APPEAL REF: APP/A2280/W/3259868

LAND AT PUMP LANE, RAINHAM

CLOSING SUBMISSIONS ON BEHALF OF MEDWAY COUNCIL

I. INTRODUCTION

1. That there is a significant need for housing in Medway is not in dispute. It is a factor that the Council had at the forefront of its mind when considering this application.

2. But the degree of housing need in Medway cannot obscure the significant and demonstrable harms that this proposal would cause. Those harms are multifaceted and irreversible.

3. The evidence at this Inquiry has demonstrated that these harms considerably and decisively outweigh the benefits of this proposal, including the delivery of housing.

4. These closings submissions adopt the following structure[1]:

   4.1. Main Issue 1 - the character and appearance of the surrounding area, including the Gillingham Riverside Area of Local Landscape Importance and the role of the appeal site as a green buffer (RfR3);

   4.2. Main Issue 2 - the availability of best and most versatile agricultural land, including the loss of the orchards (RfR8)

   4.3. Main Issue 3 - the significance of designated and non-designated heritage assets, including the local historic landscape (RfR2);

   4.4. Main Issue 4 - the capacity and safety of the local highway network (RfR5)

   4.5. Benefits of the Proposal – including (i) the delivery of housing; (ii) the delivery of affordable housing; and (iii) other benefits

   4.6. Other Considerations – including the emerging Local Plan, and the public interest in plan-led decisions

[1] The main issues are those identified by the inspector, and agreed by the parties, at the CMC and opening of this Inquiry

II. MAIN ISSUE 1 - THE CHARACTER AND APPEARANCE OF THE SURROUNDING AREA, INCLUDING THE GILLINGHAM RIVERSIDE AREA OF LOCAL LANDSCAPE IMPORTANCE AND THE ROLE OF THE APPEAL SITE AS A GREEN BUFFER (RFR3);

Context

A Valued Landscape

1. It is common ground between the parties, and their respective experts, that the Appeal Site is located within a "valued landscape".[2]

2. National Policy affords a greater level of protection to valued landscapes than it does to 'ordinary' countryside. Whereas the intrinsic character and beauty of all countryside is to be recognised[3], it is valued landscapes which are to be "protect[ed] and enhance[ed]"[4].

3. Because of this agreed position, relatively little time was spent at the Inquiry in relation to this matter. But that we are dealing with a valued landscape must not be forgotten. It is an important starting point. There is no dispute between the parties that the proposal would cause irrevocable harm to both the landscape character and visual amenity of this valued landscape.[5] The difference is largely one of degree of that harm. That being the case, on any analysis, the impact of this proposal will be contrary to the objectives of national policy for such landscapes.

4. For the reasons given by Mr Etchells in his written and oral evidence, the Council contend that the degree of harm to the landscape character, visual amenity and functioning of this valued landscape will be significant.

An "essentially rural" character

5. The Medway Landscape Character Assessment ("MLCA") **[CD3.4]** recognises that the Lower Rainham Farmland Character Area ("LRFCA") retains its *"essentially rural character"*[6].

[2] Main SoCG, para 5.1(12) Landscape SoCG, para 2.2(3)
[3] NPPF, para 170(b)
[4] NPPF, para 170(a)
[5] Main SoCG, para 5.1(15)
[6] MLCA, p69 **[CD3.4]** Whilst the MLCA refers to the "landscape type" of the LRFCA as "Urban Fringe", and the sub-type as "Urban fringe with urban/industrial influences" , as Mr Etchells explains (Proof, paras 3.4.10-11) this simply repeated the classification of landscape types which was undertaken in the much older Kent Thames Gateway Landscape Assessment (1995). At that time Bloors Wharf, to the north east of the site, was in

6. Moreover, although it recognises that parts of the LRFCA have a "urban fringe character", the MLCA explains that the "*area between Lower Rainham and Lower Twydall* [is] *in generally good condition with urban influences less apartment*"[7]. It is this area in which the Appeal Site is located. Indeed, due to its extent the Appeal Site constitutes almost the entirety of the 'area between Lower Rainham and Lower Twydall'.

7. In neither his written nor oral evidence did Mr Hughes seek to suggest that the MLCA's assessment of the existing character of the area was wrong. To the contrary, in cross-examination Mr Hughes agreed that the MLCA was a robust and considered document.[8] Furthermore, Tyler Grange's ("TG") Landscape and Visual Impact Assessment **[CD8.3]** ("LVIA") sought to draw upon elements of the MLCA (albeit, as is discussed below, it did so selectively.)

8. As is evident from the aerial photographs **[ID3]**, and as Mr Hughes accepted[9], there have been no significant changes in the settlement patten, amount of built form or land use which has materially affected the character of the local landscape since the MLCA was published. This is also confirmed by Figure 3 in Mr Hughes' appendices – which illustrates that the built form which has been consented in the LRFCA since the MLCA was published has been almost exclusively confined to the east of Rainham urban extension. [10] This area is a significant distance from the Appeal Site and, as Mr Etchells explained, has a very different character.

9. The essentially rural character of the local landscape would also have been experienced on the site visit. The Inspector will, of course, take into account the entirety of her comprehensive visit when assessing the existing character of the area. However, two elements of that experience are worth highlighting:

    (1) Firstly, when passing under the railway bridge on Pump Lane the change in character from suburbia to rural is abrupt. The "*clear physical and character boundary*"[11] which the railway line provides between the urban edge (to the

industrial use (it was used as a Ship breakers and scrap yard), such that the local landscape would have had a different appearance and character. In XX Mr Hughes agreed with this analysis.

[7] MLCA, p69

[8] XX (RW) Day 3

[9] XX (RW) Day 3

[10] The one exception is Berengrave nursery which was already an existing brownfield site and which, in any event, is separated from the Appeal Site by a substantial area of woodland. It plainly does not affect the landscape character of the immediate area in which the Appeal Site is located.

[11] Etchells Proof, para 3.4.19

south) and the rural countryside (to the north) is not a phenomenon appreciated on plan only. It is experienced, viscerally, on the ground.

(2) Secondly, when walking along the bridleway which traverses Bloors Farm on the east of the Appeal Site. This is, as Mr Etchells explains, "*a rural route, partly enclosed but with some open and attractive views across the orchards…*"[12]. The MLCA recognises that parts of the LRFCA are tranquil[13] and none is more so than this bridleway. Mr Hughes volunteered in cross examination that the bridleway was "*in the countryside, away from that urban edge*" and agreed that users would be aware that they were in the open countryside, "*having left the urban area*"[14].

10. The MLCA underscores the importance of retaining this type of landscape in Medway. It explains that "*Open countryside, particularly on the fringes of urban areas has an important role to play in buffering, separating and protecting the local identity of different communities…*" and explains that "*[a]s a general principle and in order to retain openness and respect rural character in these buffer areas, major development proposals should be avoided.*"[15] In relation to the LRFCA itself, the MLCA proposed action is to "conserve and create", and one of its guidelines is expressly to "*[r]esist further built development*" in the area.[16]

Area of Local Landscape Importance

11. The importance of the local landscape in which the Appeal Site is located is derived not merely from the quality of its rural character. The landscape also plays a number of important functions.

12. This is underscored by the designation of (most of) the LRFCA (including the Appeal Site) as an Area of Local Landscape Importance (ALLI), protected by Local Plan Policy BNE34. This designation reflects <u>both</u> the quality of the landscape character, and also the important functions that it plays, as is clear from the wording of the policy itself

[12] Etchells, Proof, para 6.7.1(g)
[13] MLCA, p68
[14] XX(RW) Day 3
[15] MLCA, p12
[16] MLCA, p69

(*"it does not materially harm the landscape character and the function of the area" (emphasis added)*), as well as its supporting text.[17]

13. The supporting text sets out the six functions that the Gillingham Riverside ALLI performs. The parties disagree about the extent to which the Appeal Site contributes to those functions and the corollary issue of how the proposal will impact on those functions. This is a matter which will be considered in detail below. However, there is no disagreement on the continuing relevance and validity of those functions, notwithstanding the age of the Local Plan. In particular, it is important to note:

    (1) The functions are supported by an objective evidence-base – the MLCA specifically highlights the "*benefits attached to this area retaining its essentially rural character*". Those benefits reflect, almost precisely, the functions identified in the supporting text to Policy BNE34. Thus, the authors of the MLCA – having undertaken a comprehensive assessment of the landscape character of Medway – were in 2011 reaffirming the identification of this area as an ALLI and, specifically, confirming the important functions that the landscape plays.

    (2) The ALLI continues to perform the functions identified today – Mr Hughes accepted in cross-examination[18] that the functions originally identified for the Gillingham Riverside ALLI continued to apply in 2021. He also accepted that, if the Inspector were to find material harm to those functions, this would be a matter which would weigh against the proposal.

The Competing LVIAs

14. Somewhat unusually the Inspector and Secretary of State have the benefit of three LVIAs before them. Each has been undertaken by a landscape professional, and each considers *inter alia* the impact of the proposal on the landscape character and visual amenity of the surrounding area. They are as follows:

    (1) **Lloyd Bore LVIA (April 2019) (LB) -** this assessment was produced on behalf of the Appellant, submitted with the original application and formed the basis of the landscape chapter within the original Environmental Statement ("ES");

[17] See Mr Etchells Proof, para 4.3.3
[18] XX(RW) Day 3

(2) **Tyler Grange LVIA (September 2020) (TG) –** TG were first instructed by the Appellant in June 2020, after the application was refused by the Council. This LVIA was submitted for the first time as part of the appeal, and now forms the basis of the landscape chapter within the consolidated ES, replacing the original assessment.

(3) **Jon Etchells Consulting (Since 2019) (JE) –** Mr Etchells has been instructed by the Council on this matter since late 2019. He undertook a short report on the LB LVIA prior to refusal, and then was commissioned to undertake an independent and comprehensive LVIA as part of the appeal.

15. It is a striking feature of this appeal that the Appellant has not sought to offer any explanation of: (a) why they jettisoned the services of LB following refusal of planning permission; nor, perhaps more importantly, (b) why the conclusions of TG in respect of both the landscape and visual impact of the scheme substantially diverge from those of LB.

16. As Mr Etchells pointed out at the end of his questioning by Mr Lopez[19], it is relevant for the Inspector, and ultimately the Secretary of State, to take account of the fact that there are three LVIA assessing the development proposals, and that two of them – by LB and JE – are generally in agreement, whereas the TG LVIA is entirely "out of step".

17. The conclusions of each assessment are summarised in Mr Etchells' Appendix D. In summary:

(1) In terms of **landscape effects** on the **local area** -

i. Both LB and JE conclude that the proposal would cause **moderate to major/high adverse** landscape impacts (Yr 1). As Mr Etchells explained in evidence in chief[20], although the definitions employed by LB and JE to describe the effects are different, the overall assessments are pitched at a reasonably similar level.

ii. In contrast TG conclude that the landscape effects of the proposal would be less significant than both LB and JE, causing **moderate adverse** landscape impacts (Yr 1). It is noteworthy that TG conclude

[19] XX (JL) Day 2
[20] XX (RW) Day 1

that there would be a lower level of landscape effect than LB notwithstanding that LB assessed the effects across the entirety of the LRFCA, whereas TG were assessing the effects over smaller area.[21] There was no attempt by Mr Hughes to explain this obvious anomaly.

(2) In terms of **visual effects,** the differences between LB and JE on the one hand, and TG, on the other, are even more stark:

i. LB and JE concluded that receptors from a wide variety of locations would experience **moderate to major/high adverse** visual effects. The only slight difference between them is that whilst JE identifies **high adverse** effects for users of the Bridleway, LB's assessment is slightly lower, at **moderate to major** adverse.

ii. In contrast TG's assessment is that visual effects range between **minor** and **moderate** adverse.[22] The assessment is particularly out of kilter in respect of users of the Bridleway, where TG suggest that there would be **minor** beneficial effects.

18. The Council submits that the Inspector and Secretary of State should place a significant amount of weight on the assessment undertake by Mr Etchells. He is an experienced landscape professional and a Chartered Member of the Landscape Institute. He has undertaken a comprehensive assessment which follows a transparent methodology. That methodology is consistent with the Guidelines for Landscape and Visual Impact Assessment, 3rd Edition (GLVIA v.3)[23] , and was not criticised during his (lengthy) cross-examination. His assessment is rigorous and supported by reference to published material. He has drawn attention to all relevant parts of the MLCA, and has not sought to selectively quote from that document[24]. His conclusions are well-reasoned, balanced and not overstated.[25] That his conclusions are

[21] What LB termed the Lower Rainham and Lower Twydall Fruit Belt. See RH, Appendixes, Fig 5
[22] Save for Properties along Pump Lane, which would be moderate to major adverse.
[23] Etchells Proof, para 2.3.2
[24] It is to his credit, for instance, that expressly acknowledged that the MLCA categorized the LRFCA as "Urban Fringe" and explained why this was not an accurate reflection of the current landscape character of the area (see fn 5 above).
[25] By way of example, see Mr Etchells' conclusion that the long term (i.e post Yr 15) landscape effects on the local area would be "moderate". He did not seek to escalate that assessment simply because it accorded with TGs. Rather, he explained why moderate adverse effect on the local landscape character area over the long term should be considered a significant adverse harm, having regard to: (i) the extent of the area affected; (ii) the fact that his scale of effects accommodates all potential developments (including up to, say, nuclear power

broadly consistent with those of LB only serves to underscore the robustness of his assessment and judgment.

19. In contrast, there is good reason to question the robustness of the assessment undertaken by TG/Mr Hughes even before one considers the substance of its content (which we do, below). In addition to being out of kilter with the other two LVIA, the assessment contravenes the guidance in GLVIA v.3 in a number of respects.

Failure to take account of the worst-case scenario

20. It is far from clear that TG/Mr Hughes assessed the impacts of the proposal applying a reasonable worst-case scenario, as GLVIA v.3 emphasises is appropriate[26].

21. In cross-examination Mr Hughes freely accepted that the TG LVIA had proceeded on the basis that the development would be limited to 8-10meters in height.[27] This is consistent with the express assumption in the TG LVIA that the height of the development would be limited to respect the existing built form[28], an assumption which we are told had been taken into account *"when assessing the susceptibility and sensitivity of the landscape to the proposed development"*.

22. However, the Building Heights Parameters Plan (PL 004 Rev B) – which was being relied upon by the Appellant at the time of the TG LVIA and Mr Hughes' evidence – originally allowed for development up to 12m in height throughout the site, save for the school and village centre.

23. It follows that the TG LVIA and Mr Hughes evidence did not take a "reasonable worst case" approach to the assessment of landscape effects.

