 m3, the development would grow to 18,100 m3, a 465% increase (Webster XiC, Day 2). The visual impact is equally substantial. The existing line of mature trees would be removed and replaced with a four-storey building along the frontage with the Portsmouth Road. As the Committee Report noted, the *"proposed building would be very apparent within the Portsmouth Road frontage"* and consequentially would have *"a significant impact upon the visual dimension of the Green Belt"* (CD 7.3 para.9.7.3.8). As Mr Webster says, the effect will be to *"introduce an additional block of linear development to the Portsmouth Road, where previously there was none"* (Webster PoE, para.3.59). Mr Connolley accepted that the visual appreciation of built form would be greater than it is at the moment.[23] Coupling the spatial increases (in footprint, volume and floor area) with the increase in the visual appreciation of built form, it is clear that the impact on openness would be substantial.

49. Accordingly, as with Site 1, notwithstanding the previously developed nature of the Site and that it is proposed to be 100% affordable housing, the development is inappropriate in the Green Belt because it does not come within paragraph 145(g) (second indent).

50. Site 2 is set further forward than the extant hotel permission (see plans at CD 7.19), moreover it is spread across the whole site frontage whereas the extant permission is more grouped around the centre. Mr Conolley properly therefore accepted that Site 2 would be visually more appreciable than the extant permission.[24] In any event, Mr Clarke, eventually accepted that the extant permission could not be considered as a fall-back, because there was no more

[23] Connolley XX, Day 7.
[24] Connolley XX, Day 7.

than a theoretical possibility of it being built out.[25] Given that, the extant permission is irrelevant to the determination of the appeal scheme.

Site 3 – 114 residential units in 3-storey buildings

51. This is a 1.76ha site, of which only 0.43ha is previously developed (Clarke PoE, Appendix 4). The Site comprises a maintenance compound, allotment gardens and staff accommodation: two semi-detached single storey and two semi-detached two storey dwellings. Mr Clarke accepted that the Site could not therefore fit within paragraph 145(g) NPPF, before consideration is even given to the impact on openness, and would be inappropriate development if judged individually.[26]

52. The present built volume is 1,750 m3 (CD 5.50 GBR, Table EDP 2.3, p.17). The boundary to Lower Green Road to the north is vegetated, although there are breaks in the vegetation affording long views over the racecourse to the Grandstand (see for example at the corner of Lower Green Road and More Lane at CD 5. 52, LTVA, EDP1). As the Appellant accepts, the Lower Green Road/More Lane junction affords *"some sense of openness in filtered views into the Racecourse"* (CD 5.50 GBR, Plan EDP2). There are also open views afforded across the Racecourse via the present lattice work gates, a little way down Lower Green Road. There are also views of the site available from the top of More Lane, across the open and falling topography of the Racecourse (see David Webster PoE, Appendix 12, VP5).

53. The proposal to introduce 3-storey apartment blocks across the site would represent a 1,828% increase in the volume of building volumes (Webster PoE,

[25] Clarke XX, Day 10.
[26] Clarke XX, Day 9.

para.3.66 and CD 5.50 Table 2.3, p.17). Mr Clarke accepted this would be a "substantial increase in built form".[27]

54. The visual effects would also be substantial. Upon completion, the Appellant tells us the development would *"introduce new built form in views from higher ground within the Racecourse"* and when viewed from More Lane would introduce an *"immediately obviously feature of the urban scene"* (CD 5.52 LTVA Appendix EDP6, Site 3), overall it accepted when it submitted the application that the *"[p]roposed development would have a greater impact on openness to that of the existing built context"* (CD 5.50 GBR, Table EDP 2.3 p.17).

55. Mr Connolley accepted in cross-examination that:[28]

    a. From the top of More Lane, a public view (cf. the private view at EDP3): *"built form would be more prominent in the view than now"* (the view being Webster PoE, Appendix 12, VP5).

    b. From More Lane, closer to the site, another public view, Mr Connolley confirmed that it would be *"immediately obvious feature of the urban scene"* (EDP2).

    c. From Lower Green Road, the removal of trees and the new development would lead to *"some increase in views from Lower Green Road"*.[29]

56. To accommodate the new built-form there is required to be a substantial[30] loss of trees (see CD.5.52 LTVA, Apdx.EDP4 Site 3). Inevitably, this will increase the inter-visibility between Lower Green Road and the proposed development (Webster PoE, para.3.67). As such, the Appellant was constrained to accept that

[27] Clarke XX, Day 9.
[28] Connolley XX, Day 8.
[29] Connolley XX, Day 8.
[30] Connolley XX, Day 8.

the development would *"introduce new built form in views looking into the Racecourse where, currently mature landscape scrub serves to prevent most views"* (CD 5.52 LTVA, para.7.19 p.40). Mr Connolley accepted in cross-examination that the perception of built form would be greater than it is now.[31]

57. The Committee Report came to the same conclusion finding that the proposal would "*result in a significant adverse impact in terms of the spatial and visual dimension of openness"* (CD7.3). Given that, the Appellant was right to say when it submitted this application that *"[o]verall, the proposals are considered inappropriate in landscape and visual terms"* (CD 5.50 GBR, Table EDP 2.3 p.17).

58. The Appellant's change of heart comes down to a misreading of **Samuel Smith** (discussed above). Given the acknowledged substantial visual and spatial effects of the proposal, it would be irrational to exclude consideration of visual effects in an assessment of the impact of this scheme on the openness of the Green Belt. This is not a case where it can be sensibly said the effects would be "limited" and therefore so small as not to require direct consideration (as in **Samuel Smith)**. Even on the Appellant's case the visual effects are "high adverse and permanent" on completion and "medium adverse and permanent" in the medium to long term CD 5.52 LTVA, Appendix. EDP6, Site 3.

59. Mr Clarke accepted that, if Site 3 were analysed on its own, it would be inappropriate development in the Green Belt because, irrespective of the impact on openness, it was only 24% PDL. Given that, the lengthy sections of the Appellant's Statement of Case dealing with the **Samuel Smith** case site were a total waste of time.

60. Added to the harm by reason of inappropriateness and openness, is the harm to the purposes of the Green Belt caused by visibly extending the line of

[31] Connolley XX, Day 8.

development to the south of Lower Green Road. Mr Webster and Mrs Hyde were right to observe that the following purposes would be harmed:

a. **To check the unrestricted sprawl of large built-up areas:** the mere fact that the land to the north of the Racecourse is not within the Greater London administrative boundary was agreed by Mr Clarke not to be determinative of this point. [32] It is factually the end point of continuous development which originates from Greater London. In Green Belt terms, it is therefore the sprawl of Greater London. Mr Clarke's point was that there were visual breaks in the form of green space and the River Thames which broke up the sprawl before it reached Lower Green Road. However, those were judgments he had made and he accepted that it was open to Arup to have come to the judgments they did. The presence of some undeveloped land or a River does not stop the perception of sprawl; for example, central London enjoys large parks and the dominant River Thames but they are all perceived as part of London.

b. The development would *"create a new southern boundary to the built-up area of Greater London along the perimeter of the Racecourse"* (Webster PoE, para.3.106). Whilst there are properties on Site 3, their small scale and limited visual perception means the site still functions to prevent sprawl. The introduction of the substantially more visually prominent Site 3, would give rise to the clear perception of southward sprawl of the finger of outward development from Greater London.

c. **To prevent neighbouring towns merging into one another:** whilst the Appellant made much of the fact that Lower Green Road and Portsmouth Road to the south were all within the Esher settlement, that

[32] Clarke XX, Day 10.