24. It is no answer to this criticism to suggest that the *intention* was to restrict the height of the development to between 8-10m, even if that intention was reflected in the Design and Access Statement ('DAS'). It is the parameter plan, and not the DAS,

points; (iii) that the site – which is sizeable of itself – would experience moderate to high adverse effects, even in the long run.

[26] GLVIA v.3, p 50, paras 4.1-4.4

[27] XX (RW) Day 3

Question (RW) - "You have in your assessment based the heights of development being limited to respect the existing built form of 8-10m"

Response (Hughes): "Yes 8-10m, as the parameters shows for the development across the site….that is the intention"

[28] TG LVIA, p54, para 6.12

which is secured by condition. And it is the parameter plan which – as the name indicates – establishes the parameters for any reserved matters application.[29]

25. This does not mean that an assessment must assume, even on a reasonable worst-case scenario, that buildings of 12m in height would come forwards across the entirety of the area identified on the parameters plan for buildings of that height. That would not be realistic, and the Council has never suggested as much. But an assessment must, taking a reasonable worst-case scenario, take into account that 12m high buildings *could* come forward *anywhere* within this area (which on PL 004 Rev B was most of the Appeal Site). This was the approach taken by Mr Etchells in his assessment[30].

26. In an attempt to meet this criticism – and thereby tacitly acknowledging the force of the point – during the Inquiry the Appellant tabled an amended Building Heights Parameters Plan (PL 011B), albeit only after the landscape (and heritage) evidence had been given. For the reasons set out in notes to the Inquiry (ID30a and ID30b) the Council did not object to the very late amendment of the parameters plan.[31]

27. However, the belated amendments to the Building Heights Parameters Plan in an attempt to retrofit the proposal so as to be consistent with TG's assessment does not cure the problem. First, it does not explain why TG/Mr Hughes failed to take a reasonable worst-case approach in the first place. Second, and in any event, as Mr Etchells has explained[32], the revised parameters plan still allows for 12m high/3 storey buildings across a large area of the Appeal Site, including in the northern, more rural part of the site.

Selective quoting of, and failure to explain departure from, the MLCA

[29] If, at reserved matters stage, a proposed building (or buildings) came forward at 12m in height in an area identified on the parameters plan as permitting buildings of that height, the Council could not (acting reasonably) refuse to discharge the application on the basis that the height of the buildings was inappropriate. They could not point to the DAS and say that was not what was intended. Because the approval of the parameters plan at outline stage would have already established the principle that buildings up to 12m in height in that location was acceptable, and this could not be undermined at reserved matters stage.

[30] See Etchells Proof, para 5.1.1(b)

[31] ID30a also debunks the Appellant's contention that it was as a result of the Council's invitation that the Building Heights Parameters Plan (PL 004 Rev B) permitted a large area of the site to have buildings up to 12m in height. However, the question of who was responsible for the buildings heights shown on PL 004 Rev B is a complete irrelevance. The short point is that any assessment has to be based on the parameters shown on those plans

[32] See his notes attached to ID30a and 30b

28. One of the central purposes of GLVIA v.3 is to ensure that the basis for making judgments on significance of effects *"is transparent and understandable, so that the underlying assumptions and reasoning can be understood by others"*.[33] When assessing the baseline for landscape assessment the guidance recommends that, as a first step, there should be a review of existing character assessments.[34] In particular it stipulates that *"[j]ustification should be provided for any departure from the findings of an existing, established LCA"*[35].

29. In contrast to Mr Etchells, TG's LVIA failed to draw attention to – and justify any departure from – elements of the MLCA which are of central relevance to the assessment of the existing character and functioning of the local landscape.

30. Most notably the TG LVIA failed to recognise, let alone engage with, with the judgment of the MLCA that the LRFCA has an *"essentially rural character"* , and that the specific area in which the Appeal Site occurs is in *"generally good condition with urban influences less apartment"*. This was a highly relevant conclusion in the MLCA in circumstances where the TG LVIA seeks to categorise the site and its surroundings as "peri-urban" and (as is addressed in greater detail below) this conclusion forms an important component of their analysis of landscape effects.

31. Mr Hughes accepted[36] that it was an "omission" of the TG LVIA to fail to mention the conclusions of the MLCA on this issue. This is to underplay the failure which was serious, and calls into question the robustness of the assessment. If, as appears to be the case, TG/Mr Hughes' judgment is that the local landscape does not have an essentially rural character, they should have engaged directly with the conclusions in the MLCA, explaining why they departed from them. Instead, they chose to ignore it, selectively citing from those parts of the MLCA which supported TG's judgments.[37]

32. This was not a one-off slip. Mr Hughes also accepted[38] that it was an omission of the TG LVIA to fail to identify that the MLCA had concluded that there were a number of benefits of the area retaining its essentially rural character, and that these benefits

[33] GLVIA v.3, p37, para 3.23
[34] *Ibid* pp78-78, paras 5.12-5.15
[35] *Ibid* pp78-78, paras 5.13
[36] XX(RW) Day 3
[37] See, for instance, TG LVIA, p59, para 7.11 *"As recognised with the MLCA…[there is] poor east to west connectivity"*
[38] XX(RW) Day 3

identified reaffirmed the functions originally identified for the Gillingham Riverside ALLI. In circumstances where the TG LVIA seeks, as part of its assessment, to downplay the impacts of the proposal on those functions, this too was a serious omission.

Hedgerow loss and approach to mitigtaion

33. Finally, GLVIA v.3 stipulates that *"[i]t is essential to demonstrate that any measures included as part of the mitigation proposed to respond to adverse landscape and visual effects can be delivered in practice"*[39] and requires an assessment of whether mitigation is *"technically achievable, practically deliverable, and likely to be sustainable in the future"* , as GLVIA v.3 requires.[40]

34. Contrary to that guidance TG/Mr Hughes have relied heavily on proposed mitigation when arriving at their conclusions on the impact of the proposal, without any assessment (let alone rigorous assessment) of the efficacy of that mitigation.

35. While by no means the only instance[41], the most stark example of the Appellant's lax approach concerns the landscape mitigation proposed on Pump Lane.

36. Both the TG LVIA and Mr Hughes' proof of evidence placed significant reliance on the retention of existing hedgerows, as well as the introduction of new hedgerows to mitigate the effects of the development on Pump Lane, with the LVIA concluding that *"Ongoing maintenance and new hedgerows will help retain the character of the lane"*[42].

37. However, as Mr Hughes accepted in cross examination[43], neither at the time the LVIA was undertaken, nor even when the proof was drafted, had TG/Mr Hughes calculated the extent of hedgerow that would be lost on Pump Lane to accommodate the accesses and new road arrangements. This exercise was only undertaken when

[39] *Ibid*, para 4.38
[40] GLVIA v.3, p64, para 4.39
[41] Significant reliance is also placed on the establishment of community orchards, without any investigation at the time of the TG LVIA or Mr Hughes' Proof how those orchards would be achieved, delivered or sustained. ID26 was produced in a belated attempt to address this issue. This note can provide little comfort. First, there is no indication of when Mr Hughes started discussions with The Orchard Project – the distinct impression is that it may have only been after the Inspector raised a query about the implementation and management of the Orchards. Second, there is no evidence from the Orchard Project themselves. Third, there is distinct a lack of detail in relation to how the orchards would be implemented and, more importantly, sustained during the lifetime of the development. This is an important issue, given the weight placed on them in TG/Mr Hughes' analysis.
[42] TG LVIA, p61. See also RH Proof, paras 4.5 & 5.62
[43] XX (Day 3) RW

Mr Etchells raised the issue prior to the Inquiry in order to secure agreement in the Statement of Common Ground about the approximate extent of the loss.

38. Furthermore, and compounding the issue, as ID4 acknowledges the Landscape Framework Plan - on which the TG LVIA and Mr Hughes relied when considering the effect of landscape mitigation - was based on the Green and Blue Parameter Plan which *pre-dated* the detailed junction arrangements for Pump Lane.

39. It follows that, as Mr Hughes agreed in cross examination, the conclusion in the TG LVIA that "*the hedgerows and banks along the lane will be managed to retain the character of the lane*[44] was made without: (i) even an approximate calculation of the amount of hedgerow to be lost; or (ii) an understanding of the detailed junction arrangements (and therefore, how far back replacement planting would have to be set to accommodate sightlines etc).

40. Thus the Appellant's blithe conclusion that " *the character of the lane will be retained and enhanced*" can be given little, if any, weight. As we will discuss in greater detail below, the character of Pump Lane will be irrevocably and harmfully changed. However, the important point for now is that the Appellant's cavalier approach to the effectiveness of the landscape mitigation further serves to undermine the credibility of their assessment.

Landscape Impacts (including impact on Pump Lane)

JE's assessment

41. The Council relies on, and commends to the Inspector (and Secretary of State), the assessment of Mr Etchells in respect of landscape impacts. This closing does not seek to replicate the detailed analysis undertake in Mr Etchells' written and oral evidence. Instead, it simply highlights the key conclusions in his analysis, together with cross-references to his evidence.

    (1) As a starting point, it is important to recognise the size of the Appeal Site, and the extent to which it occupies the ALLI. The site itself is around 1.2km in extent from Lower Twydall Lane in the west to Lower Bloors Lane in the east, and 0.7km from the railway line in the south to Lower Rainham Road in the

[44] TG LVIA, p61

north As can be seen from Mr Etchells Figure 3, the site takes up a significant proportion of the ALLI.[45] Often there is a debate about the extent to which a proposal would affect a designated landscape: here, by virtue of its size, the proposal would consume much of that designated landscape. **[Etchells, para 3.4.25 and XIC(RW) Day 1]**

(2) As Mr Hughes' Figure 5 illustrates clearly, the previously consented developments in the ALLI are almost exclusively located to the east of the Lower Rainham urban extension which is physically and visually separate from the main part of the ALLI *"which has, and will continue to have, a rural character"* **[Etchells XIC(RW) Day 1].** If anything, the consented development to the east of the Lower Rainham urban extension on the periphery of the ALLI, increases and emphasises the importance of the retaining the remainder as open countryside. **[Etchells XIC(RW) Day 1].**

(3) Although the southern edge of the site is located next to the existing urban area of Rainham, the *"overwhelmingly dominant characteristic of the Appeal Site is that it is rural"* **[Etchells XIC(RW) Day 1]**. In particular this is because of: (a) the physical barrier of the railway line; (b) the size of the appeal site, so any urban influence from Rainham is limited to the southern edge of the site; (c) the fact that the settlement of Lower Rainham is a small village in the countryside, not an urban area and Lower Rainham road is not a particularly urban influence – it is a moderately busy rural road. **[Etchells XIC(RW) Day 1]**

(4) Perhaps unsurprisingly given the proportion of the character area it takes up, the Appeal Site exhibits many of the characteristics of the area identified in the MLCA[46], most notably: (a) the site makes a significant contribution to the farmland in the area: (b) it provides virtually all of the "well managed areas of orchard" within the character area; (c) due to its size, the Site, is "tranquil in many parts despite enclosure by road to the north and rail to the south" –as Mr Etchells explains it provides an "escape" from the urbanising influences, for instance on the bridleway which is "in the countryside and…relatively

[45] Particularly the main part, excluding the area to the east of the Lower Rainham urban extension which is physically and visually separate.
[46] MLCA, p68 'Characteristics'

tranquil"; and (d) the Site provides an area of separation between the village and conservation area of Lower Rainham and the urban area of Rainham **[Etchells XIC(RW) Day 1]**

(5) The **landscape sensitivity** of the Appeal Site and the local area is **medium to high.** This is a function of the value of the landscape and its susceptibility to the proposed development. The landscape value is medium to high - which derives partly from the landscape quality of the area, but also from the important functions that the landscape plays. The susceptibility of the landscape of the proposed development is also medium-high, reflecting *inter alia* the fact that proposals would extend the urban area beyond the physical barrier of the railway line, across much of the remaining area of currently open countryside between the most the urban area to south and estuary to the north. **[Etchells Proof, paras 3.5.1-3.5.6]**

(6) The **magnitude of change** within the Appeal Site itself would be **high**, and for the local landscape around the site would be **medium to high**. **[Etchells Proof, para 6.2.4]**. This conclusion is based on a number of factors including:

i. As the development would take up a significant proportion of the ALLI, its role as a "*green buffer…would be fragmented and greatly reduced*"

ii. The proposal would involve the removal of a large amount of orchards, "*a locally characteristic land use as noted by landscape assessments at all scales*"

iii. The proposed development would "*leapfrog the existing boundary into an area which presently has a largely rural character*".

iv. It would "*effectively subsume the village of* [Lower Rainham] *into the expanded urban area.*"[47] It is to be noted that LB shared this view explaining that "*[t]he proposed scheme will increase the settlement envelope of the Twyydall and Rainham urban area effectively merging the settlement with Lower Rainham*".[48] In a belated attempt, to counter this point, the

[47] Mr Etchells explained that the areas of green 'buffering' which are now to be located adjacent to Lower Rainham would be "small open spaces, in a large urban area", and this would not prevent the urban area encompassing Lower Rainham. **[XIC(RW) Day 1]**

[48] LB LVIA, para 11.6.168

Appellants, through Mr Hughes in evidence and Mr Lopez in cross-examination, appeared to argue that Lower Rainham was already part of the urban area, such that the proposal would not extend the urban area any further north. With respect, this contention - which finds no basis in the TG LVIA or Mr Hughes Proof[49] - is nonsense.

v. Pump Lane would lose its presently rural character – a factor which is addressed in greater detail below.

vi. The site would be visible for approximately 1.5km in each direction, and within that area the development would be a *"readily visible and locally dominant feature"*

(7) The effect on landscape character would be **high adverse** for the Appeal Site itself and **moderate to high adverse** for the local landscape area around it. As Mr Etchells explains *"the character of the local landscape would change completely, from being a pleasant, largely rural area dominated by orchards to a new residential area with an urban character."* **[Etchells Proof, paras 6.3.3-6.3.5]**

(8) These levels of effect are **significantly adverse**. Moreover, significant adverse effects would continue for the long run, even when the mitigation planting is fully grown out (and assuming it is effective). Although, on Mr Etchells' assessment the effect on the landscape character of the Site would reduce to moderate to high adverse by Yr 15, and to the local area would reduce to moderate, Mr Etchells explained in his evidence why these levels of effect should continue to be considered significantly adverse **[Etchells XIC(RW) Day 1]** (On Mr Etchells' methodology[50], both moderate and high adverse effects are considered to be significant. Contrast this with TG/Mr Hughes approach, where only major effects are considered to be significant[51]: leaving the anomalous result that a proposal which *"would cause substantial permanent*

[49] Mr Hughes' Proof repeatedly identifies the existing urban edge as being Twydall and Rainham, and treats Lower Rainham as separate from that urban area. See, e.g. p6, para 1.33(13), p17, para 3.16, p17, para 3.7. In XX Mr Hughes conceded that the existing urban edge was found at Gillingham to the west, Rainham to the south, and Rainham extension to the east [XX(RW) Day 3]

[50] Etchells, Appendix E, Table 6

[51] See TG's LVIA Appendix 2, Table 5 – notation at the top of the hierarchy.

loss or alternation of one or more key elements of the landscape"[52] would be considered by TG/Mr Hughes to have insignificant landscape effects!).

42. Although also part of the overall analysis of landscape impacts, the impact on the character of Pump Lane is a separate issue in its own right, given its designation in the Local Plan as an "important rural lane" which has the protected of Policy BNE47.

43. It is agreed that the two junctions being introduced on Pump Lane would require the removal of circa. 175m of hedgerow. The layout of the southern junction is such that it would require any replacement planting to be set back significantly. The lane at this point would cease to be narrow, and would no longer be enclosed by hedgerows. The impacts at the northern junction would, if anything, be even more dramatic. The road would be realigned to incorporate two T-junctions, with the effect that the road would case to a be a 'lane'. As Mr Hughes' agreed[53], at both junctions drivers heading north or south would have direct views into (and when turning would be looking directly at) built development. As Mr Etchells explains *"[a]t the moment Pump Lane is a narrow, enclosed land with tall hedges to either side – after these works it would be locally widened, with two new junctions and associated signages, and would have the appearance of a residential access road within a short area."*[54]

44. In short, Pump Lane would no longer be a rural lane.

TG/Mr Hughes assessment

45. Quite apart from the issues of robustness discussed above, TG/Mr Hughes' assessment of landscape effects is undermined by its reliance on three assumptions, all of which are flawed.

46. Those assumptions are: (i) That the Appeal Site and the local landscape area has a "peri-urban" character throughout; (ii) that the commercial orchards are not typical of the traditional character of the fruit belt; and (iii) that the area, including Pump Lane, has distinctive hedgerows which would be retained.

47. As became clear during cross-examination[55] these three assumptions informed every stage of the assessment within the TG LVIA. Each assumption informed the

[52] See TG's definition of moderate adverse effect, TG LVIA Appendix 2, Table 5
[53] XX(RW) Day 3
[54] Etchells Proof, Para 5.1.1
[55] XIC Hughes (RW) Day 3

assessment's conclusion the landscape had a medium sensitivity;[56] that the magnitude of change was medium;[57] and the significance of effect was moderate adverse.[58]

48. None of these assumptions withstands any scrutiny.

49. First, on any fair analysis it is clear that, whilst the southern edge of the site has an urban influence, it cannot be concluded that the entirety of the Site, let alone the entirety of the local landscape area, has a "peri-urban" character. This is contradicted by the conclusions of the MLCA ("*an essentially rural character*") with which the TG LVIA failed to engage; the conclusions of the LB LVIA (The site *"predominantly shares characteristics with the wider rural landscape…The proposed residential development will be out of character for the majority of the site"*[59]) with which neither the TG LVIA not Mr Hughes engaged; and Mr Etchells expert analysis.

50. Second, the contention that the commercial orchards are not characteristic of the North Kent Fruit Belt Area such that their removal would not result in the loss of a key characteristic of the area was plainly untenable.

51. Indeed, in cross-examination[60] Mr Hughes ultimately conceded that the orchards on the Appeal Site *are* characteristic of the area, both the LRFCA and the wider North Kent Fruit Belt Area, and that the commercial orchards were a modern manifestation of the same use which has been ongoing since the 18th Century. His only caveat was that, in landscape terms, the quality of commercial orchards is not equivalent to that of traditional orchards.

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[56] TG LVIA p26. When concluding on landscape value TG had regard to the "peri-urban context"; the assumption that the *"commercial orchards are not typical of traditional character of the fruit belt"*; and noted the hedgebanks as distinctive features (see Rarity, in relation to Pump Lane itself) (see p22, Table 1). When concluding on landscape susceptibility it explained that the sites was *"within a peri urban context"*;and identified hedgerows as one of the "key landscape sensitivities"

[57] TG LVIA p58 where the magnitude of change to the landscape character was reduced because the *"LLCA [is] situated within a peri urban context"*; because the *"proposals would not remove characteristic areas of traditional orchards from the local landscape within the fruit belt"*; and because, *"[e]xisting hedgerows….bounding the site,…are to be retained"*. AT p61 this final point is developed specifically in relation to Pump Lane, where it is said that *"[o]ngoing maintenance and new hedgerows will help retain the character of the lane"*.

[58] As the significance of effect is a function of landscape sensitivity and magnitude of change, it is inevitable the case that these assumptions affected the overall judgement on significance of effect. However, lest there was any doubt on p58 when concluding on the significance of impact the assessment reiterated that, in their view, the *"Proposals are situated within a peri urban landscape that is strongly influenced by adjacent urban areas and transport infrastructure."*

[59] LB LVIA, paras 11.6.203-11.6.204

[60] XX(RW) Day 3

52. This concession was undoubtedly correct. It accords with the judgment the other experts who have considered this matter.[61]

53. Third, since the TG LVIA was drafted it has become apparent that there would be a significant loss of the distinctive hedgerows on Pump Lane and that, contrary to the LVIA's analysis, the existing rural character of the lane would not be retained. Indeed, Mr Hughes conceded that Pump Lane would not have a rural character where the new entrances are located. His suggestion that it would, nevertheless retain a rural character on the middle part of the lane between the entrances is fanciful.

54. The obvious flaws in three of the key assumptions which permeated all stages of their LVIA means that little, if any, weight can be given to the conclusions of TG/Mr Hughes in respect of the landscape impacts. The Council submits that Mr Etchells assessment – which is broadly consistent with that of LB - is plainly to be preferred.

Visual Impacts

55. The Inspector will reach her own judgments on visual impacts of the proposal, having regard to the photographic material before her and, more importantly, her experience from the Site Visit. For this reason, the analysis of visual impacts in these closings is far shorter than that in respect of landscape impacts.

56. The Council submits that the Inspector should prefer the analysis of Mr Etchells in respect of the visual impacts of the scheme – which again is broadly consistent to that of LB – to that of TG. It relies on Mr Etchells analysis in his proof of evidence **[Etchells Proof, para 6.2.1]** on which he expanded in his oral evidence.

57. TG/Mr Hughes repeatedly underplays the visual impacts of the scheme of this magnitude.

58. In respect of users of the bridleway the visual impacts are not simply underplayed, they are mischaracterised as being beneficial.

59. Currently users of the bridleway are aware that they are in the countryside, having left the urban area, as Mr Hughes accepted.[62] Notwithstanding its enclosed nature in

[61] The orchards were in commercial use when the MLCA was undertaken, and nonetheless the authors of the MLCA plainly considered that the "well managed areas of orchard" were characteristic of the area. The LB LVIA referred to the commercial orchards as being a "key characteristic" of the area . And, as noted above, Mr Etchells considers the orchards to be a characteristic part of the local landscape.

[62] XX(RW) Day 3

parts, users experience close and pleasant views of the orchards (particularly in summer), as well as, in places, longer attractive views down to the Estuary. As Mr Etchells explained in his oral evidence, the proposal would result in " *significant harm for users of the bridleway because their experience would change completely…It is* [currently] *clearly in overall terms a rural experience, where you are walking through the countryside…*[following the development] *you would be forcefully aware of the fact that you were in an urban area."*[63]

60. The suggestion of TG that the visual experience of a user of the bridleway would be enhanced by the introduction of housing on either side of the path for its entire length; by built development replacing a swath of what is currently open countryside; and by the construction of a new road over which users would have to cross, is fanciful.

Impacts on the functioning of the Gillingham Riverside Area of Local Landscape Importance, including the role of the appeal site as a green buffer.

61. As noted above, the local landscape derives its importance not simply from the quality of its landscape character, but also the important functions it plays.

62. As Mr Etchells explains in his evidence[64], the proposal would have a significant adverse effect on a number of the functions which both the Local Plan and the MLCA identify the Gillingham Riverside ALLI performing. Indeed, such is the scale of the proposed development relative to the ALLI (and, in particular, the main, undeveloped, section of the ALLI) that it is not hyperbole to suggest that, were the development to go ahead, the ALLI would cease to perform a number of the functions.

63. It is the Council's case that the proposal would cause a significant adverse effect to the following functions.

Important Green Buffer **(function 1)**

64. This is a spatial function. Its objective is to maintain a buffer – in particular, a "green", i.e a non-developed buffer – between the built-up areas of Twydall and Rainham and

[63] Etchells XIC (RW) Day 1
[64] Etchells, para 6.3.5

the areas of internal importance for nature conservation and recreation along the Medway estuary.

65. The Appeal Site forms a significant proportion of the ALLI – around 75% of its width from the edge of Twydall to the estuary at this point - and therefore makes a major contribution to the green buffer function of the ALLI.[65] The proposed large scale of built development across the site, extending from the railway line in the south to Lower Rainham Road, would significantly and adversely affect this function.

66. As can be seen from JE's Figure 3, were the development to go ahead, the 'green buffer' between the urban edge and the estuary would be substantially reduced. The remaining area between the urban edge and the Medway estuary would consist only of one field's width (i.e the field to the north of Lower Rainham Road).

67. In answer to the Inspector's questions, Mr Hughes accepted that if the Site were developed as proposed "*that green buffer, the physical green buffer….would clearly be removed from being green on the site (apart from the green infrastructure elements)*". This was a belated, but ultimately inevitable acceptance by Mr Hughes that the Site would cease to perform the function of a green buffer at all (the green infrastructure elements within the proposal would provide areas of undeveloped land *within* an urban area. They may be attractive areas. But they would not play a buffering role between the urban edge and the estuary).

68. The separation between the urban edge and the SSSI areas – the green buffer - is largely, if not entirely performed by the Appeal Site. If the development were to go ahead there would be virtually no green buffer left. It would cause irrevocable and substantial harm to this function.[66]

Allowing attractive views from the river and railway (part of function 2) and Forms a green backdrop when viewed from the Medway Estuary (function 6)

69. As Mr Etchells explained, views from both the estuary (in particular Motney Hill and Horrid Hill) as well as views from the railway line would be significantly harmed.

[65] Etchells, para 4.3.3

[66] The apparent suggestion in cross examination of Mr Etchells (not advanced in any of the proofs of evidence) that there would be no harm to the green buffer function because the proposal would have no direct impact on the nature conservation and recreation within the SSSI should be seen for what it plainly is: an advocate's attempt to avoid a conclusion which is obviously adverse to the scheme he is promoting. It is a bad point. The

Therefore this element of the second function would also be adversely affected by the development

Providing residents within an extensive urban area with access to an attractive rural landscape (function 3)

70. The proposal may increase access to the area of the Appeal Site (albeit note the evidence of local residents that historically they have been free to walk through the orchards). However, it would not be through an attractive, rural, landscape. It would be through a housing estate which formed a continuation of the urban area.

71. Given that one of only two public rights of way in the ALLI runs through the Appeal Site (the bridleway) the ALLI would largely cease to perform this function. The ALLI would provide little, if any, opportunity for residents of the urban area to escape into the countryside.

Providing an attractive setting to the Lower Rainham and Lower Twydall conservation areas (function 4)

72. As discussed above, the proposal would, in the words of LB, "*effectively subsume the village of [Lower Rainham] into the expanded urban area*". The settlement of Lower Rainham would largely lose its present independent identify and character. The attracting setting current provided by the ALLI to the Lower Rainham conservation area would cease to exist.

73. Whilst the ALLI would continue to provide some countryside setting to Lower Twydall conservation area, this would be substantially reduced.

Contains Orchards

74. The proposal would – at one strike – result in the loss of almost all of the orchards within the ALLI, a key characteristic of the landscape. The limited areas of community

purpose of the green buffer is not to directly enhance nature conservation or recreation within the SSSI. The purpose is to provide a green buffer between the SSSI and the existing built up area.

orchards proposed – even if deliverable and sustainable – would be negligible as compared to the vast loss of orchards.

Conclusions on functions

75. Each and every one of the important functions of the ALLI identified in the Local Plan and MLCA would be significantly harmed by the development. In respect of half of the functions - the green buffer; the attractive setting to Lower Rainham Conservation area; and the provision of orchards – the ALLI's functioning would either cease or be very substantially reduced.

76. Thus, quite apart from the significant adverse impacts they would cause to the character and visual amenity of this valued landscape, the appeal proposals would largely, if not entirely, eradicate the basis on which the landscape was designated within the Local Plan.

III. MAIN ISSUE 2 - THE AVAILABILITY OF BEST AND MOST VERSATILE AGRICULTURAL LAND, INCLUDING THE LOSS OF THE ORCHARDS

Introduction

77. Virtually the entirety of the Appeal Site – 51.5ha in total – is Best and Most Versatile (BMV) agricultural land. BMV land is that which is considered to be the *"most flexible, productive and efficient in response to inputs and which can best deliver future crops for food…."*[67] 96% of the BMV on the site is classified as either Grade I ("Excellent[68]") or II ("good"[69]).

78. The Environmental Statement[70] concludes that the impact BMV constitutes a *"direct, permanent substantial adverse effect, which is significant"*[71]. It is right to do so. The loss of this extent of BMV land of the highest quality is plainly a consideration which would ordinarily carry substantial weight against the proposal.

79. The Appellant's main countervailing argument is to contend that the land is not viable for agricultural purposes. Either for the orchard use which is currently ongoing or for other agricultural purposes.

80. As both experts agreed[72] – and is plainly correct – the burden of demonstrating that the land is unviable for agricultural use falls on the Appellant. It is not for the Council to prove its viability.