is not determinative of the coalescence issue. Indeed, the proposals map showing the settlement boundary is not even part of the development plan.[33] The Character SPD explains that the Racecourse functions to separate *"Esher from its train station and Lower Green".*[34] Mr Connolley told us that he read that as separating the land to the north of the Racecourse from that to its south. That is reinforced by the fact that More Lane and Lower Green are in different character areas within the SPD. Moreover, the Landscape Sensitivity Study (2019),[35] assessed UW6-A, which incorporated Sites 3 and 4 within their landscape unit boundary. Their landscape unit boundary drew the northern boundary of that landscape unit as the northern boundary of the Racecourse. They found that under *"settlement character and edge conditions"* that *"Sandown Park in the west is relatively private and enclosed by fencing and therefore contributes little to the scenic quality of the adjacent settlement edges, however its large scale contributes to the perceived gap between settlements and acts as a buffer between Esher and the south-west main line".* Both the Character SPD and the Arup work in 2019, found it appropriate to draw a boundary between the northern part of the Racecourse and Lower Green Road, and therefore treated central Esher on the Portsmouth Road and Lower Green as different in character terms.

d. In visual terms, there is a limited perception of Lower Green from Portsmouth Road. Similarly, out of the railway station there is limited perception of the urban form of Esher until the Portsmouth Road. To the south-west, within the Conservation Area, there is no perception of Lower Green. Finally, there are some views of Site 3 from the top of

[33] **Fox Land & Property v SSCLG** [2015] EWCA Civ 298 at [28].
[34] CD 3.2 (2 of 2) p.4.
[35] CD 3.25 (2 of 2) p.171.

More Lane but the existing buildings are not particularly dominant and, as such, there is a limited perception of Lower Green. At the northern-end of More Lane, there is an end to the flatted developments called The Eclipse, which Mr Connolley said "was the last building before you get the green". Between The Eclipse building and the Gatehouse there is no built form. This area exists as a transition between the larger properties on More Lane and Lower Green. There is then the gap between the Gatehouses, which marks the break between the settlement of sprawl of Greater London to the north and Surrey to the south. It is clearly perceptible. The strong performance of the Site in respect of purposes 1 & 2 is reinforced by the recommendation in 2019 to extend the Green Belt boundary from the site to northern Lower Green Road (CD 3.10 GBBR 2019).

e. The development would *"erode the 'essential gap'"* and result in *an "actual and measurable loss of open space, and the inevitable coalescence of built-up areas"* (Webster PoE, paras.3.115 and 3.116). Both in actual distance between built form of Lower Green Road and the Racecourse Grandstand and in perceptual terms, there would be coalescence. That is consistent with the findings of the 2018 Report, which found that removal of Site 3 from the Green Belt would *"promote ribbon development in a sensitive area of the Green Belt, which would harm the performance of the wider Green Belt"* and *"physically reduce the perceived and actual distance between settlements, resulting in their merging"* (CD.3.9 GBBR 2018, SA-70).

f. Even applying Mr Connolley's opinion, he told us the existing relationship he identified with Site 3 and the flats would be deepened upon completion. Mr Connolley also accepted that *"due to the increased*

intervisibility the perceived northern built context of Esher would be closely associated with this area of Lower Green".[36] Mr Connolley also accepted that if Lower Green and the southern boundary of Esher were indeed different for the consideration of Green Belt purposes, there would be *"a degree of perceived coalescence".*[37]

g. **Safeguard the countryside**: Mr Clarke accepted that because Green Belt is not a landscape character designation, it was appropriate to adopt the test in applying purpose 3 of *"the degree to which the land was free from urban influence".*[38] In re-examination, Mr Clarke appeared to suggest that was not the approach Arup had taken. That is wrong. Arup adopted the approach of the extent to which the land was under urban influence or displayed a rural character.[39] Thus Local Area 52 scored a 2/5 because it had less than 15% built form. Judged on that basis, Mr Clarke was constrained to accept that, post development, Site 3 would be under a greater urban influence that it is now. Accordingly, there would be a conflict with purpose 3.

61. Site 3 is therefore inappropriate development. It would cause a significant impact on openness and purposes.

Site 4 – 72 residential units in a 6-storey building

62. According to the submission documents, this is a site devoid of buildings and is not previously developed (CD 5.50 GBR, Table ED2 2.3 p.18 and CD 5.51 GBS, Apendx.02, Table 2, Site 4). However, the Appellant *now* says 0.09ha of this 0.57ha site is PDL (Clarke PoE, Apndx.4) but accepts it is otherwise free from built form. The lack of built form is evident for users of Portsmouth Road and

[36] Connolley XX, Day 8.
[37] Connolley XX, Day 8
[38] Clarke XX, Day 10.
[39] CD 3.8 (1 of 3) p.44.

Station Road, notwithstanding the close-boarded fence and sporadic tree line boundary, with no mature tree cover (Webster PoE, para.3.75). It is also clear that there is not built form on the site when viewed from the south on Littleworth Common.[40] Additionally, the lack of built form on both sides of the Portsmouth Road (save for the Marquis of Granby PH) is appreciable from the Scilly Isles roundabout as one approaches the junction with Station Road.[41] All those are public views.

63. The proposal is to introduce a six-storey building, with a volume of 30,050m3. Mr Clarke accepted (however only when the same question was put by the Inspector) that this was *"a substantial increase"*.[42]

64. In addition to the substantial volumetric impact, there is a substantial visual impact. The Appellant accepts that, on completion, *"taller elements of the proposed development will be visible"* from the Racecourse and from Littleworth Common, it would be seen as *"a skyline feature"* and Mr Connolley accepted that it would be *"visually very apparent"* in that view.[43] From the signalised junction when viewed from the east along Portsmouth Road/Station Road junction, it would also be a skyline feature, through gaps in the vegetation,[44] and would be also be *"visually very apparent"*[45] from this perspective. Even in the medium to long term, the building would remain visible *"above existing built form"* (CD 5.52 LTVA, Apndx. EDP6 Site 4). Given that, it is not surprising that Mr Connolley accepted that *the "visual appreciation of built form would be considerably greater than it is now"* from public views.[46] That view is consistent with the view of the case officer, who found that: *"the impact*

[40] Connolley XX, Day 7.
[41] Connolley XX, Day 7.
[42] Clarke XX, Day 9.
[43] Connolley XX, Day 7.
[44] Connolley XX, Day 7.
[45] Connolley XX, Day 7.
[46] Connolley XX, Day 7.

on the openness of the Green Belt in spatial and visual terms would be significant" (CD 7.3, para.9.9.3.23).

65. Given that evidence, it is also not surprising that the Appellant originally conceded that the development here would be inappropriate (CD 5.51 GBS, Apendx.02, Table 2, Site 4). On any view, the development would give rise to a considerably greater impact on the openness of the Green Belt than the present situation. It cannot therefore fall within paragraph 145(g) NPPF in any event.

66. That aside, the site does not pass the gateway. It is not previously developed land and would not represent "limited infilling". It cannot rationally be said to be "infilling", when only one side is developed (i.e. the car park of Café Rouge) when viewed from its frontage on Station Road. Moreover, it cannot be said that 75 units is "limited" in its context, especially as it would be considerably taller than Café Rouge. The only conclusion is that the proposal is inappropriate development.

67. Added to the harm by reason of inappropriateness and the harm to the openness, is the harm caused to the purposes of the Green Belt. Mr Webster and Mrs Hyde were right to observe that there would be harm to purpose 3. The land was found to have a *"semi-urban"* character and served to provide a *"transition from urban to more open racecourse beyond"* (CD3.9 GBBR 2019, Annex 1C). Whilst Site 4 met this purpose weakly, it is not being considered for release from the Green Belt in any document. The loss of undeveloped land and its replacement with conspicuous built-form would reduce the contribution of the land to the purpose of safeguarding the countryside from encroachment. Mr Clarke accepted that the site would be under a greater urban influence than now.[47]

[47] Clarke XX, Day 9.

68. Moreover, an extension to the Green Belt was also recommended to the north of Site 4 and to embrace Station Road in the vicinity of the Station (Webster PoE, Appendix 6).