81. It is a burden that the Appellant does not come close to discharging.

Context

82. The contention that over 50ha of Grade I and II best and most versatile land cannot be viably farmed for any purpose is remarkable. Mr Lloyd-Hughes described it as 'unique' – in all his years of experience this was the first time that it had been suggested that a

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[67] TIN049, p2 [CD7.8]

[68] "*no or very minor limitations to agricultural use. A very wide range of agricultural and horticultural crops can be grown and commonly includes top fruit, soft fruit, salad crops and winter harvested vegetables. Yields are high and less variable than on land of lower quality."* ALC Classification, p9 [CD7.7]

[69] *"Land with minor limitations which affect crop yield, cultivations or harvesting. A wide range of agricultural and horticultural crops can usually be grown but on some land in the grade there may be reduced flexibility due to difficulties with the production of the more demanding crops such as winter harvested vegetables and arable root crops. The level of yield is generally high but may be lower or more variable than Grade 1"* ALC Classification, p9 [CD7.7]

[70] Consolidated ES – Main Text [CD8.3]

[71] *Ibid*, paras 13.66, 13.77and Table 13.6 (pp170-172)

[72] Mr Lloyd-Hughes in XX(JL); Mr Pelham in XX(RW)

significant area of BMV land was not capable of being viably farmed for any crop.[73] Mr Pelham could not point to any previous example in the planning arena where such a contention had ever been advanced, still less accepted by a decision maker.[74]

83. The context in this case makes this argument all the more surprising:

(1) A C Goatham & Sons ("Goathams") are a substantial and sophisticated operator in the top-fruit market. They operate 29 farms in the North Kent area, operating a 'hub and satellite' model with four of the farms being hubs and the remainder – including the Appeal Site – being the satellites.[75] They farm over 2,400ha of land for top fruit, growing over 350 million apples a year and 55 million pears.[76] It can therefore be reasonably assumed that they make investment decisions on an informed basis.

(2) Having regard to the following factors, Goathams plainly considered Pump and Bloors Farm to be viable prospects:

i. They purchased the freehold of Pump Farm in 2011. It is reasonable to assume that, before purchasing the freehold of the farm (rather than merely renting it), they would have undertaken due diligence and have only purchased the farm if they considered it to be viable. They would have been aware of the characteristics of the site (and its supposed limitations), including its location, size (of the farm as a whole and orchards), orientation of the orchards, and soil quality. As it was already operating as a commercial orchard they surely would have enquired as to the yields it was producing.

ii. Since purchasing Pump Farm, they have reinvested in the site by replanting the orchards twice (4.45 ha in 2011, and 4.45 ha in 2017). Mr Pelham accepted that the replanting costs are not insignificant, and that it is reasonable to assume that Goathams would not have replanted had they considered the orchards to be unviable.[77]

[73] XIC(RW) Lloyd-Hughes Day 4
[74] XX (RW) Pelham Day 5
[75] RLH02, para 4.10 & Figure 4
[76] RLH02, para 4.1
[77] XX(RW) Day 5

iii. Goathams also illustrated their confidence in the viability of the orchard by purchasing the freehold of Bloors Farm in 2016, thereby expanding orchard production at the farm. At the time they had been operating Pump Farm for five years. Therefore, they decided to purchase Bloors Farm having had half a decade of experience of operations on the neighbouring farm. It is highly unlikely that they would have made such an investment had Pump Farm been operating at a loss (and no alternative explanation has been given).

iv. It is notable that both the replanting of Pump Farm and the purchase of Bloors came after (on Mr Pelham's evidence[78]) three seasons of hail damage, including the worst year (2014) where apparently 35% of the crop was damaged. This is of relevance given the importance Mr Pelham places on hail damage in his viability assessment. It is inconceivable that Goathams would have replanted Pump Farm and purchased Bloor Farm had they considered that the incidences of hail were so severe as to render orchard farming in this location unviable.

(3) It is also highly relevant that Goathams have very recently sought to invest in Gore Farm – and to facilitate its continued use as an orchard - by way of an application for the erection of an agricultural building for secure storage (April 2020).[79] The Planning Statement for that application explained that this building was necessary to *"provide much needed secure storage to support Gore Farm and the applicant's expanding agricultural enterprise*….[and] *will support the ongoing expansion and improved efficiency of a business."*[80]. Gore Farm is approximately 3 miles east of the Appeal Site[81]. In terms of its (i) status – as a satellite farm[82]; (ii) overall size[83], (iii) cropping area[84]; (iv) variety of top-fruit[85]; (v) yield[86] and (vi)

[78] Proof, p10, Table 1
[79] RLH08
[80] RLH08, paras 7.4&7.5
[81] Gore Farm is c.2-3 miles from the Appeal Site (see RLH08, F1 – Gore Farm)
[82] See RLH02, Figure 4
[83] Gore is 50.4ha (RLH08, para 1.3); Pump and Bloors is 51.5ha
[84] Gore is 36ha (RLH08, para 1.4); Pump and Bloors is circa 44 ha (SoCG, para 1.1&1.4)
[85] Gore produces - Gala, Braeburn, Reuben and Bramley (RLH08, para 1.4); Pump and Bloors – Gala and Braeburn
[86] Gore's yield is 6000-7000 bins per annum (RLH08, para 1.4); Pump and Bloors – 6,7000 bins per annum (SoCG, para 1.3)

orchard size[87], Gore Farm shares very similar characteristics to Pump Farm. In neither his rebuttal proof nor his oral evidence did Mr Pelham seek to explain why, despite the proximity of Gore Farm and the similarity in characteristics, the conclusions of his viability assessment were not equally applicable to Gore Farm.

84. Set against this context, it would require very compelling evidence to demonstrate that the use of the Appeal Site for orchard farming is unviable.

The viability case

85. The Appellant's viability evidence, far from being very compelling, was entirely unconvincing.

86. It is flawed in a number of respects.

87. First, despite Goathams having farmed the Appeal Site for a decade, as part of its top-fruit business, the Appellant has produced no financial information whatsoever as to the actual profitability or otherwise of the farm during that time. There is no evidence of direct costs associated with Pump Farm; no evidence of actual overhead costs; no evidence of actual turnover; and no evidence of actual profit or loss.

88. Given that the Appellant is seeking to argue that the Appeal Site is (and will be) unviable for its existing orchard use, this omission is startling. Set against the context outlined above, the lack of any actual financial information from the operation of the site provides a basis alone for rejecting the viability case being advanced.

89. It is no answer to this omission to contend that the financial information (or at least some of it) is said to be commercially sensitive. As Mr Pelham accepted, it is well-recognised principle that viability assessments will be publicly available.[88] This is reflected in the PPG.[89] However, if data is truly commercially sensitive, then this can be provided to a decision maker on a confidential basis. Again, this is reflected in the PPG.[90] It is not unusual for viability assessments to be published, with commercially sensitive data

[87] Mr Pelham emphasizes that Pump and Bloors have a number of orchards which are 2ha or less. RLH04 shows that Gore Farm has at least 6 individual orchards of less than 2 ha,3 of which were replanted in 2018.
[88] XX(RW) Day 5
[89] Should a viability assessment be publicly available? Paragraph: 021 Reference ID: 10-021-20190509
[90] *Ibid.*

redacted and available only the decision-maker. As Mr Lloyd-Hughes explained, he not infrequently reviews viability assessments on behalf of local planning authorities which contain financially sensitive information.[91]

90. Nor is it an answer to suggest – as the Appellant might – that such information was not available, because the Appeal Farm forms part of a wider enterprise and cannot be disaggregated. Mr Pelham explained in his evidence in chief that he is often asked by clients to undertake a "profit performance" of individual farms in a wider enterprise.[92]

91. It is telling that – as he confirmed in cross-examination – Mr Pelham had not been asked to, nor had, undertaken an assessment of the "profit performance" of Pump Farm. Most damning of all was his acceptance that whilst he "suspected"[93] that Pump and Bloors Farm had not produced any profit in the last 10 years, he could not be confident of this because he had not undertaken the relevant analysis.[94]

92. Second, the theoretical model on which Mr Pelham placed great reliance is defective, and cannot be given any weight, for a number of reasons:

    (1) It is purely hypothetical. In circumstances where, actually, financial information concerning the running of the farm was available, it is highly anomalous for reliance to be placed on a theoretical model.

    (2) Apart from an assumption in respect of the soil quality, as Mr Pelham confirmed none of the assumptions on which the model is based are site specific to Pump or Bloors Farm.[95] They would equally apply, he accepted, to the replanting of any of the 29 Farms operated by Goathams, including Gore's Farm.[96] Given that Goathams is not contending that any of its other farms are similarly unviable (and quite to the contrary, are investing in them), this immediately undermines the credibility of the model.

    (3) Most significantly, the central assumption underpinning the model is entirely unsubstantiated by the Appellant, and is contradicted by the evidence produced by Mr Lloyd-Hughes:

[91] XIC(RW) Day 4
[92] XIC(JL) Day 5
[93] A term he repeatedly used in XIC in chief when describing the exiting and historic viability of the Appeal Site
[94] XX(RW) Day 5 [You Tube 5:58:54]
[95] XX(RW) Day 5 [You Tube 6:09:45]
[96] XX(RW) Day 5 [You Tube 6:10:45] Subject to achieving a north/south alignment of the orchard

i. The central assumption in the model is that the sale price of the apples will remain "*unchanged throughout the crop lifetime*"[97]. i.e. that for the 16 year period of the model, the sale price achieved would remain static. In contrast the model assumed that costs of production increased annually.[98]

ii. It does not take an economist to work out that if sale prices are assumed to remain static, and costs of production are assumed to increase annually, at some point the model will show costs exceeding turnover, and therefore a lack of viability!

iii. The assumption that the sale price of the apples will remain unchanged was said to be "consistent with past and current evidence"[99]. However, as Mr Pelham brazenly stated in examination in chief, he is unable to produce any empirical evidence to support this contention. And in cross-examination he confirmed as much, agreeing that he was asking the Inspector and Secretary of State to "take my word" that this assumption was correct.[100]

iv. The lack of any empirical evidence to support such an important assumption renders the model devoid of any merit. Even if there were no other evidence before the Inquiry on this subject, the model should be rejected on this basis alone.

v. Moreover, the central assumption is contradicted by evidence produced by Mr Lloyd-Hughes. He produced evidence published by DEFRA concerning the past and current trends in sale prices of apples, including Gala apples.[101] This evidence was criticised by the Appellant because it does not directly represent prices paid by supermarkets. The criticism is true in respect of the second set of data in RLH07, but not the first set of data, which has been adjusted to reflect the 'farm-gate' price.[102] But this criticism is entirely irrelevant. It is the only empirical data before the Inquiry of the past and current trends of sale prices of apples. And it

[97] Pelham Proof, , para 6.3
[98] *ibid*
[99] See Pelham proof page 21 para 6.3
[100] XX(RW) Day 5 [You Tube 6:36:00].
[101] RLH 07
[102] See the metadata in CD7.9a

demonstrates that sale prices rose between 3.33% per annum and 5.12% per annum[103] between 2010 and 2019.

vi. Mr Lloyd-Hughes's evidence demonstrates that, assuming all other assumptions are correct, even a very modest annual price rise of 2% per annum would give rise to a healthy profit, applying Mr Pelham's model.[104] Indeed, it would only require a rise in sale prices of 0.6% per annum to render the proposal viable, again even assuming that all other assumptions are correct.[105]

(4) Furthermore, even with these unevidenced assumptions, Mr Pelham's model shows that the orchard would be viable[106] were it not for an assumption that hail damage would result in 10.4% being damaged by hail annually.[107] Despite the importance of this variable, Mr Pelham accepted that, as he was not a meteorologist, he was unable to opine on whether this level of hail damage is likely to occur at the site in the future. Nor was there any evidence to support his implication[108] that the Appeal Site is particularly susceptible to hail damage; or that it has any greater level of susceptibility than any of the other 20 farms own by Goathams in Kent.

93. Third, the six arguments[109] advanced by Mr Pelham as to why the Appeal Site could not viably be farmed for any agricultural purpose were comprehensively responded to in the written and oral evidence of Mr Lloyd-Hughes. Those points are not addressed in any detail in these closings, and Mr Lloyd-Hughes's evidence is relied on in full. However, the short point that can be made in respect of each of them is that – even if each of the arguments individually had any merit (which they do not) – they do not demonstrate a lack of viability. At their very highest they are characteristics of the site

[103] See RLH Proof, paras 66&67 and ID16
[104] RLH Rebuttal Proof.
[105] RLH (XIC) Day 4
[106] Pelham Proof, Table 8
[107] Pelham Proof, para 6.9-6.10 and Table 9
[108] See Pelham Rebuttal, para 11
[109]
- Operation as a satellite to main hub centres (Flanders Farm Hoo, and Howt Green Farm, Bobbing).
- Size and layout of the existing orchard blocks.
- Lack of suitable buildings.
- Hail damage.
- Increasing costs of production vs "static" prices.
- Orchard age and varieties.

(and in one case the market) which may affect productivity or costs associated with production. They tell the reader nothing about the viability of the enterprise.

94. The Council therefore invites the Inspector and Secretary of State to reject the Appellant's viability case. It is patently unmeritorious.

Other considerations – potential need for BMV land

95. The Council accepts that a degree of BMV land may be required in order to meet housing needs across Medway. The future *potential* need for BMV land is a relevant consideration in the overall weight to be given to the loss of BMV land in this case.

96. However, this should not significantly reduce – and certainly not eliminate - the weight to be given to this important issue. The Council does not accept that allocated sites in the emerging Local Plan would inevitably involve the loss of this extent of BMV land or this quality. And certainly not a site in active agricultural use, as the appeal site currently is.

97. Furthermore, the allocation of sites will be the result of a comprehensive comparison and balancing exercise, which can take account of government policy to the effect that *"areas of poorer quality land should be preferred to those of a higher quality."*[110]. Indeed, as Mr Canavan explained in his evidence in chief, the presence of BMV is a constraint identified in the Medway Strategic Land Availability Assessment ('SLAA'), in which several sites are ruled out – in part - on the basis that they are of Grade 1 or 2 BMV quality (which receives a 'red' rating in the traffic light system; Grade 3a sites receive an amber)

98. Therefore, whilst the Council recognises that this context calls for a reduction in the weight to be given to a loss of BMV land which would otherwise carry substantial weight, this reduction should not be significant. It is for this reason the Council considers that the loss should carry **moderate weight** in the overall balance.

[110] NPPF, fn 53

IV. ISSUE 3 - THE SIGNIFICANCE OF DESIGNATED AND NON-DESIGNATED HERITAGE ASSETS, INCLUDING THE LOCAL HISTORIC LANDSCAPE (RFR2);

Context

Law and policy: the proper approach

99. Where harm is caused to the significance of designated heritage assets, including listed buildings and conservation areas, it is not merely another material consideration to be weighed in the balance. To the contrary, primary legislation[111] establishes a strong statutory presumption against development which causes harm to the significance of either listed buildings or conservation areas.

100. It is firmly established in the authorities – and is an agreed between the parties[112] – that this legislation requires decision makers, when carrying out the balancing exercise - to give "considerable weight and importance" to the desirability of preserving the significance of listed buildings and conservation areas.

101. That this approach is required must especially be remembered when a decision maker is applying paragraph 196 of the NPPF. This policy has been described, rightly, as a 'trap for the unwary' because although it is expressed as a straight balance between the heritage harm, on the one hand, and public benefits, on the other, the balance is not 'straight'. Whether applying the paragraph 196 balance or broader planning balance under section 38(6) of the Planning and Compulsory Purchase Act 1990, decision makers must apply the statutory presumption, and give considerable weight and importance to the desirability preserving of the significance of listed buildings and conservation areas, in *any* circumstances where harm would be caused to the significance of designated heritage assets.

102. Further, it has also been established in case-law – and is again agreed between the parties[113] – that treating a conclusion that there would be "less than substantial

[111] S.66(1) and s.72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 in respect of listed buildings and conservation areas respectively. These duties have consistently been described by the Courts as giving rise to a "strong presumption" against granting permission for development that would harm the setting of a listed building or the character or appearance of a conservation area. See, for instance, *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council* [2014] EWCA Civ 137, discussed in the Heritage SoCG, para 2.4

[112] Heritage SoCG

[113] Hertiage SoCG, para 2.5

harm" for the purposes of the NPPF as being a 'less than substantial objection' would amount to an error of law: *Barnwell Manor* at [29]

103. Finally, a striking feature of this proposal is the number of designated heritage assets that would be adversely affected (on either party's case). Moreover, these are not – as is sometimes the case – a collection of designated heritage assets located at one property. As Ms Wedd explains the proposal would impact on a 'constellation' of designated heritage assets located throughout the local landscape, including two separate conservation areas.

104. The parties are also agreed on the proper approach to paragraph 196 of the NPPF when, as here, harm is caused to the significance of multiple designated heritage assets. As Mr Parr agreed in cross-examination[114], a decision maker should not apply the paragraph 196 balance to each designated asset in turn. Instead, a decision maker should apply the paragraph 196 balance once, taking account of the *aggregate* harm to all of the designated heritage assets[115]. Although there is no binding legal authority on this issue, this must be the correct (and certainly lawful) approach. To do otherwise would be to risk a 'death by a thousand cuts', because a decision-maker would never test whether the public benefits arising from a single proposal outweighed the totality of the harm to designated heritage assets caused by the same proposal. To adopt this 'asset by asset approach' would not be consistent with legislative or policy schemes.

A broad measure of agreement

105. There is a significant amount of agreement between the parties, and their respective experts, as to the impact that the proposal would have on the significance of designated heritage assets in the vicinity of the site. In particular, it is agreed that:

(1) the proposal would cause material harm to the significance of a number of designated heritage assets in the local area. Ms Stoten on behalf of the Appellant accepts that harm would be caused to the significance of five separate designated heritage assets[116], including the Grade II* listed Bloors

[114] XX(RW) Day 9

[115] It is, oo
f course, important not to factor in harm to non-designated heritage assets at this stage, as the paragraph 196 test does not apply to them

[116] Pump Farm House (Grade II); Chapel House (Grade II)

Place. The dispute in terms of whether any harm occurs at all relates only to: (a) York Farmhouse; and (b) the outbuildings and Garden Walls at Bloors Place.

(2) in respect of the five designated heritage assets which it is agreed harm would be caused, both experts agree that the harm would be "less than substantial" for the purposes of the NPPF. The dispute in terms of the harm caused to these five designated heritage assets is one of degree only, and even then the dispute is relatively narrow. Whereas Ms Stoten contends that the harm would be either at the lowest or low end of that spectrum, Ms Wedd considers that the harm would be at the middle of the spectrum.

(3) when assessing the degree to which a proposal which affects the setting and significance of heritage assets, both parties agree that while issues of intervisibility are important, it is also relevant to consider other factors, including the economic, social and historical connections between the asset and its surroundings.[117] This is consistent with the guidance given by Historic England in GPA3[118] and the approach set out by the Court of Appeal in *Catesby Estates Ltd v Steer* [2018] EWCA Civ 1697 **[CD4.6]**

106. There is less agreement in relation to the impact on non-designated heritage assets. That said, both experts agree that there would be harm to Bloors Oasts, albeit less than substantial harm at the lowest end of the spectrum. There is disagreement as to whether the local historic landscape should be considered a non-designated heritage asset and, if so, the degree of harm which would be caused.

Historic England's advice

107. Historic England are the Government's specialist heritage advisor on heritage issues. It is settled law that their views must be given considerable weight and that

[117] Heritage SoCG, para 3.12

[118] **CD3.17.** See in particular, p2 which states: *"The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors <u>such as noise, dust and vibration from other land uses in the vicinity, and by our understanding of the historic relationship between places.</u> For example, buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each."*

cogent and compelling reasons are needed if a decision maker is to depart from them.[119]

108. Their letter of 1 August 2019[120] should, of course, be read in full, but their headline points from it are as follows:

(1) The agricultural land of the Appeal Site forms the setting of: the Lower Twydall and Lower Rainham conservation areas; the listed buildings within them; as well as isolated listed buildings, such as Pump Farmhouse.

(2) The "*distinct settlement pattern of modest hamlets dependent on the surrounding land*" evolved from the historic use of the land – including the Appeal Site - for farming. The settlement pattern, which was established by the medieval period, continues to be evdienced today with *"both Lower Rainham and Lower Twydall surviving as modest historic settlements surrounded by arable land."*

(3) Having expressly referred to the guidance in GPA3 to the effect that "*setting is not limited to visual connections and can include…historic association, land use, functional relationships and aspects such as tranquillity*", Historic England explain that "*[b]oth conservation areas and the listed buildings within them thus derive some significance from their setting which continues to illustrate a historic functional relationship to the surrounding agricultural land and their character as modest rural hamlets*". Historic England, therefore, considered that the contribution that the agricultural setting makes to the significance of the assets is not limited to simply a direct visual connection between the two.

(4) Historic England are firmly of the view that the proposal would cause harm to the significance of both conservation areas, as well as the listed buildings within them. It is worth setting out in full their explanation as to why such harm would be caused:

> *"Building across large swathes of land which form the agricultural and rural setting to both conservation areas and listed buildings within them would have an impact on the significance these designated assets derive from their setting. A sense of the rural setting afforded to both conservation areas and to buildings like Bloor Place is still appreciable from surrounding roads and pathways and*

[119] This is trite law and has been confirmed in numerous cases. If citation is needed, see Regina (Hayes) v York City Council [2017] EWHC 1374 (Admin) at [92]

[120] In a letter dated 29 March 2021 HE confirmed that the amendments to the parameters plan did not fundamentally alter their views, and that their position remained as set out in their letter of 1st August 2019

from the train which passes directly to the south of the site… Introducing a large amount of new development would fundamentally alter the historic character of the area. Such new development would inevitably have a presence in a number of views, and change would also be appreciable in increased vehicular movements, noise and light pollution. An understanding of the historic functional relationships between the historic hamlets and the surrounding land which they were dependent on would also be compromised. We can only conclude that this would cause harm to the significance of both conservation areas through we think the greater level of harm is to the Lower Rainham conservation area which is more directly affected by the development."

It is noticeable that, when considering the impacts on the significance of the conservation areas and the listed buildings, Historic England consider not only direct views from the heritage assets themselves, but also kinetic views that are appreciated when travelling around the area, as well as the non-visual considerations.

(5) Historic England expressly disagree with the Appellant's assessment in its original ES that there would only be minor adverse harm to the significance of the conservation areas.[121]

(6) They also expressly disagree with the Appellant's assessment in its original ES that there would only be moderate to negligible harm to the individual listed buildings.[122]

(7) In terms of Bloors Place – which is afforded separate treatment, presumably because of its Grade II* listing – Historic England explains that *"its relationship to the surrounding fields and its rural setting are important to understand its historic use as a farmhouse and its origins as a rural dwelling"*. They conclude that the development would cause harm to the significance of Bloors Place due to the fact that *"the wider environs in which the asset is experienced would be fundamentally altered by building across it as associated noise and light pollution etc would also likely have an effect"*.

[121] The replacement ES [CD8.3] increases the level of harm to the Lower Rainham CA to moderate adverse, but maintains that the level of harm to the Lower Twydall CA would be minor adverse (see paras 14.89-14.94 and Table 14.5, p191)

[122] The replacement ES [CD8.3] concludes that the level of harm to the individual listed buildings would be minor to negligible adverse (see paras 14.84-14.88 and 14.109, as well as Table 14.5)

(8) Ultimately, they reiterate their "concerns regarding the application on heritage grounds", and conclude that the application fails to meet the requirements of the NPPF, including paragraph 194 – which requires there to be "clear and convincing" justification for harm to the significance of designated heritage assets.

Harm to designated heritage assets

General Approach – Common themes in Ms Stoten's analysis.

109. As was evident from her proof of evidence, and as was underscored in the heritage roundtable sessions, there are several themes running through Ms Stoten's assessment which causes her to underassess the harm that would be caused to the designated heritage assets. These including the following:

(1) **Undue emphasis on intervisibility –**Ms Stoten's assessment places heavy reliance on the intervisibility between the asset and the setting which leads her to underplay other ways in which the Appeal Site contributes to significance. A prime example of Ms Stoten's myopic approach is found in her assessment of York Farmhouse.[123] She concludes that the Appeal Site does not contribute to the heritage significance of the listed building <u>at all</u>, doing so primarily because (in her view) of the "minimal intervisibility" between the two.[124] In oral evidence Ms Stoten was at pains to emphasise the degree of screening on the boundary of the York Farmhouse site which, in her words, causes a "high degree of separation from the wider landscape"[125]. Even putting aside that this approach ignores the kinetic views in which both York Farmhouse and the Appeal Site can be appreciated (such as from walking across the footbridge over the railway)[126], this is to entirely ignore non-visual connections, including: (a) the functional relationship between the two – historically there was a direct functional relationship between the Appeal Site and the asset, as Ms Stoten accepts;[127] and (b) the associative relationship – as HE point out, quite apart from the historic functional relationship, "*the survival of this historic*

[123] Although this flawed approach applied to all of the assets including, for example, Lower Twydall Conservation Area
[124] GS Proof, para 6.27
[125] Heritage Roundtable (Day 6)
[126] As Ms Wedd drew attention to in the Heritage Roundtable (Day 6)
[127] GS Proof, para 67.28

farmsteads…[including] York Farmhouse]" illustrates an "*association with and dependence on the surrounding land*" . It also ignores that the change from a rural to urban landscape would also be experienced in ways other than direct views, such as by increased vehicular movements, noise and light pollution. Given these factors, the contention, contrary to the views of Ms Wedd and HE, that that the Appeal Site – and the agricultural land which it occupies – fails to contribute *at all* to the significance of York Farmhouse is untenable. So too is her conclusion that the replacement of swathes of agricultural land with a large housing estate would cause absolutely no harm to its significance.

(2) **"Modern Commercial Orchards" –** Ms Stoten repeatedly refers to the fact that the Appeal Site has a "modern commercial character"[128], explaining in her oral evidence that (in her view) the modern orchard had a "fundamentally different" character to the historic use of the Appeal Site.[129] This conclusion has caused Ms Stoten to minimise the contribution that the Appeal Site makes to the contribution of the heritage assets, on the basis that the Appeal Site no longer exhibits its historic character. This approach is plainly flawed. The Appeal Site remains in agricultural use - a land use which has been ongoing since the medieval period and which, as HE explains, was the very catalyst for the establishment of the modest historic settlements of Lower Rainham and Lower Twydall, as well as the construction of the listed buildings. The commercial orchard currently undertaken on the Appeal Site is a modern manifestation of this historic orchard use, which has been ongoing for centuries. It does not diminish the contribution that the Appeal Site makes to the significance of the heritage assets. Ms Wedd expressed this point forcefully and eloquently in her oral evidence.[130]

[128] This is mentioned 14 times within Ms Stoten's proof of evidence

[129] Heritage Roundtable (Day 6)

[130] Heritage Roundtable (Day 6), when discussing Bloors Place. She said in respect of the "modern commercial orchard" issue that *"Ms Stoten and I interpret this in 180 degree opposing ways. We know…that agricultural activity in this area has been going on since the medieval period. We know from…. the Hasted description that there was wheat, corn, apples and cherries being grown in this Parish. And we know that older orchards had been grubbed up. So there was change in the 18th Century. We know from the appearance of the Oast houses…that there were hops grown at some point. This is perfectly normal. Modern commercial orchard is the current manifestation of a long history of agricultural uses. If you had asked any farmer since the agricultural revolution of the 18th Century: are you farming in a modern commercial manner? He would have said, yes of course I am….so the fact that we have* [a modern commercial orchard] *is interesting, it has changed the*

(3) **Focus on the existing functional association** – Ms Stoten further errs by focusing on the lack of any *existing* functional relationship between the assets and the agricultural land on the Appeal Site. In her proof, she repeatedly downplays the contribution that Appeal Site makes to the significance of the assets on the basis that any functional association has been "severed". The implications of this erroneous approach were illustrated in Ms Stoten's oral responses concerning Lower Twydall Conservation Area. Ms Wedd pointed to – and agreed with - HE's characterisation of Lower Twydall as a "modest historic settlement surrounded by arable land" and their explaination that the conservation area (as well as Lower Rainham) "*derive some significance from their setting which continues to illustrate a historical functional relationship to agricultural land and their historical character as modest rural hamlets" (emphasis added)*. Ms Wedd's point was that - as HE recognised - this "*historical functional relationship to agricultural land"* is still appreciated today, notwithstanding that there is no longer any existing functional relationship between the two. Further, that the undeveloped natural of the Appeal Site plays a major contribution in maintaining Lower Twydall character as a "*modest rural hamlet"*. Faced with this, Ms Stoten was forced into criticising HE's assessment, alleging that HE was wrong to claim that there is any functional relationship between the agricultural land. But this is not what HE was claiming. Their point – which Ms Stoten ignores, or at least downplays – is that the *historical functional relationship* between the conservation area and the surrounding agricultural land continues to be illustrated by the Appeal Site's current, agricultural use.[131]

(4) Narrow focus ignoring the relationship between the widely spaced assets – GPA 3 **[CD3.17]**[132] explains that setting can be influenced by "*our understanding of the historic relationship between places. For example, buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each."* Ms Wedd cogently explains how the designated heritage assets in question are not a series of random unconnected assets. Instead, they form "constellation of assets", and it is the

appearance of the…farmland…. But that does not diminish the contribution that the open undeveloped farmland makes to the significance of the heritage assets."

[131] See also Ms Wedd Proof, paras 5.13-5.14 where the same point is made.

[132] Page 2

undeveloped farmland setting – of which the Appeal Site plays a major part – that explains the sparse and scattered disposition of these listed buildings and the modest rural hamlets.[133] Ignoring this factor, as Ms Stoten does, is to ignore an important contributor to the significance of the heritage assets. In short, were the development to occur, the undeveloped farmland setting would cease to exist, and with it the value it provides in illustrating the historical basis for the disposition of those heritage assets.