Site 5 – 68 residential units and a children's nursery in 4 and 2 storey buildings

69. Presently, this site lies behind a short, close boarded fence, over which long views are available over the Racecourse. The lack of built form is visually appreciable, especially in winter views.

70. The proposal is to demolish the existing buildings on site (save for the Toll House), comprising 1,200 m3 and replace them with two buildings, comprising 18,150m3 in total volume, a 1,412% increase in built volume (Webster PoE, para.3.85). There will be four four-storey buildings parallel to the Portsmouth Road and another, two-storey building, set back into the site. There also will be the creation of a new, wide bell-mouth engineered site access.

71. As the Appellant concedes, the new development would, on completion read as a *"a visible and identifiable element within the view"* and would *"reduce the length of road which* [views to the northern boundary of the Racecourse] *could be obtained"* (CD 5.52 LTVA Apndx. EDP6, Site 5). Within the Racecourse, the effects would also be felt, as a consequence of the planned tree removal (CD 5.52 LTVA Appendix EDP4). This would have the effect of *"exposing the proposed development to views from the within Racecourse, resulting in a perceived loss of openness to the wider site"* (Webster PoE, para.3.87). Built form would be visible through the new access, framing the view.[48] Mr Connolley fairly accepted that *"the visual appreciation of buildings would be greater than it is now"*.[49] The Committee Report observed that the effect on both spatial and visual dimensions of openness would be *"substantial"* (CD7.3 para.9.7.3.9).

[48] Connolley XX, Day 7.
[49] Connolley XX, Day 7.

72. Even if the site can be considered all PDL (in-spite of approximately 250 m2 not being PDL, on the Appellant's measurements), it cannot sensibly be said that a development with those effects will not have a greater impact on the openness of the Green Belt. The development is therefore inappropriate, as it does not fall within any of the exemptions.

Overall

73. Sites B, D and 1-5 would therefore amount to inappropriate development within the Green Belt, which would cause harm to its openness and purposes. To this harm, ***"substantial"*** weight **must** be (and has been) attached (para.144 NPPF and Hyde PoE, para.107).

74. In order to avoid a conflict with DM17 Development Management Plan and the NPPF, very special circumstances must exist which clearly outweigh this harm and any other planning harms.

ISSUE 2 – THE EFFECT ON THE CHARACTER AND APPEARANCE OF THE AREA

Approach

75. Consistent with paragraph 127 and 130 NPPF, the development plan takes a robust stance in favour of good design which is sympathetic to, and takes the opportunities to enhance, local character and quality of an area. The Government attaches great importance to good design. By paragraph 124 NPPF we are told that the creation of high-quality buildings and places is ***"fundamental to what the planning and development process should achieve"*** and that ***"[g]ood design is a key aspect of sustainable development …".***

76. One of the Objectives of the Core Strategy is to ***"protect the unique character of the Borough, and to enhance the high quality of the built, historic and natural environment"*** Core Strategy p.15.

77. That policy objective is integrated into the policies themselves. Within Esher policy CS9 Core Strategy requires that ***"all new development will be expected to enhance local character".*** By CS17 Core Strategy, all new development across the Borough is required to ***"respond[…] to the positive features of individual locations, integrat[e] sensitively with the locally distinctive townscape"***. Policy DM2 Development Management Policies provides detailed guidance on how new development should ***"preserve or enhance the character of the area"***. To assist with the application of these policies the Council adopted the Design & Character SPD and Companion Guide in April 2012 (CD3.2).

78. From every angle, the proposed development would undermine the local character and appearance of the area:

Approaching Esher from London

79. Approaching Esher from the Scilly Isles roundabout, you come to the junction of the Portsmouth Road and Station Road, presently marked by Café Rouge. This junction is identified in the SPD as a "Key Gateway" (see map within the Companion Guide CD3.2 p.6) where particular care needs to be paid to the scale and form of development. Contrary to the advice in the Character Companion Guide SPD (CD 3.2 2 of 2, p.9), the site would propose a new flatted development which would be of a different scale to its adjoining buildings. As Mr Connolley accepted, in some views Site 4 might be seen as a similar scale but in other views *"of course it wouldn't".*[50]

[50] Connolley XX, Day 7.

80. Here, visitors to Esher would be greeted by the six-storey building at Site 4, of considerably greater scale to its neighbours (Webster PoE, para.8.49). It would create a new skyline feature for viewers from within the UW6 Character Area (Littleworth Common) as well as being visible from within the Racecourse.

81. Along Station Road and the southern boundary there would be a loss of trees. Whatever screen planting is proposed in this location it would not obscure these effects completely and would take many years to mature. Even on maturity, the taller elements would be clearly visible. Mr Connolley accepted that car park infrastructure (lights, cameras, kerb work etc) and the new pedestrian crossing along Station Road, would be urbanising features.[51]

82. These effects are contrary to the principles identified in the LTVA. There is no *"setting back the proposed development from Station Road"* (CD 5.52 LTVA, para.6.5 pp.30-31). The tallest, most prominent element of the proposal would be adjacent to Station Road and the only site access would be from Station Road (see Illustrative Layout CD 5.33). There would also be tree loss and whilst there would be replacement planting, it would take some time to mature and the effects would not be materially different from Day 1.

83. The building would be of a considerably different scale to its neighbours (Webster PoE, para.8.49), including the Café Rouge building on the junction. Whilst Mr Connolley suggested a "gateway building" would be appropriate on the site, it would in fact reduce the significance of the corner site, which marks the gateway, by introducing a taller element behind the corner site, down Station Road. It would in fact herald the arrival into Station Road and not Esher.

84. In any event, as Mr Connolley accepted in response to the Inspector's questions, the notation of "Key Gateway" appears to refer to the road junction,

[51] Connolley XX, Day 7.

whereas Site 4 is set back down Station Road. Besides which, there is no policy requirement for a "gateway building" on a "Key Gateway".[52]

Entering Esher

85. Passing the residential and commercial buildings on the right, you come to the Toll House. According to the Appellant, this location plays *"a key role in the approach to Esher on the Portsmouth Road"* (CD 5.52 LTVA, para.7.13).

86. Here there would be a considerable amount of built form arising from the four-storey and two-storey buildings on Site 5, substantially reducing the open undeveloped characteristic of this key approach (Webster PoE para.8.52). It would appear above Cheltonian Place and the Toll House.[53]

87. When viewed obliquely, the impression would be of a single bloc of built form (Webster XiC). The buildings would be out-of-scale with the development on the south side of the Portsmouth Road. Indeed, there are no other 4-storey buildings along this section of Portsmouth Road. The effect would be readily apparent along the main road, including being visibile when viewed through the listed railings heading east out of Esher. Mr Connolley accepted Site 5 would continue the pattern of ribbon development along the Portsmouth Road.[54] The tree loss on the site would afford clear views of the site from within the Racecourse (and thus from within Character Area UW6). Any tree planting would take many years to mature. The Appellant accepted there would be no material change from Day 1. Although Mr Connolley explained this was a "worst case scenario", it was a modelled scenario which nevertheless took-into-account the opportunities for planting.

[52] Connolley XX, Day 8.
[53] Connolley XX, Day 7.
[54] Connolley XX, Day 7.

Passing the entrance to the Racecourse

88. The characteristic long views across open land, which Mr Connolley accepted contributed positively to the character of the area,[55] would be terminated by the substantial built form of the six-storey hotel at Site B (Webster PoE, para.8.31). It would introduce a new and imposing structure. There would be a loss of trees, in favour of built form. The building would be visible from many parts of the Racecourse and from the Portsmouth Road, including through listed railings where views of the Grandstand, noted as a "Local Landmark" (CD3.2 Companion Guide p.5), would be obscured (Webster PoE, para.8.30 and accepted by Connolley XX on Day 7). Indeed, Mr Connolley accepted that the function of the Grandstand as a local landmark would, in some views along the Portsmouth Road, be reduced.[56] That cuts against the "landscape design principles" established in the LTVA to *"maintain the approach to Esher on the Portsmouth road, particularly where open views are possible through the old gates to the Racecourse"* (LTVA para.6.5 p.31). Indeed, together with the built-form at Site 5, the width of views of the Racecourse would be reduced.

Entering Esher High Street

89. Here, the elevated, treed boundary and readily appreciable open space behind it would be replaced by the four-storey building at Site 2. The rarity of residential buildings higher than three storeys is noted in the Companion Guide SPD (CD3.2 para.3.7, p.7). Contrary to the SPD, the development would be in parts higher than three-storeys and of a greater scale than the commercial buildings.

[55] Connolley XX, Day 7.
[56] Connolley XX, Day 7.

90. This result of development will change the sense of arrival into Esher. The built form would be substantial and would be out of scale with the adjacent existing buildings (Webster PoE, para.8.40). This would be harmful to the character of the area (Webster PoE, para.8.44). The adverse effects would be made more apparent by the decision to set the building back from the existing alignment of the shopping parade. The mitigation of boundary planting would be cramped and very close to the building façade, reducing the likelihood of its retention (Webster PoE, para.8.43). Indeed, as the LTVA records the Day 1 effect will not materially reduce over time.

91. Mr Connolley accepted that if Sites 4, 5, B & 2 were to be implemented, they would serve to change the nature of the approach into Esher.[57]

Leaving Esher High Street and turning right into the Conservation Area

92. Turning right on the High Street to access the Esher Conservation Area and another "Key Gateway" in the Character SPD (CD3.2 p.6).

93. Site 1 is located adjacent to character area ESH05, where replacing housing at larger scale and an increasing presence of flatted development are noted as issues, which leads to the opportunity to ensure development takes account of the established scale and grain (CD3.2 p.11). Contrary to that guidance, the three-storey proposal at Site 1 would be visible from higher parts Esher Green and looking through the proposed access at the "Key Gateway". It would be at a greater scale than the surrounding built form. Indeed, it would be at least a storey taller than neighbouring detached dwellings, affecting views to The Warren (Webster PoE, para.8.35 and Webster Apndx.12 VP 4). As is explained in the Committee Report, The Warren is noted as a "Key Landmark" (CD 7.3 paras.1.7 and 1.15).

[57] Connolley XX, Day 7.

94. The Conservation Area Appraisal (CD7.10) describes the Green as retaining *"much of the character of a rural village green, in contrast to the densely developed town centre to the south … Most of the surrounding buildings are relatively small scale, accentuating the size of the Green"* (p.13). The introduction of an apartment building, in an elevated position, near the highest point of the local setting, behind much smaller detached dwellings would be distinctly out of character (Webster PoE, para.8.38).

95. Even with the effect of screen planting, the Appellant accepts the proposed development is likely to *'remain visible in local views"* (CD5.52 LTVA Apdx.EDP6 Site 1). Indeed, as accepted, the Day 1 effect will not *"materially reduce over time"* (Landscape SoCG para.3.2).

96. Mr Connolley accepted that he had underscored the sensitivity of receptors in this location. They are both within the Conservation Area and, contrary to what is said, the views of the site are from a promoted view point in the development plan. These factors mean a low/medium sensitivity for pedestrians is much too low and Mr Connolley fairly accepted a medium sensitivity was more appropriate.[58]

Leaving the Conservation Area and travelling north down More Lane

97. Passing The Wheatsheaf PH, Site 1 and The Warren, there are views across to the northern treed boundary of the Racecourse from More Lane, (Webster Apdx.12, VP5).

98. Site D to the right, would see the loss of 12,900m2 of Greenfield land to Grasscrete (CD6.49 DAS). The use for cars, would detract from the open

[58] Connolley XX, Day 7.

character of the vista and have an urbanising effect. There would be slight harm as a consequence (Webster PoE, para.8.34).

Leaving More Lane and turning right into Lower Green Road

99. As More Lane bears right into Lower Green Road, we come into the ESH06 area of the Character SPD (CD7.10). This describes the houses as having a *"Garden Suburb"* quality due to their *"cottage scale, tall chimneys and eaves half dormers"* (para.3.51). Mr Connolley accepted that was a *"fair description of the properties that front onto Lower Green Road"*.[59]

100. The site itself is outside any character and falls within "landscape setting". Mr Connolley accepted that the development would introduce a "significant amount of built form" within the area annotated as "landscape setting",[60] as identified in the recent Landscape Sensitivity Study (CD 3.25).

101. The site would however front onto, and its access would be, onto Character Area ESH06. The Appellant accepts that the three-storeys of Site 3 would be *"very noticeable within the vicinity through the introduction of some prominent elements and differences with the existing scale and pattern of development"* (CD5.52 LTVA para.7.11). Mr Connolley accepted:[61]

a. The development would not be of the "garden suburb" character of the properties opposite. The development would not be of a "cottage scale" and would not have "tall chimneys and eve half dormers" of the Lower Green Road properties. Accordingly, it would not reflect the character of Lower Green Road.

[59] Connolley XX, Day 8.
[60] Connolley XX, Day 8.
[61] Connolley XX, Day 8.

b. That development would be perceptible from the public realm in filtered views and, in those views, people would be seeing a development which did not reflect the character of Lower Green Road.

102. There would also be *"very noticeable"* views available from within the Racecourse and from the elevated sections for More Lane and Lower Green Road (see Webster Appendix 12 View Point 5). This new feature would be of a different scale and pattern to the properties on the northern, facing side of Lower Green Road (Webster PoE, para.8.45). The site would become distinctly urban, away from the *"semi-urban"* character, noted in the Green Belt Review (CD 3.8, 3 of 3).

103. Whilst the SPD does say that higher density development may be appropriate (para.3.55) that is said to be as set out in Case Study 1. Case Study 1 (pp.58-59) shows a replacement of a single residential dwelling with another building, of a higher density, which *"is located within the parameters of the footprint and height envelope of two storeys"* (para.7.18) and *"should reflect the informality of plan shape and massing which is the predominant character of this streetscape"* (para.7.15). Mr Connolley accepted that Site 3: (i) strays significantly beyond the footprint of the existing buildings, (ii) it ranges beyond the height envelope (by two storeys in some instances) and (iii) fails to reflect the prevailing plan shape, massing and style of buildings on Lower Green Road. Site 3 does not fall within what the Character SPD contemplated as an opportunity for increasing density.

104. To comply with the requirements of the Highways Authority, there is to be road widening to the east of the proposed access point, opposite 58 and 130 Lower Green Road, to serve new car parking spaces (Condition 27). If that

condition were found to meet the policy tests for imposition, this would result in a loss of vegetation and an urbanising effect (Webster XiC, Day 2).

105. The Appellant relies on the 61 More Lane decision (7 August 2019 CD 8.4). Permission was granted on appeal for the erection of a three-storey building for 17 flats. Mr Webster's view was that this decision did not change his evidence because:

a. It was for a considerably smaller scheme in a far less prominent location.
b. The buildings opposite Site 3 do fall clearly within the typology identified in ESH06 and the scale and location of the proposed buildings at Site 3 would be an uncharacteristic form of development (cf DL,11).
c. The proposed development at Site 3 would not preserve the spacious feel and verdant character of the area, and would not be compatible with its context (cf. DL,13).

106. Mr Connolley accepted that 61 More Lane, if built out, would be considerably less prominent than Site 3. Moreover, he accepted that there is a clear visual relationship with the railway embankment. Further, that existing two dwellings on 61 More Lane fill the majority of the width of their respective plots. Finally, he accepted that the scheme was not within the Green Belt. It was therefore of no real assistance in resolving the issues in this scheme.

107. For those reasons, the 61 More Lane scheme is not comparable with the proposal for Site 3 and should not weigh in favour of the grant of permission.