Individual Harm

110. Having explored the main reasons for the difference between Ms Wedd's and Ms Stoten's assessment, the Council's case can be addressed relatively briefly. The Council continues to rely on, and commends to the Inspector and Secretary of State, the careful, considered and compelling analysis that Ms Wedd set out in her proof of evidence[134] and amplified in her oral evidence.

111. **York Farmhouse (Grade II) – less than substantial harm, at the low end of that range.** As explained above, the farmhouse has a historical association with and dependence on the surrounding agricultural landscape, which includes the Appeal Site. This agricultural setting, if not entirely lost, would be very much diminished by the proposed development. Furthermore, whilst direct intervisibility is limited (although the buildings of the appeal site are likely to be visible from the upper floors), the change in setting would be appreciated in kinetic views and, in any event, through non-visual experiential factors (noise, increased vehicle movements etc).

112. **Pump Farmhouse (Grade II) – less than substantial, at the middle of that range** - As with York Farmhouse, Pump Farmhouse has a historical association with and dependence on the surrounding agricultural landscape. The impact on significance would be greater because of the direct visual impact the proposal would have – replacing short and mid-distance views of agricultural land[135], with a swathe of built development; and the fact that the asset would be enclosed on all sides by built development.

[133] See Ms Wedd Proof, paras 5.9-5.15
[134] Wedd Proof, paras 6.4 – 6.34
[135] See Wedd, Appendices, Fig 9

113. **Chapel House (Grade II) - less than substantial, at the middle of that range –** the impact would be of a similar magnitude to Pump Farmhouse given the proximity between the asset and the appeal site and the potential intervisibility. The construction and operation of the main entrance to the Site from Lower Rainham road to the rear of this property would particularly affect its setting and significance.

114. **Bloors Place (Grade II*) - less than substantial, at the middle of that range –** Bloors Place is a particularly important designed heritage asset: only 5.8% of listed buildings are Grade II*. Both Ms Wedd and HE explain how the historic relationship with the surrounding farmland and its rural setting contribute to the understanding of its historic use as a farmhouse, and therefore its significance. The proposal would eliminate that farmland and rural setting – as with the settlement of Lower Rainham, Bloors Place will be subsumed within the expanded urban area. This would cause considerable harm to the significance of this important heritage asset. This is a good example of where Ms Stoten's assessment underplays the harm due to its undue emphasis on direct visual connectivity[136]; focus only on existing functional relationships[137]; and erroneous approach to the existing character of the Appeal Site (the "modern commercial orchard" point).[138]

115. **Outbuildings and Garden Walls (Grade II) – less than substantial harm, at the low end of that range. -** The listed outbuildings, together with the walls, are part of the historic farmstead. Like the farmstead they would be harmed by the loss of the historic, agricultural setting.

116. **Lower Rainham Conservation Area - less than substantial, middle of the range –** As noted above, HE explains how the existing use of the Appeal Site illustrates the "historic functional relationship" between the conservation area and its agricultural surroundings, as well as helping to maintain its "historic character as a modest rural hamlet". Both elements would be destroyed by the proposal, which would have the effect of encompassing the Lower Rainham **conservation area** within the expanded urban area. There would be little, if any, of agricultural surroundings left to explain the settlement's historical inception. And it would no longer would it have a character of a modest rural hamlet. In that context, Ms Stoten's assertion that

[136] Stoten Proof, para 6.146
[137] Stoten Proof, para 6.148
[138] See Ms Stoten, para 6.151

the harm would be at the "lowermost end of the spectrum" - is simply untenable. Indeed, Ms Stoten's conclusions are undermined by the fact that the Appellant's own ES now concludes that the proposal would cause "moderate adverse" effects to the significance of the Lower Rainham CA.[139]

117. **Lower Twydall Conservation Area - less than substantial, middle of the range –** Whilst the impact may be slightly less dramatic, for similar reasons to Lower Rainham, the heritage significance of the Lower Twydall would be adversely impacted.

Aggregate Harm

118. Relying on Ms Wedd's assessment, the Council considers that the aggregate (or cumulative) harm to the significance of these designated heritage assets – six listed buildings and two conservation areas – would be **less than substantial, in the middle of that range**. For the reasons set out in her evidence, and summarised above, the Council contends that this is the appropriate level of harm for the Inspector and Secretary of State to apply when undertaking the paragraph 196 and general planning balances.

119. We say that this conclusion accords with the assessment of Historic England, who expressly rejected the suggestion that the harm to even individual designated heritage assets could be characterised as minor.

120. Ms Stoten fails to provide a level of aggregate harm. This is somewhat anomalous given that Mr Parr, the Appellant's heritage witness, agreed that in order to apply the paragraph 196 balance it is necessary to consider the aggregate all of the harms designated heritage assets affected (and indeed, this is the approach he purported to have taken in his proof of evidence). However, even if, contrary to the Council's case, the Inspector or Secretary of State were to adopt Ms Stoten's conclusions in respect of the individual assets, on any logical approach the *aggregate* harm caused by the proposal to be designated heritage assets must be *greater than* "less than substantial harm at the low end of that range".[140]

[139] CD8.3, see paras 14.89-14.94 and Table 14.5, p191.

[140] If not, this would mean that the proposal would have been be assessed as causing the same level of harm if it only affected, say, Pump Farmhouse, which Ms Stoten assessed as suffering from less than substantial harm at the low end of that range. This would fail to acknowledge that the harm caused by this one proposal is not

Harm to non-designated heritage assets

121. There is agreement between the heritage experts that Bloors Oasts is a non-designated heritage asset and that the proposal would cause harm to the significance of the asset, albeit that harm would be of a low scale.

122. The experts disagree as to whether the local historic landscape is non-designated heritage asset (although they do agree - rightly[141] - that landscapes are *capable* of being a heritage asset). Ms Wedd explains[142], in cogent and clear terms, why the historic sequence of river, wharfage and estuarine land (to the north of the site); farmland and related development (of which the Appeal Site forms an important part); and suburbia (to the south of the site, and beyond the physical and psychological barrier of the railway line) constitutes a heritage asset in its own right. She also describes how the development would, in one fell swoop, eradicate that historical sequence and "*erode the historical character of the landscape to the point at which it would cease to be a heritage asset in its own right*".[143]

123. The suggestion by Ms Stoten in her oral evidence that Ms Wedds' analysis was undermined by her failure to identify specific boundaries to the asset is misconceived. First, it is a false premise: there is nothing in guidance which indicates that historic landscapes can only be considered heritage assets if they have a precisely defined border. It is in the nature of landscapes (and therefore in landscapes which amount to historic assets) that their edges are often undefined, with one landscape blending into another. Second, and in any event, when asked to specify the boundaries of the asset Ms Wedd was able to explain what she considered the boundaries of the historic landscape to be, with reference to physical features on the ground.

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just to one heritage asset – it causes (even on the Appellant's case) harm to a multitude of designated heritage assets.

[141] See the definition of heritage assets in the NPPF. See also GPA3, which also treats heritage assets as including historic landscapes.

[142] Weed Proof, paras 2.19-2,21, and 5.16-5.25

6.38-6.47

V. MAIN ISSUE 4 - THE CAPACITY AND SAFETY OF THE LOCAL HIGHWAY NETWORK (RFR5)

124. The closings in respect of issue 4 address the following issues:

(1) Existing context and introduction;
(2) Policy approach;
(3) Credibility, accuracy and appropriateness of the transport modelling;
(4) Credibility of the expert highway witnesses;
(5) Impacts of the development on the local highway network, in terms of capacity and congestion;
(6) Conclusions

(1) Existing Context

125. There can be no doubt that parts of the local highway network are already heavily congested. Representations from local residents, as well as from the local MP, have emphasised as much. In his oral evidence Mr Tucker (apparently in an attempt to down-play the traffic impacts of the proposal itself) appeared to accept that the existing conditions as being congested[144], and acknowledged that queuing already occurred at junctions.[145] And the 2028 reference case – which the Appellant accepts is credible and accurate[146] - shows that, even in the "without development" scenario, a number of junctions will be operating at, or over, capacity.[147]

126. Applying national policy[148], this alone would be capable of providing a reason for refusing the development unless the development were to provide mitigation to overcome the severity of the existing situation.[149]

127. It does not.

[144] See XIC Day 13 (You Tube 6:25:50 and 7:36:25);
[145] XX (Day 14: You Tube Video: 6:43:25)
[146] XX of Mr Jarvis by JL (Day 11: You Tube 5:35:00 onwards). Confirmed in XX of Tucker)Day 14: Youtube 4:47:20)
[147] See Rand Rebuttal, Table 1, which shows two junctions operating at LoS F in the reference case.
[148] NPPF, para 109
[149] See Land at Kidnappers Lane, Leckhampton & the summary of Mr Justice Holgate's refusal to grant permission to proceed with a judicial review challenge of the decision (Rand, Appendix C,pp51-53)

128. The proposal would generate a significant amount of additional vehicular traffic on the local highway network. The Council contends that there would be, circa, an additional 800 two-way trips in the AM and PM peaks (13 additional trips *every* minute). On the Appellant's figures – which are unrealistically low for a development of this size – there would be almost 600 additional two-way trips in the AM and PM Peaks (10 additional trips *every* minute).[150]

129. Even accounting for the off-site highway mitigation proposed (including the additional highway mitigation proposed mid-way through this Inquiry), the proposed development would significantly exacerbate the situation on the local highway network, with a considerable worsening in the operation of a large number of junctions; a significant deterioration in congestion on the highway links; and substantial increases in travel times on corridors such as the A2, A289 and Lower Rainham Road.

130. Moreover, it is of some significance that, as Mr Jarvis explained in his evidence, the local highway network impacted by this development incorporates two of the key east-west arterial routes in Medway: the A2 and the A289 Pier Road. This is important in at least two respects. Firstly, it means that the adverse impact of the proposal will be experienced on routes, and junctions on those routes, which are of critical importance to the functioning of the local highway network. Secondly, the limited options for crossing the River Medway means that, should these routes become gridlocked during peak hours – as the Council contends will occur if this development is permitted – then there would be little, if any, opportunity for traffic to be absorbed on alternative routes (as the microsimulation modelling demonstrates).

(2) Policy Approach

National Policy

131. Paragraph 108 of the NPPF provides, as relevant:

> *"In assessing…specific applications for development, it should be ensured that:*
> *….*

[150] See Lower Rain Report Addendum 3a **[ID34]**, p10 Table 2

c) any significant impacts from the development on the transport network (in terms of capacity and congestion), or on highway safety, can be cost effectively mitigated to an acceptable degree

132. Paragraph 109 then provides:

> *"Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe."*

133. In *Gladman Development Limited v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 104, Lindblom LJ reminded us of the proper approach to interpretation of planning policy, including that found in the NPPF:

> *"Policy is not statute, and ought not to be construed as if it were. As Lord Carnwath observed in Hopkins Homes Ltd. (at paragraph 24), not all planning policies lend themselves to a rigorous judicial analysis. Where they do require interpretation, this should be done objectively in accordance with the language used, read in its proper context (see the judgment of Lord Reed in Tesco Stores Ltd. v Dundee City Council [2012] P.T.S.R. 983, at paragraphs 19, 21 and 35). A sensible approach should be adopted in seeking the true sense of the policy in question. The courts should not encourage unmeritorious claims based on intricate arguments about the meaning of policy. They should resist the over-complication of concepts that are basically simple (see East Staffordshire Borough Council, at paragraph 50)." (emphasis added)*

134. This approach holds true for the test of severity found in NPPF, para 109. It is a basically simple concept which should not be over-complicated. The Council submits that, in applying this test, the Inspector and Secretary of State should approach that test having regards to the following principles:

(1) The test is plainly context specific. A delay or queue at a junction or on a link which may be considered severe in one context, may not in another;

(2) Any invitation to draw bright-lines as to what is – and what is not – capable of constituting a severe residual cumulative impact should be resisted, when the policy itself does not define severity nor seek to draw such lines;

(3) The term 'residual' indicates that the focus should be on the impact post-mitigation: both that proposed as part of the scheme under consideration, and that which has been secure elsewhere and is likely to come-forwards within the relevant timeframe.

(4) As Mr Rand explained, the term 'cumulative' can be considered to have a duality of meanings:

a. First, the decision-maker should not simply focus on the impact of the development in isolation. That impact cannot be divorced from the existing context into which it is to be inserted. It is the cumulative effects of all expected development which must be considered, having regard to that context. This principle was well-illustrated in the *Leckhampton* decision[151] and the subsequent refusal by the High Court to grant permission to challenge the decision.[152]

b. Secondly, the decision-maker should have regard to all material effects and determine whether, cumulatively, the impact is severe. Thus, for example, a decision-maker might consider that a single junction operating at or over capacity does not constitute a severe impact (particularly if that junction is not of strategic importance), but that, when considered cumulatively, with impacts at other junctions and links, there is a severe impact.

(5) When paragraph 109 is read in context with paragraph 108(c) it must follow that that network *capacity* and *congestion* are both relevant considerations when applying the severity test.

(6) It is also clear from these paragraphs that impacts on the road network "*in terms of capacity and congestion"* are treated separately from highway safetyand are plainly a concern in their own right.

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[151] Rand, Appendix B. Where the Inspector explained that the NPPF referred *"not to the additional impact of the scheme, as the appellant asserts…but to residual "cumulative" effects, implying it is the cumulative effect of all expected development which must be taken into account, rather than the individual contribution of each development…"* at [223] and went onto note that *"the existing or future "in any event" situation on the highway network, is not an unrelated problem which evaluation of the proposed development should ignore. It is a related problem which is highly pertinent to the evaluation of the current appeal proposal"* [225]

[152] Rand, Appendix B. Where the judge is recorded as having observed "that it would be open to a decision taker to rationally conclude that a given development could wash its own face in highway impact terms, but due to existing over capacity, the residual cumulative impacts of the development could be severe". It is important to remember that this taken from an article recording the comments of Holgate J at a permission hearing, and must be read in that context. The important point is that the principle being espoused is plainly correct.

135. The Appellant has advanced an approach to the severity test which should be resisted. It is not hyperbole to suggest that adopting their approach would amount to a misinterpretation of policy, and an error of law. It is flawed in a number of respects.