Overall

108. These elements of the appeal scheme cannot be said to ***"preserve or enhance local character"*** or ***"respond to the positive features of individual locations, integrat[e] sensitively with the locally distinctive townscape"***. The

development therefore conflicts with policies CS9 CS17 Core Strategy and DM2 Development Management Plan. As these policies conform to national policy and the harm would be geographically widespread, Ms Hyde was right to attach significant weight to that conflict (Hyde PoE, para.108).

ISSUE 3 – AFFORDABLE HOUSING

Approach

109. Policy CS21 Core Strategy requires that for schemes of 15 units, where viable, 40% of the gross number of dwellings is required to be affordable, with a requirement of 50% on greenfield. Here, given the blend of greenfield and PDL, the Council has established that 45% would be the appropriate proportion.

110. The argument comes down to two points:

a. Whether it is appropriate to use the value of the Racecourse enhancement works as the BLV or whether the existing use of the land should be used as required by the Planning Practice Guidance (PPG); and

b. Whether the Appellant has exhausted all other routes to generate the capital required to undertake the enhancement works.

Methodology

111. Policy CS21 Core Strategy provides that it will "require" provision for affordable housing to be made on site (save for exceptional circumstance) for all schemes, where viable. As the site is a mix of brownfield and greenfield, Mr

Clarke accepted Mrs Hyde's view that 45% would be the appropriate policy requirement.[62]

112. The Developer Contributions SPD, was adopted in July 2020 and was rightly accepted by Mr Clarke to aid in the application of policy CS21. The SPD provides that all viability appraisals should *"observe guidance set out in the … Standardised inputs to viability assessment set out in the Planning Practice Guidance – please see Reference ID: 10-010-20180724 Paragraphs 010 – 020"*.[63]

113. Applying CS21 in line with the SPD, as expected, a proposal which failed to follow the PPG approach would be in conflict with policy CS21. Curiously this uncontroversial proposition was not accepted by Mr Clarke. He chose to support that response by suggesting that the word "observe" in the SPD meant that provided a developer had literally "observed" the PPG but ultimately did something different, that would be sufficient.[64] Suffice to say the Council submits that response is not only wrong but is outwith the range of reasonable responses a planning professional could make to a planning inquiry.

114. The PPG (CD 2.4) provides the "*government's recommended approach to viability assessment"* and that ***"any viability assessment should follow the government's recommend approach to assessing viability"*** (ID 10-010-20180724). Paragraph 57 NPPF reinforces the same point. There is no exception stated to that approach.

115. Following the standard methodology, viability is determined by considering the residual land value compared to the benchmark value. The benchmark value is to be derived from the existing use value (plus a premium

[62] Clarke XX, Day 10.
[63] CD 3.49, para.4.59.
[64] Clarke XX, Day 10.

to incentivise sale) ("EUV+") (ID 10-013-20190509) or exceptionally, an alternative use value ("AUV") which compiles in full with planning policy requirements and for which there is a market demand (ID: 10-017-20190509).

116. The Appellant has adopted a different approach. Candidly it acknowledges that it has ***"depart[ed] from the standard approach"*** set out in national policy (CD5.38 Viability Assessment, para.15, p.27). The Appellant's approach is not to use the existing use value as the benchmark (which it accepts is *"nominal"*) rather to use the cost of the proposed works (totalling c. £36m) as the benchmark. Mr Fell accepted orally that he has not followed the standard approach in the PPG, and that there was nothing in the development plan, the NPPF, the PPG or any other policy documents which authorised his approach. [65] He offered no justification for failing to follow that approach. Mr Clarke offered a candid explanation which was ***"because the PPG does not capture what we want to do on site"***.[66] Needless to say, the particular desires of the applicant are not a material planning consideration justifying a departure from local and national policy.

117. By adopting this unconventional approach, the Appellant is able to say that anything beyond 20% is not viable (CD.5.38 para.16, p.29). However, if the NPPF/PPG approach were adopted, there would be a residual land value sufficient to provide the full 45% affordable housing contribution (Lee PoE, paras.7.3-7.4). That evidence was not disputed by Mr Fell.[67]

118. The Appellant's departure from national policy is unjustified. It amounts to a prioritisation of its private venture over the policy objectives of the development plan (to secure affordable housing). The Appellant goes a step

[65] Fell XX, Day 8.
[66] Clarke XX, Day 10.
[67] Fell XX, Day 8.

further to then claim the sub-policy provision of affordable housing is a *"significant benefit"* weighing in favour of the scheme (Clarke PoE, para.8.5). Every element of that argument is misconceived.

119. There is no local or national policy which suggests that racecourses should be prioritised over other objectives of the development plan and national policy, such as the need to secure an adequate supply of affordable housing. Whilst the Racecourse does support some public benefits (in the form of jobs, tourism & suppliers) Ms Hyde's evidence was that these benefits carried only moderate weight compared with the shortfall in affordable housing, which carried substantial weight.

120. The London Irish Decision (EBC3/5) bears a resemblance to this appeal. Here, London Irish RFC sought to develop a new ground, subsidized by 194 residential units and a care home. The Club only proposed 10% affordable housing, whereas the policy requirement was 50%. The Inspector noted (IR,409) that (as in Elmbridge) market housing funded the provision of affordable housing as a form of "public subsidy". The Inspector characterised the Club's approach was to override the vast majority of the development plan subsidy in favour of its own financial needs and preferences. Accordingly, the Inspector framed the issue as whether it was appropriate to divert a "public subsidy" away from affordable housing to provide the new Club facilities.

121. The Inspector noted that whilst the scheme would provide some public and community benefits, the bulk of the benefits would flow to the Club itself. Accordingly, he found a conflict with the development plan requirement to provide affordable housing (IR, 412). The Secretary of State agreed with that analysis, finding that there was no specific development plan support for the proposal, nor was there any heritage asset to be protected or preserved by the

enabling works, rather the primary purpose was to support the Club itself (DL,20-21).

122. The Inspector took a similar approach in the Lord Wandsworth College Decision (EBC 3/6). Here the provision of affordable housing below the policy requirement, with the rationale that to fund works to Gavin Hall (a building used within the College for performing arts) was a higher priority. The Inspector found the works to Gavin Hall were not made necessary by the appeal scheme, nor was the appellant able to point to a policy basis for that approach and that, accordingly, there was a breach of the affordable housing policies because inadequate provision had been made (DL,37).

123. Applying the reasoning of those cases, Mr Fell confirmed that:

i. There was no heritage asset to which would be protected or preserved by the housing scheme.
ii. The Racecourse improvement works are not made necessary by the housing elements of the scheme.
iii. There is no development plan support for the Racecourse improvement works.

124. The only decision the Appellant has put forward for consideration is the Stockport decision (CD 4.18). The case is clearly distinguishable from this one:

a. The Appellant was a registered charity providing education for children and young people living with severe mental and physical disabilities.[68] A charity is a legally defined organisation. The law requires a charity to be (i) for a charitable purpose and (ii) for the public benefit (not merely a section of the public), see: s.1 and 2 Charities Act 2011. Moreover, a charity is subject to the control of the Charity Commission which has

[68] See, IR 23.

extensive supervisory powers, see: Part 2 Charities Act 2011. It is legally meaningless to say something is "akin" to a charity. By contrast the Appellant (nor the JCR) is a registered charity. The JCR may be established by Royal Charter (which is simply a method of incorporation) but it has no duty to act for the general public benefit or to answer to any regulator such as the Charity Commission. Whilst the Appellant may be a not-for-profit organisation, in that its residual income is spent on its purposes, it is in that respect no different to a private members' club. It is no wonder Mr Clarke would not be drawn on whether the Appellant made the same contribution to the public benefit as the charity in the Stockport decision.[69] There is no sensible comparison.

b. The charity in the Stockport decision had borrowed money and had undertaken significant fundraising before seeking the public to subsidise its project via a below-policy complaint level of affordable housing.[70] Here, by contrast, the Appellant has done nothing of the sort.

c. The charity, with all its competing demands, still managed to contribute 10% more affordable housing as a portion of its housing than the Appellant here.

d. Also, unlike here, the conflict with the affordable housing policy was acknowledged and dealt with in the planning balance. Here, by contrast, the Appellant purports to have complied with the affordable housing policy and then brazenly says that should carry weight in *favour* of the scheme.

[69] Clarke XX, Day 10.
[70] See IR, 628.

125. The proper approach is to acknowledge a shortfall in affordable housing supply gives rise to a conflict with CS21 to which substantial weight should be attached. That harm should be dealt with transparently in the planning balance.

Other sources to make up the shortfall

126. Even if the Appellant's approach were to be adopted, there is no good justification for rejecting two obvious measures to make-up the Appellant's funding shortfall so that a policy complaint level of affordable housing provision could be made. As Dr Lee explained and Mr Fell accepted, given the Appellant already owns the land, the full residual land value of £20m generated by the scheme incorporating the full affordable housing provision would be available for re-investment purposes, leaving only a £14.9m shortfall from other sources (Lee PoE, para.7.6).

127. There are at least two alternative methods of meeting the £14m shortfall whilst still meeting the full affordable housing contribution:

128. **First**, there is the self-development option. The Appellant has assumed it will sell the land to third parties for development. This results in significant leakage of value as a third party would (a) deduct their profit from the price to acquire the land, (b) pay stamp duty, acquisition fees and legal fees on the land value and (c) pay interest on the land. In the 50% affordable housing scenario, this amounts to £17.15m (Lee PoE, para.8.3). However, by developing the land itself with the services of a development manager (who would expect a payment for their services of typically around 5% of development costs, £3.6m) the retained profit is much higher (Lee PoE, para.8.4 and Apndx.3). Even accounting for a 5% risk contingency, the profit would not likely fall below £35.2m (Lee PoE, para.8.7). None of that evidence was disputed by the

Appellant. What instead was said, was that such a course would not be appropriate for a "not-for-profit organisation", however Mr Gittus accepted:

a. The Appellant (nor the JCR) is not a charity. It is not regulated by the Charity Commission or required to apply their Guidance when taking decisions.

b. Even if the Guidance were applied by analogy, there was no prohibition on undertaking a housing project themselves with the benefit of suitable advice from a development manager (provided the revenue was ploughed back into the organisation).

c. Whilst he maintained it would give rise to an unacceptable risk in conflict with the JCR's obligations as trustees, he had not taken specialist legal advice to inform that view.

d. Whilst he also said development managers he had consulted said it was not something they would envisage an organisation like the Appellant undertaking, their views were not before the inquiry.[71]

129. Mr Fell's philosophy to giving evidence was something akin to a submarine commander: running silent and deep, agreeing with the propositions within Dr Lee's evidence before surfacing to deploy a payload of technical detail not foreshadowed in evidence, rebuttal, in discussions with the Council's expert or even led in evidence in chief. As it turned out, the loud bangs were just duds. Dr Lee's note provides a clear and short explanation as to why the points are hopeless:

[71] Gittus XX, Day 6.

a. *Mr Fell Point 1: Appointing a development manager would not overcome the complications of delivering a scheme of 500 units across 5 separate sites:* Dr Lee explains that a development manager could extend beyond a mere project manager. Drawing on his own experience, he explained that he regularly works with development managers to deliver large and complex schemes.

b. *Mr Fell Point 2: The use of a Special Purpose Vehicle ('SPV') by the Appellant would not obviate the need for the Appellant to fund construction costs by borrowing, which Mr Fell says would be unavailable:* Dr Lee notes that Mr Fell accepts that the SPV could mitigate risk, but he explains that Mr Fell has underestimated the role a Registered Provider could play. The deposit paid by them at the commencement of the construction project would remove a large amount of risk to fall on the Appellant. Alternatively, the Registered Provider could take on an even more active role, leaving the Appellant effectively just providing the land.

c. *Mr Fell Point 3: Funding will not be available without security being provided and this would require a charge against the development land:* Dr Lee explains that any developer purchasing the sites would have to provide some collateral to the lender. In the event of default, the lender would take control of the land which would limit the Appellant's risk to the loss of the land of the sites.

130. **Second**, there is the bond issue. As Dr Lee explains, there is a precedent in racecourse improvement projects for this approach (Lee PoE, para.8.8). Even accounting for an affordable housing contribution at 50%, the balance to be found would be £14.9m, which could be easily serviced on the Appellant's disclosed profits (Lee PoE, para.8.10). Mr Gittus asserted that whilst it may be

serviceable on the profits of the JCR, it would not be a viable option at Sandown. This was because there was a greater "emotional" connection to Cheltenham, however he confirmed that he had not even asked potential investors about the level of interest here.[72] This lacklustre approach reduces to zero the weight to Appellant's case that there is no more affordable housing the development could support. Whilst Mr Gittus also suggested there were bank covenants preventing further borrowing, these were not before the inquiry and were only mentioned during cross-examination. Even if they do exist in those terms, they merely demonstrate that the Appellant has incurred debt supporting other elements of its property estate and now has exceeded a commercial exposure when it comes to Sandown Park. That is no justification for demanding the sacrificing of public policy objectives.

131. Either of Dr Lee's options would make up the shortfall and deliver sufficient profit to make the contributions and the necessary improvement works (Lee PoE, paras.5.6-5.7). The reasons for rejecting these options are wholly unconvincing. Accordingly, it cannot be said the affordable housing provided is anywhere near the maximum viable amount and certainly no-where near the policy requirement of 45% on a blended greenfield/brownfield site.

132. Putting all that to one side, there is no planning policy justification for failing to follow the PPG in this case and deliver the full amount in line with policy.

133. Overall therefore, Mrs Hyde was entitled to attach significant weight to the failure to provide the maximum viable affordable housing (Hyde PoE, para.110).

[72] Gittus XX, Day 7.

ISSUE 4 – IMPACT ON THE HIGHWAY NETWORK

134. The Council's case is two-fold:

a. The acknowledged increase in traffic would not meet the threshold of "severe" to justify refusal by itself but would nevertheless cause harm to an already congested local network; and

b. The claimed sustainability benefits of the scheme have been overstated.

Congestion

135. The starting point here is the advice from the statutory consultee, Surrey County Council. It is their locally-informed and expert advice that *"Central Esher is a known congestion blackspot"* and that *"due to the existing congested nature of the local highway network this does not necessarily mean that the impact will not be significant",* such that *"even a relatively small uplift in trip rates can result in a significant impact when applied to a network operating close to, or at, capacity as is the case within Central Esher"* (Mitchell PoE, para.3.56 – 3.57). It is important to recall that the highways authority made that response in the full knowledge of the package of sustainable transport measures proposed with the appeal scheme.

136. Here, the uplift is indeed *"relatively small"* but it is nonetheless an uplift to an already congested network (App Transport SoC, Table 3.9 p.31):

a. Lower Green Road (+21 AM Peak and +19 PM Peak)
b. Station Road (+22 AM Peak and +19 PM Peak)
c. Portsmouth Road/Esher High Street (+53 AM Peak and +44 PM Peak)
d. More Lane (+19 AM Peak and +21 PM Peak)

137. The agreed traffic flows show this will place an additional 72 vehicles onto the gyratory (SOC1/16, Fig 7 2027 PM Traffic Flows + Development).