136. Firstly, the contention that impacts on a highway network in terms of capacity and congestion cannot, of themselves, trigger the severity threshold in NPPF (i.e. unless they give rise to some other 'harm', such as in terms of highway safety, amenity, or air quality etc) paragraph 109 is plainly wrong. This is for the following reasons:

(1) The wording of paragraphs 108 or 109 NPPF provide no support for the proposition. The Appellant's approach would constitute an impermissible re-writing of the policy. Had the drafters of the NPPF wished to restrict the application of the severity test in such a manner, they would have said as much;

(2) As Mr Tucker accepted in cross-examination[153] , and is plainly correct, effects on the network in terms of capacity and congestion can constitute a significant impact in their own right for the purposes of paragraph 108. It is when this threshold is reached that consideration must be given to providing cost-effective mitigation. It would be wholly perverse if capacity and congestion on a network was capable, in and of itself, to trigger the "significance" threshold in paragraph 108, but was not capable in its own right of triggering the "severity" threshold in paragraph 109;

(3) Paragraph 109 establishes a separate threshold in terms of highway safety ("unacceptable"). As such, it cannot rationally be contended that capacity and congestion can only give rise to severe impacts if they were to cause highway safety concerns – because a different standard applies when highway safety issues are in play.

(4) Contrary to the contention of Mr Tucker, *Land at Pinn Court Farm* **[CD4.14]** does not establish a general principle which is applicable to this case[154]:

[153] XX(RW) Day 14

[154]It should be noted that Mr Tucker only sought to rely on this decision at rebuttal stage, having read Mr Rand's proof of evidence, and in particular the Hartnell's Farm decision which refers back to Land at Pinn Court Farm. One may ask, rhetorically, why, if this was an interpretation of the severity test Mr Tucker had always advanced , this was not to be found in the TA, Planning Statement, Statement of Case or his original proof

a. Firstly, and as ever, the specific factual context is all-important. In that case, the main concern of the Highway Authority was in relation to the increase in queueing at one junction only, with the potential consequence that this would extend beyond the entrance of that appeal site.[155] It was in that context that the parties *"agreed that an increase in queuing may be inconvenient but that in itself would not provide the necessary justification to refuse permission"*. It is perverse to suggest – as Mr Tucker does – that because it was agreed between the parties in that particular case that issue of concern was not the extent of the queue at the one junction, but the effect of queuing on driver behaviour at the site access, that issues of congestion and capacity can never trigger the severity test.[156]

b. Secondly, and in any event, *Land at Pinn Court Farm* concerned the 2012 NPPF, not the 2019 NPPF. In contrast to paragraphs 108 and 109 of the 2019 NPPF, with which we are concerned, the 2012 NPPF made no express reference to the concepts of congestion or capacity. Thus, even if the case did purport to establish a general principle, it is not one which is applicable to the proper interpretation of 2019 NPPF.

(5) Finally, there are numerous examples, even in the appeal decisions before this Inquiry, of inspectors proceeding on the basis that impacts on the local highway network in terms of capacity and congestion alone (i.e without giving rise to any other harms) were capable of triggering the severity threshold. The *Leckhampton* decision is but one example.[157]

137. Second, the suggestion – both in respect of NPPF, para 109 and Local Plan policy T1 - that the impacts must be assessed relative to the entirety of the highway network in Medway (such that the fact that the proposal would have no material impact on the road network in the Hoo peninsula, for example, must be take into

[155] CD4.14, IR 182

[156] It is also of some significance that, whilst the inspector had the regard to the potential for severe residual transport impacts if no mitigation was forthcoming, he ultimately concluded that there would be no such residual impact concluding that there was a likelihood of adequate mitigation being provide in one form or another, having regard to the highway proposals already in train. See CD4.14 193-194

[157] See DL14 and IR221-238. Note the reference to changes in driver behaviour in IR231 refer to the potential for rerouting as a result of the congestion; and are not separate highway safety concerns being raised

account as a countervailing factor) is a lawyer's point. With respect to my learned friend, it is a bad one.

138. The suggestion was first made by Mr Lopez in cross-examination of Mr Rand, without having been foreshadowed in any of Mr Tucker's three proofs. Mr Tucker, presumably out of deference to Mr Lopez but apparently without any critical analysis, picked up the baton and ran with it in his oral evidence.

139. The "road network" in NPPF, para 109 is not defined. Again, it is left to the decision maker to determine, in the context of the case, what the relevant road network constitutes. There is nothing in policy to require decision makers to assess severity against the entirety of the road network in the administrative area. Indeed, adopting such a rigid approach would be perverse, because doing so has the potential to be both over-inclusive, and underinclusive at the same time.

140. It is likely to be over-inclusive because such an approach would prevent the severity test from being triggered in respect of virtually all proposed developments. Indeed, in response to the inspector's insightful questions, Mr Tucker was forced to postulate that proposals of the size of a new settlement, or the cumulative effect of proposals for housing growth in a Local Plan context[158], as being the only examples where the severity threshold would be triggered when assessed against the Medway highway network as a whole. This wholly unrealistic situation gives lie to the Appellant's approach. Given that paras 108 &109 of the NPPF are applicable to development management decisions[159], it cannot be correct to approach the test of severity in such a way which restricts its application only to new settlements or to the Local Plan process.

141. At the same time, such an approach also has the potential to be under-inclusive, because if one was artificially restricted to the highway network of the Medway, there is the potential that significant – and potentially severe – effects on the highway network of neighbouring authorities would be ignored.

[158] He suggested

[159] NPPF, para 108 ("specific applications for development"); para 109 ("Development should only be…refused"

142. Moreover, the Appellant's approach finds no support in the appeal decisions before the Inquiry, where the issue of severity has been considered in relation to impacts at single junctions[160] or corridors[161], without any suggestion that the test had been applied relative to the entirety of the local authority network.

143. Finally, Mr Tucker invited the Inspector, when applying the severity test, to 'balance' any harm caused in respect of impacts on the highway network (para 108(c)), against the fact that a safe and suitable access had been provided (para 108(b)); and appropriate opportunities had been taken up to promote sustainable transport modes (para 108(a)).

144. Again, adopting such an approach would be erroneous. NPPF, para 108 establishes three objectives, each of which is required to be met. The third objective requires decision makers to consider whether any significant impacts from the development on the transport network in terms of capacity and congestion have been mitigated to an acceptable degree. If, notwithstanding any mitigation, the residual cumulative effect on the transport network in terms of capacity and congestion remain severe, the third objective is not satisfied. The significant impacts will not have been mitigated to an acceptable degree. It is no answer to point to the fact there is no objection to the proposal in respect of the first two objectives. This does not render the residual cumulative effects on the road network any less severe.

Policy T1 of the Local Plan

145. Policy T1 provides, as relevant:

> *"In assessing the highways impact of development, proposals will be permitted provided that:*
>
> *(i) The highway network has adequate capacity to cater for the traffic which will be generated by the development, taking into account alternative modes to the private car"*

146. The Appellant contends (very belatedly[162]) that this establishes a lower standard than the severity test in the NPPF. The Council disagrees. It does so because

[160] E.g. *Land at Pinn Court Farm* [CD4.14] focused primarily on the impact on ne junction only

[161] E.g *Hartnell's Farm* focused on the a3259 corridor, and specifically two junctions on it. In *Leckhammpton* the focus was on the A46 Shurdington Road

[162] It was originally agreed between the parties that Policy T1 was consistent with national policy and upto date. This was recorded in the Policy Position Statement agreed at the request of the inspector. It was not

the 'adequacy capacity" test in Policy T1 begs the question "what is adequate"? The policy leaves this to the judgment of decision-makers. Decision-makers applying national policy will conclude there is "adequate capacity" unless residual cumulative effects on the road network would be severe. Thus, the flexibility provided for in Policy T1 is capable of accommodating, and being applied consistently with, para 109 NPPF.

(3) Credibility, accuracy and appropriateness of the transport modelling

Overview

147. There are two models before the Inquiry which seek to assess the residual cumulative impacts of the proposal on the highway network.

148. The first model – the Medway Aimsum Model ("MAM") - is a sophisticated model which operates at both macroscopic and microscopic levels simultaneously. It has been designed *inter alia* with the specific purpose of assessing *"the impacts of specific development sites"*[163]. It validates extremely well across multiple measurements against a very broad observed data set. Both its base model, and the future reference cases (which assess the future "without development" scenarios in 2028 and 2037) have been approved by Highways England.[164] The functionality of microsimulation – in particular, the ability to assess complex traffic interactions between junctions, as well as links and junctions ('blocking back'); to take into account any issues caused on links themselves (e.g from pedestrian crossings, bottlenecks etc.); and to replicate 'real-life' vehicle behaviour (such as lane changing behaviour) – means that it more accurately reflects likely network performance than traditional isolated junction modelling. Furthermore, it provides outputs, such as corridor journey time analysis, which both allows the model to be validated across sub-networks and particular routes, but also enables decision-makers to assess the overall impact of a scheme on the highway network. The use of microsimulation modelling is particularly apposite in the current context: a proposal for a strategic development, which on any account will generate a

resiled from by Mr Parr when giving planning evidence. It was only resiled from on the penultimate day of the Inquiry, after Mr Williams had pointed out that the line of questioning advanced by Mr Lopez was inconsistent with the agreed position.

[163] MAM Validation Report, para 2.1 **[CD12.4]**

[164] Jarvis XIC. See also Jarvis Proof, Appendix D (in relation to the base model)

significant number of additional vehicular traffic in an urban environment where the local highway network, including key arterial routes, is already heavily congested.

149. The second model – isolated junction modelling – is relied upon by the Appellant. Whilst the modelling products (LinSig and Arcady) are well known, and are regularly used in transport modelling, there are significant shortcomings which fatally undermine both their credibility and accuracy in the instant case. Most crucially, the only output against which the Appellant has sought to validate their modelling – queue length – demonstrates that the modelling performs extremely poorly when compared to observed conditions. The validation results should have set alarm bells ringing for the Appellant's highways team, and led them to reassess their modelling. It is of some concern that, instead of doing so, Mr Tucker sought to downplay – and frankly misrepresent – the validation results in his evidence. The validation results alone undermine the credibility of the isolated junction modelling results.

150. However, even putting concerns in relation to validation aside, the simplistic nature of isolated junction modelling means that it could never fully capture the traffic impacts of this scheme. It is unable to take account of the complex interactions between junctions (and other causes of delays on links) which regularly occurs in a congested urban environment. Nor can it account for the diversionary impact of the development traffic. And it pays no regard whatsoever to delays caused by issues on the links between junctions.

151. It follows that isolated junction allows only for a partial assessment of the impact of a development proposal on the local highway network. Thus, even if its base model validated appropriately – which plainly does not – the MAM results are to be preferred as providing a more realistic assessment of the likely effects of the scheme.

152. That is by way of overview. Given the importance of the credibility and accuracy of the modelling both to this appeal and beyond (the MAM has been also developed for assessment of the highway network to underpin the Local Plan; and is used regularly by Medway to assess the high impacts of major proposals), this closing now turns to consider these issues in greater depth.

Credibility of the MAM

153. The credibility of any highway model hinges on how well it validates. That is, how well the base model outputs compare to observed data. Mr Tucker accepted that validation was a crucial part of the modelling process. When asked whether this was true of isolated junction modelling, as well as microsimulation modelling, he responded that it was "absolutely" the case.[165] During his cross-examination also Mr Jarvis explained why it was "fundamental" that highway models validate well against observed data.[166]

154. In both his original and rebuttal proof of evidence, Mr Tucker's attack on the credibility of the MAM modelling centred on his contention that it did not validate appropriately. He referred to, what in his view, were *"significant and undermining shortcomings in model validation"*[167]. It was because of these alleged shortcomings in model validation that the inspector was invited to prefer the evidence base of the Appellant.[168]

155. This criticism was entirely misguided, as is demonstrated by Mr Tucker's very belated withdrawal of his contention [169]. The contention that the model did not validate appropriately should never have been made. It was based on a selective reporting of the validation report[170] [CD12.4], a wilful refusal (in written evidence at least) to acknowledge that the DfT criteria for validation had been met in full; and a failure to enquire of the Council whether any further local validation had been undertaken.[171]

156. To the contrary, the Inspector and Secretary of State can record that the MAM base model validates <u>extremely well</u>, and is fit for purpose, having regard to the following:

[165] XX(RW) Day 14
[166] XX(JL) day 12 You Tube 12:53:30
[167] Tucker Rebuttal, para 3.5. This was not an isolated criticism. See also Proof at 6.4.4, 6.7.4
[168] See Tucker Summary Proof, para 2.11p2.12
[169] Tucker 2nd Rebuttal, and Tucker XIC. Subject to two minor lingering concerns he raises, both of which are baseless)
[170] See Tucker Proof, para 6.4.3-6.4.5 and XX(RW) Day 14
[171] Having had the validation report for well over a month, Mr Tucker wrote to the Council in early December following my request that the Appellant set out in writing any further information that was required in relation to the highways modelling. No request was made to be provided any further information regarding validation of the model, and specifically no request was made to see any local validation results.

(1) The MAM was calibrated and validated at both macroscopic and microscopic levels so as to enable *inter alia* "*detailed local impacts of proposals anywhere with Medway to be considered*".[172]

(2) It was validated against a "*comprehensive dataset of existing and new traffic counts and journey time data*"[173]. This included over 150 Automatic Traffic Counts (ATC), which ran over a 14 day period, and over 110 Manual Classified Traffic Counts, on single days (MCTC).[174] Unsurprisingly, given the importance of the two arterial routes, both the A2 and A289 in the vicinity of the site were very well accounted for in these traffic counts.[175]

(3) As the MAM validation report concludes[176], both the macroscopic and microscopic modelling passed the DfT criteria for validation as set out in the TAG Unit 3.1 guidance[177]. It met – indeed far exceeded – the requisite criteria against each of the three required measurements: (i) assigned flows and counts for each screenline[178]; (ii) flows and counts on individual links and turning movements at junctions;[179] and (iii) journey times along routes.[180]

(4) Highways England have approved the MAM validation report.[181]

(5) Further local validation of the microsimulation model has been undertaken of the three subnetworks (in accordance with the recommendation in the MAM Validation Report)[182]. This was recorded in Mr Jarvis' original proof of evidence[183] with further details given in his rebuttal proof.[184] This shows that, on a number of metrics, the MAM model validates extremely well. In each subnetwork both the turns and links/sections at junctions; and the journey

[172] MAM Validation Report, p77 **[CD12.4]**
[173] *Ibid*.
[174] MAM Validation Report,, pp17-18 This does not take account of the Highways England locations
[175] MAM Validation Report, fig 11& fig 12 (pp96-97)
[176] MAM Validation Report, p77, Section 10.2 **[CD12.4].**
[177] Tucker Proof, ST6
[178] MAM Validation Report, p64-65
[179] MAM Validation Report, p66-68
[180] MAM Validation Report, p70-76
[181] Jarvis Proof, Appendix D. See also Medway Guidance Note (Jan 2018), para 7 (Jarvis Proof, Appendix A)
[182] MAM Validation Report, p78
[183] Jarvis Proof, para 4.6 and Table 2
[184] Jarvis Rebuttal, paras 2.6-2.13, Tables 1-5

time analysis was closely aligned to observed data, well in excess of the DfT criteria.