138. Even this minor delay will cause harm to the Esher gyratory and Scilly Isles junctions (Mitchell PoE, para.3.59 & 3.63). Applying **Redhill Aerodrome v SSCLG** [2014] EWCA Civ 1386 (CD4.12) *per* Sullivan LJ at [32] and consistent with the Secretary of State's approach in the Bishops Stortford decision (Mitchell Appendix A, DL,20 and IR, 132), this harm should be included in the planning balance and afforded moderate weight (Hyde PoE para. 109),

Claimed sustainability benefits

139. The Appellant's case that there will be no harm, relies on there being a high mode-shift away from a private car towards sustainable modes of transport. We disagree.

140. The overarching point to note is the site has an average PTAL score of 1b (with 0 the worst and 6b the best) (Mitchell PoE, para.3.15). Compared to other developments (e.g. Guildford Station with a PTAL of 3 to 4), it cannot be said the site, even compared to other Surrey towns, is "very sustainable" (Mitchell PoE, para.3.18). The Council acknowledges PTAL is a methodology used by TfL but the site is a mere 3km from Greater London and, besides, the detailed consideration of the sustainable transport options bears-out the conclusion drawn from the application of the PTAL method:

a. **Buses**: only the High Street bus stops have a high level of services, there is no proposal to increase the frequency of other services. Given the considerable walking distance from some of the sites to access these higher frequency services, the benefits are limited (Mitchell PoE, para.3.27). Indeed, Sites, 3, 5 and 5 are over the mean walking distance

from a bus stop (Mitchell PoE, Fig.3.6 on p.13 and Table 3.3. on p.17). These factors, coupled with the the 2% mode share in the last Census data, undermines the Appellant's claim that there is *"significant potential to encourage bus travel"* in this case (Mitchell PoE, para.3.28).

b. **Rail**: over 55% of the dwellings are 1km or more from the railway station (Mitchell PoE, para.3.31). Sites 1 and 2 would be over the 1010m mean walking distance to stations (Mitchell PoE, Fig.3.7 on p.15 Table 3.3 on p.17). In any event, there is no proposed improvement to capacity of the trains. Between 0702 and 0800 there is standing room only (Mitchell PoE, para.3.35). Given these points, it is unjustified to say there would be a positive impact on rail usage (Mitchell PoE, para.3.38).

c. **Cycling**: The Appellant only envisages an additional 10 cycling trips. It is therefore clear that cycling is not projected to be a major mode of travel (Mitchell PoE, para.3.46).

141. The 61 More Lane decision does not advance the case for the Appellant. It concerned a much smaller scheme, which was not "significant development".[73] As such, the Inspector was not considering the question of whether it was sustainably located under paragraph 103 NPPF. He reaches no conclusion on the topic at all, rather his observations are in the context of a refusal based on parking pressure. He certainly reaches no conclusion that the location is "highly sustainable", such as to support the Appellant's asserted mode-shift.

142. Judged overall, Mrs Hyde was right to only afforded only limited weight to the location of the site (Hyde PoE, parar.106).

[73] Clarke XX, Day 10.

ISSUE 5 – OTHER ECONOMIC, SOCIAL AND ENVIROMENTAL CONSIDERATIONS

143. The Council acknowledges that the scheme would be capable of delivering economic, social and environmental benefits. The Council's position in respect of these benefits is as follows:

144. **Preservation of the Racecourse as an employer and tourist venue:** The Council acknowledges that the loss of the Racecourse would give rise to planning harms in the form of the loss of 110 jobs, suppliers to the Racecourse (277 of which are local) and the attraction of 250,000 visitors to Esher a year, some of whom spend money in the district centre. The preservation of the Racecourse is therefore a planning benefit.

145. However, the appeal scheme has not been robustly demonstrated as the *"minimum required to arrest the decline of Sandown"* (cf. Gittus PoE, para.18) nor has it been demonstrated what would happen if the appeal were dismissed or over what timescale. Mr Gittus accepted that there was no quantitative evidence before the inquiry to show the effect of less extensive works on long-term viability.[74] Moreover, in-spite of not questioning Dr Lee's evidence that providing 40% affordable housing would deliver a surplus of £22.9m, Mr Gittus explained that the Appellant had not even modelled what could be done for £22.9m.[75] Finally, the proposal does not appear sustainable. Further substantial sums are apparently required even after the works which are the subject of the planning application (Gittus PoE, para.19), including £3.2m for the Eclipse building (Gittus RPoE, Appendix 2). There is no projected income before the inquiry to show how the improved racecourse facilities will fund these further works. Mr Gittus' evidence that the scope of the planning application is that which is *"essential and needed at the current time"*[76] was revealing. He could

[74] Gittus XX, Day 6.
[75] Gittus XX, Day 6.
[76] Gittus XX, Day 6.

not be *"certain"* that the appeal scheme would arrest the decline of Sandown. It cannot therefore be ruled-out that a further application for revenue generating Green Belt development will not be submitted in the near future.

146. In any event, whilst policy CS24 Core Strategy does establish the objective of supporting the *"improvement of the quality of existing visitor attractions"* it seeks the fulfilment of that objective *"without compromising the objectives"* of the Green Belt. It follows that upgrading facilities whilst causing harm to the Green Belt should not carry significant weight in the balance here. That is because it is not fulfilling the objective in the manner which the development plan sought it to be achieved.

147. Finally, the Appellant has in effect double-counted the c.£36m "enhancement works" to the Racecourse. This is because it has used them to demonstrate the scheme can only provide 20% affordable housing and, then in the benefits, it has used the same works to demonstrate a benefit of "significant" weight.

148. Mrs Hyde was therefore quite right to question the sustainability of this proposal (Hyde PoE, parar.19). In all the circumstances, moderate weight should be attached to the contribution the appeal scheme will make to sustaining the Racecourse.

149. **The Hotel:** The hotel would generate new jobs. On the expression of interest placed before the inquiry from Accor, a midscale/upscale hotel would be appropriate and applying the Employment Density Guide (CD3.54), that would generate between 50-75 jobs.[77] Whilst Mr Gittus and Mr Clarke alluded

[77] As confirmed by Gittus in XX, Day 6.

to other expressions of interest from Marriot and Intercontinental, which may support a higher number of jobs, that evidence was not before the inquiry.

150. The Council accepts that hotel accommodation is to be supported in Esher by policy CS9 Core Strategy. However, there is no requirement in the policy for the hotel be on the Racecourse, or that it has to be a "high quality" hotel, or located the Green Belt or be for the sole purpose of supporting the Racecourse. It would be possible to fulfil the objectives of CS9 Core Strategy in a considerably less harmful way. For example, the extant hotel permission (broadly aligned to Site 2) would cause less harm to the openness of the Green Belt than the proposal at Site B here (Hyde PoE, paras.32 and 39-40 and Webster in XiC). These considerations temper the amount of weight to attach to the provision of a hotel on the site in the manner proposed to limited (Hyde PoE, para.43). Ms Hyde was right to take that view. It is material to take-into-account whether a benefit could be achieved with less harm to the Green Belt, see: **Hayden-Cook v SSCLG** [2010] EWHC 2551 (Admin) *per* Sales J at [23].

151. **The contribution to market housing land supply**: the Council accepts that it cannot demonstrate a five-year supply of homes against the standard method figure. However, that figure takes no account of the substantial policy and environmental constraints on delivering homes in the Borough. Over half of the Borough is Green Belt and other areas covered by absolute environmental constraints (Hyde PoE, para.48). In those circumstances, it is hardly surprising therefore that the Council cannot demonstrate a five-year supply. Nevertheless, the Council is taking steps to meet the shortfall through an Action Plan and the preparation of a new Local Plan (Hyde PoE, paras.50-52).

152. In any event, the Government policy is clear that the single issue of unmet housing need (and consequentially all the foreseeable benefits which flow from the construction and occupation of new homes) is unlikely to outweigh harm to the Green Belt (see WMS 2 July 2013). It follows that the normal economic and social benefits which flow from providing a housing scheme in the context of a housing shortfall are also unlikely to amount to very special circumstances. Mr Clarke managed to give three inconsistent answers on this point, first he agreed, then disagreed then said he could not comment on what the Secretary of State had in mind.[78] The Council submits he was right first time. It follows that the following are all unlikely collectively to amount to very special circumstances:

a. Construction jobs;
b. Increased spend in the local economy by future residents;
c. Council tax receipts/CIL Receipts;
d. Delivery of homes in a sustainable location; and
e. A policy compliant affordable housing contribution.

153. Finally, there is no evidence from housebuilders to lend credibility to the suggestion that these sites would come forward within five years to assist with the shortfall. Those factors inevitably effect the weight to attach to the supply of housing in this case. Fairly, Ms Hyde gave significant weight to the contribution of new homes but was right not to afford substantial weight to this benefit (Hyde PoE, para.55).

154. **The contribution to affordable housing:** It is the Council's primary case that the proposed quantum of affordable homes is substantially below the policy requirement. Accordingly, there is no benefit at all, simply a substantial

[78] Clarke XX, Day 10.

dis-benefit. However, even if the Council's viability evidence is rejected, the weight to attach to 64 units would be moderate (Hyde PoE, para.61). That is because the number is only 19.2% of the Borough's annual need on a site which could deliver much more, both the sites would be located furthest from the station and there is no evidence from affordable housing providers that they would be willing to take on the units on the landowner's envisaged terms (Hyde PoE, para.63).

155. **The site's location:** As the evidence of Mr Mitchell shows the sustainability benefits of the site have been overstated. Elements of the site would be within mean walking distances to access sustainable modes of transport but substantial elements would not be. In any event, the sustainable location of the site is a local and national policy requirement (policy CS25 Core Strategy and NPPF, para.103). It is not a "benefit", it is a neutral matter weighing in the balance. Mrs Hyde was therefore right to afford limited weight in favour of the scheme to this consideration (Hyde PoE, para.67)

156. **Provision of a family/community zone:** there is no identified deficiency in children's play provision, indeed Esher already benefits from an excess of open space beyond the quantitative standard (CD.3.53 Open Space Assessment, p.83). Whilst Mr Clarke drew attention to the child densities and local deprivation, he omitted to mention those factors were expressly taken into account by the authors of the assessment when arriving at the qualitative judgment there was an excess of provision (see para.3.1 on p.29). Moreover, the facility would not be open to the general public on race days.[79] In all the circumstances, the weight to attach to this provision is therefore limited (Hyde PoE, para.71).

[79] Gittus XX, Day 6.

157. **Replacement day nursery**: the Council accepts there is an unmet need for childcare provision and that a purpose-built nursery could offer a high quality environment. However, Mr Clarke accepted that there was no evidence of comparative capacity or jobs versus the existing.[80] The benefit is therefore limited (Hyde PoE, para.77).

158. **Ecological enhancements**: the Council does not dispute that ecological benefits on-site could be achieved via a management plan which sought to maximise biodiversity. However, the details are presently vague and undeveloped, there is no management plan or biodiversity calculator output. Accordingly, the weight to attach to this benefit is limited (Hyde PoE, para.78). The contribution for Littleworth Common should also carry limited weight. Whilst there is benefit in creating a management plan, the extent to which the £20,000 for implementation will act as mitigation (rather than as a benefit) cannot be known at this stage.

159. **Integration between district centre and railway station:** the new pedestrian crossing is a requirement of the highway authority, it simply removes an objection which would otherwise tell (and tell strongly) against approval. Mr Clarke accepted it was primarily a mitigatory measure.[81]

160. **Heritage benefits**: Mr Clarke conceded significant weight was not appropriate when confronted (but only when confronted) with his own heritage evidence,[82] which explained that the improvements would be "minor" (JCR/8 para.4.2). Mrs Hyde was therefore right to say these benefits carried very limited weight (Hyde RPoE, para.12).

[80] Clarke XX, Day 10.
[81] Clarke XX, Day 10.
[82] Clarke XX, Day 10.

161. **Air Quality and Noise Benefits:** Mr Clarke accepted these should carry only limited weight.[83] The Council considers they should carry no weight. As Mr Clarke accepted, the air quality benefit turned on the extent of mode-shift and, as the Council disputes that will occur, the air quality benefits will not arise (Hyde RPoE, para.13). As for noise, whilst there have been complaints, no environmental health action has been taken and, more importantly, there is no comparative evidence to demonstrate that the family/community zone will be less noisy than the go-kart track. The noise "benefits" should therefore carry no weight (Hyde RPoE, para.15).

162. **Landscape/Arboricultural Benefits:** Mr Clarke accepted that these were "primarily mitigatory"[84] and so, again, limited weight can only be rationally attached to something which is the mere fulfilment of normal development control policies.

ISSUE 6 – DO OTHER CONSDIERATIONS CLEARLY OUTWEIGH THE HARM?

163. It is the Council's case that the economic, social and environmental considerations advanced by the Appellant in favour of the scheme, do not clearly outweigh the substantial harm to the purposes and openness of the Green Belt, the harm to the character and appearance of the area, the inadequate affordable housing provision and the harm to the local highway network. By definition, they cannot therefore be "very special circumstances".

164. In any event, in large part, they comprise the mere fulfilment of development plan policies, absent which there would be harm. Such matters cannot amount to very special circumstances, even if they were to have clearly outweighed the harm. That is because to be very special, the circumstances

[83] Clarke XX, Day 10.
[84] Clarke XX, Day 10.

must *"go beyond satisfaction of the normal … development control policies"* see: **R(Lee Valley Regional Park Authority) v Broxbourne BC** [2015] EWHC 185 (Admin) *per* Ouseley J at [71] (CD 4.14). It appeared to be suggested on occasion (both by Mr Clarke and Mr Steel QC) that this was no more than could be done within the strictures of Reg.122 Community Infrastructure Levy Regulations 2010, this is wrong. As Gilbart J held in **R(Working Title Films Ltd) v Westminster CC** [2016] EWHC 1855 (Admin) at [25], an element of a planning obligation could be *"necessary"* under Reg.122 *"because it provided a countervailing benefit to set against* [a] *disadvantage".* In that case it was the failure to make a full affordable housing provision but the legal principle could relate to any policy conflict.

165. In any event, the circumstances of the case cannot objectively be described as "very special" that is to say *"something which exceeds or excels or something which is exceptional in character, quality or degree",*[85] see: **Chelmsford v First Secretary of State** [2003] EWHC 2978 (Admin) *per* Sullivan J at [55]-[56].

166. It follows that very special circumstances do not exist to justify the inappropriate development and the scheme would therefore conflict with paragraph 143 NPPF and DM17 Development Management Plan (Hyde PoE, 111).

CONCLUSION

167. The Council's case is that the development conflicts with policies CS9, CS17, CS21, CS25 Elmbridge Core Strategy and policies DM2, DM5, DM7, DM17 Elmbridge Development Management Policies. The Council evidence is that the

[85] Accepted by Mr Clarke XX, Day 10 as the appropriate formulation.

scheme would therefore conflict with the development plan as a whole (Hyde PoE, para.112).

168. The shortfall in the supply of housing against the standard method engages the tilted balance at NPPF para.11(d). Here, however, the application of the Green Belt policies in the NPPF has provided a clear reason for refusing the development proposed (above).

169. Even if the Appellant's position that the scheme was "not inappropriate" development were to be accepted, it is the Council's case that the harm to the character and appearance of the area, combined with the failure to make an adequate affordable housing provision and the harm to the highway network, would significantly and demonstrably outweigh the benefits (Hyde PoE, para.113).

170. It follows that as neither the application of paragraph 11(d) NPPF, nor any other material consideration indicates that the application should be determined otherwise than in accordance with the development plan, permission must be refused.

171. The Council therefore respectfully invites the Inspector to recommend to the Secretary of State that planning permission be withheld for this poorly thought-through, self-serving and harmful scheme.

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1 December 2020.