(6) Mr Jarvis – who has considerable experience of macro and microsimulation modelling, including the validation of such modelling – explained in his oral evidence that meeting the DfT criteria was very difficult, and that it was frequently the case that models in urban areas did not meet all of the criteria. He emphasised that given the MAM does not simply meet, but exceeds, all of the criteria at the macro, micro and local levels, this demonstrates that it is very well validated. This was not an instance of Mr Jarvis "marking his own homework" – it was Fore Consulting who developed the base-model.[185]

(7) The use of the MAM is not novel: it has been used to assess the traffic impacts of other sizeable schemes in the Medway area[186], and it is currently being used to test the cumulative impact of proposed allocations in the emerging Local Plan. Outside of Medway, microsimulation modelling (including AimSum models) is regularly used by local highway authorities. Indeed, Mr Tucker has previously instructed Fore Consulting to produce an assessment of an individual scheme based on SAMM, Sheffield City Council's version of MAM.

157. The Council therefore invites the inspector and Secretary of State to find that the MAM validates extremely well when compared to a broad range of observed data across a range of metrics. This is one of the key reasons why the MAM assessment should be found to be credible and should be preferred over the isolated junction modelling.

158. Whilst Mr Tucker largely withdrew his criticisms of the validation of the MAM, he did have some lingering, minor concerns. On analysis, these concerns are baseless, and his continued advancement of them simply serves to underscore Mr Tucker's steadfast refusal to believe that the MAM outputs could be accurate:

(1) First, the residual concern Mr Tucker raises in relation to the validation of journey times on Route 6A in the AM Peak has been proven to be entirely

[185] XIC(RW) Day 11 (You tube 1:37:00)
[186] See Jarvis Proof, para 4.3 and 4.5

misguided.[187] Mr Jarvis explained (and Mr Tucker did not dispute) that the divergence in the modelled and observed journey times on this route occurred on the eastbound approach to the Four Elms roundabout on the Hoo Peninsula, far removed from the subnetworks with which we are concerned. Moreover, as has been noted above, both subnetworks 2 and 3 (which represent that part of Route 6A in the vicinity of the site) validate well – and in accordance with the DfT criteria – both in respect of journey times and turn/links at junctions. Accordingly, Mr Tucker's concern about the Route 6A journey times is of no relevance to the credibility of the MAM assessment in this case.

(2) Second, the contention that the 'validation routes' in subnetwork 3 are shorter in length than recommended in the DfT guidance is misconceived. Importantly, Mr Tucker – consistent with his selective quoting of the guidance elsewhere– ignores the context. The 3km guidance is directed to the 'validation routes' when validating models as a whole (see paras 4.3.2 and 4.3.3). This was the exercise undertaken in the Model Validation Report. The guidance goes on (in para 4.3.4) to explain that although *"it is standard practice to use journey validation at the route level….increasingly there is a need to take a more detailed approach and check journey time validation at the link level or for segments of the route as well" (emphasis added)*. This is exactly what Mr Jarvis has done when undertaking the local validation – a check of journey time validation for segments of the route. There is no suggestion that these sections are required to be 3km in length. Even if this was a valid criticism (which it is not) , it is highly pertinent to note that subnetwork 3 validates well against the alternative metric (turn and link counts at junctions). Of course, Mr Tucker confirmed that this criticism does not apply to subnetworks 2 or 7.

(3) Third, Mr Tucker sought to argue that when assessing capacity at junctions microsimulation modelling *outputs* should be checked against outputs from isolated junction modelling.[188] Again this is to misread the applicable guidance. The DfT guidance cited by Mr Tucker[189] is applicable to calibration of the microsimulation model (i.e. adjusting model parameters to accurately reflect

[187] Tucker, 2nd Rebuttal, para 2.5 and 1st Rebuttal, REB1
[188] XIC (Day 13) 7:21:30
[189] Tucker Rebuttal, para 3.23

the network), rather than validation (comparing model outputs with observed data). As the section in the Model Validation Report on calibration makes clear, the guidance to which Mr Tucker refers has been followed when the MAM was calibrated.[190] In terms of validation, as the DfT TAG Unit 3.1 guidance confirms, it is the *observed* data against which the model outputs should be compared: which is exactly what has been done. Contrary to Mr Tucker's contention there is no suggestion in the DfT guidance that at the validation stage, MAM outputs should be compared against estimated outputs of isolated junction modelling.

159. Having been forced, at a late stage, to abandon his central attack on the credibility of the MAM, in his 2nd rebuttal proof and in his oral evidence Mr Tucker turned his attention to the future scenarios in the MAM.

160. The 'logic' of Mr Tucker's position became clear in cross-examination. In his view, the outputs of the isolated junction modelling are infallible. That being the case, once the MAM base model was demonstrated to validated adequately, on his approach the only possible reason for the disparity between the outputs of the isolated junction modelling and the MAM, could be down to an (still unidentified) error in the development of the future scenarios. Of course, this logic only holds true if one starts from the position that the isolated junction modelling is infallible – which plainly it is not.

161. Mr Tucker's belated criticism of the credibility of the future scenarios is as baseless as his original and primary attack on the validation of the MAM.

162. It is of particular significance in this regard that Mr Tucker does not challenge the credibility or accuracy of the 2028 and 2037 reference cases (both of which are future scenarios).[191] He was right to accept as much. The reference cases, developed by Sweco, were the subject of a detailed forecasting report undertaken by Sweco and Fore

[190] MAM Validation Report **[CD12.4]**, p50, second bullet which explains that
"FORE_MACRO_JDF_3_Roundabout: This function is used to calculate the delay incurred on the approach to a roundabout. Capacity is calculated as a function of the circulating flow based on the capacity relationship used in ARCADY. The geometric parameters (entry width, approach road half-width, flare length, turning radius and inscribed circular diameter) are all calculated from the coded network geometry using a Python script. The resulting RFC is then used to calculate the delay."
[191] XX (Day 13) You Tube 4:46:00. See also Mr Lopez XX of Jarvis (Day 11) You Tube 5:35:30

Consulting[192]. And as Mr Jarvis explained, the MAM future year reference case models have been signed off by Highways England and their consultants.

163. The fact that no one is doubting the accuracy of the reference case should give the Inspector and Secretary of State significant confidence about the credibility and accuracy of all future year scenarios, including the "with development" scenarios. Both the reference case, and the "with development" scenarios were developed by Sweco using the same parameters and assumptions.

164. Indeed, in terms of modelling approach, the future year reference case and future year development scenarios are closely aligned. As Mr Tucker accepted in cross-examination[193], the only differences between the reference case and the "with development scenarios": (a) additional development trips (which can also have a diversionary impact on existing traffic) and (b) off-site mitigation proposed in conjunction with the appeal scheme. In respect of the former, any difference between the parties has been accounted for by the Council modelling the Appellant's preferred trip generation. In respect of the latter, there is no suggestion that Sweco have misunderstood or inaccurately modelled the Appellant's proposed mitigation. This therefore begs the question, if the future year reference cases are accepted as being credible and accurate (as the Appellant does), why are the future year "with development" scenarios not similarly credible and accurate? It is a question with which the Appellant has not even sought to engage.

165. Instead, shorn of his criticism concerning validation and having conceded that the reference case was credible and accurate, Mr Tucker resorted to disparate criticisms of the future year scenarios – pointing to outputs which did not look right to him (it being recalled that he has never built, calibrated or validated a microsimulation model[194]). For the reasons set out below, none of these criticisms have any force. However, even if they did, pointing to supposed isolated anomalies within the future year scenarios would not be sufficient to undermine the credibility of the MAM outputs given the robustness of the model as outlined above. Mr Tucker's

[192] Jarvis Proof, Appendix E
[193] XX (Day 13) You Tube 4:48:25.
[194] As he confirmed in XX(Day 13)

residual criticisms of the MAM are a far cry from the *"significant and undermining shortcomings"* which he was originally alleging.

166. It is in that context that the residual and disparate criticisms concerning the future year scenarios fall to be addressed:

(1) First, in Tables 4 to 6 of his original proof, Mr Tucker pointed to the apparent disparity between the relatively small change in flows on certain routes and the change in the recorded level of service on those corridors as demonstrating that the "findings of the model are clearly erroneous".[195] This criticism is repeated in his second rebuttal proof.[196] Mr Jarvis explained during his examination in chief why this analysis was misconceived[197] (a subject on which he was not cross-examined). In short this is because:

a. Mr Tucker had taken flows in the tables from the macro model. These are the *demand* flows - the amount of traffic that wishes to use the route. And he has sought to compare them with journey times taken from the microsimulation model. These are based on *actual* flows - the amount of traffic that can use the route.. Where a route is congested the actual flow (which is affected by queuing, blocking back and flow metering) will be lower than the demand flow (which is unaffected by such phenomenon). Thus, Mr Tucker's tables 4 to 6 impermissibly compares 'apples and pears' and is, therefore, of no value.

b. The flows are taken from one single location on a route; whereas the journey time is based on the entire corridor. The difference between the level of flows at one point on the corridor tells us little, if anything, about the difference in flows across the entirety of the corridor.

c. In any event (without explaining as much) the tables do not present like with like: the level of service/journey times are taken from the December 2019 report (with a 2035 reference case) **[CD12.10]** and flow

[195] Tucker Proof, para 6.6.10
[196] Tucker 2nd Rebuttal, para 3.12
[197] XX Day 11 YouTube video 3:58:50

information from the October 2020 report (with a 2037 reference case) **[CD12.1]**.

(2) Secondly, Mr Tucker pointed to the 'select link analysis' which, he said, showed an immaterial change in flows on the network, particularly on the A2, once the development is added.[198] The Flow Comparison information **[ID43] –** which provide the macroscopic/demand flows **-** gives the lie to this contention. These show that, although there are some corridors which experience a reduction in flows[199], there are sizeable increases in flow in the AM Peak on: (i) A2 Eastbound west of Bowaters (+100 vehicles (+7%)); A2 Eastbound east of Bowaters (+366 vehicles (+44%)); and Lower Rainham Road westbound (+450 vehicles (+77%)). In the PM peak there is a sizeable increase on the A2 Eastbound east of Bowaters (+318 vehicles (+29%), as well as material increases on the A2 Eastbound west of Bowaters (+79 vehicles (+4.5%); and A2 Westbound west of Bowaters (+29 vehicles (+2%)). These changes in flow are a result of the additional development traffic, as well as the diversionary impact caused by the development traffic and the mitigation proposed.

(3) Thirdly, and following receipt of the Flow Comparison information, in cross-examination Mr Tucker sought to realign his criticism, querying why the microsimulation modelling showed a substantial increase in queueing on the A2 west of Bowaters, when the flow increases on that stretch were (in his view) immaterial. The answer is obvious when the situation is considered in context. The microsimulation videos show that the eastbound A2 west of Bowaters in the 2028 reference case is already congested in the AM Peak. It is wholly unsurprising that once the development traffic is added the congestion is worsened, taking account of: (a) the additional demand of 100 vehicles on this particular corridor (which is plainly not immaterial); (b) the addition demand of 366 vehicles immediately to the east of Bowaters (which is substantial); and (c) importantly, the blocking back which occurs through the roundabout, caused by a combination of the pedestrian crossing to the east of Bowaters, and the bottleneck where two eastbound lanes mere into a single lane (this blocking

[198] Tucker 2nd Rebuttal, paras 1.6, 3.8 and 3.12

[199] IAs ID42 explains, this is because of diversionary impacts, as well as reduction in capacity for certain movements as a result of the proposed mitigation causing rerouting.

back can clearly be observed on the microsimulation video, and does not occur in the reference case). The same is true of the PM Peak, albeit to a lesser extent.

(4) Fourthly, in respect of subnetwork 3, Mr Tucker points to the alleged disparity between the observed data for Meresborough Road in 2016/2018 and the flows predicted in the 2028 reference case for this link and *"assumes the change to be in error"*. [200] This criticism is surprising given that Mr Tucker has accepted the credibility of the reference case. In any event, Mr Jarvis explained why there was no such error[201].

a. The MAM validation report does not show Meresborough Road having a flow of 8 vehicles per hour (it being noted that Mr Tucker did not provide a reference to the relevant data in his proof or oral evidence). Further analysis shows that Mr Tucker appears to have confused Meresborough Road with Meresborough Lane – a rural lane, approximately 1.5km away which does have a flow of approximately 8 vehicles an hour.[202] In contrast, in 2016 the observed flows on Meresborough Road ranged between 20 and 260 vehicles per hour – depending on where the count was taken.[203] Therefore Mr Tucker's premise is incorrect.

b. Even if the observed data were correct, as Mr Jarvis explained the disparity is not a cause for concern because there is no reason to suppose that flows observed in *2016* would be comparable with predicted flows in the *2028* reference case (having regard to the additional traffic on the network at that stage).[204] It is a fundamentally different exercise to validating the 2016 base model where one would

[200] Tucker Rebuttal 2, para 3.48-3.49. His proof refers to Moor Park Close, but as there is no observed data for this road in either the DTA or MAM validation report

[201] XIC (RW) Day 11 You Tube 4.26.00

[202] See MAM Validation Report **[CD12.4]**, Appendix D 'Observed' data, p151 PDF AM Peak 28051 Meresbourgh Lane – 7.5; p198 pdf, PM Peak 28051 - Meresbourgh Lane – 10

[203] See MAM Validation Report **[CD12.4]**, Appendix D 'Observed' data. Word search "Meresborough Road". It needs to be emphasised that the flows reported by Mr Tucker are derived from one day counts whereas the flows reported in the MAM validation report (CD12.4) come from automatic traffic counts over a two-week period

[204] Further analysis shows that in the reference case 2028 AM flow plots in Appendix C of Addendum 3 [ID34a], there are 155 vehicles on Meresborough Road northbound (south of Moor Park Close,). This flow results in part from traffic using a link to Meresborough Road from the services on the M2 between J4 and J5

expect the modelled flows to be comparable to those which are observed.[205]

167. Standing back from the detail of the criticism, it can be concluded that the MAM is a credible model. It validates extremely well. Its future year reference cases are (rightly) not challenged. And there is nothing of substance in the disparate, unsubstantiated criticisms of the future year "with development" scenarios.

Credibility of Appellant's modelling

168. In contrast, the credibility of the Appellant's modelling is fatally undermined by the failure of its base model to validate adequately.

169. As a starting point, the process of validation was plainly inferior to that of the MAM:

(1) In contrast to the multiple measurements against which the MAM base model was validated, the outputs of the Appellant's base model has been compared to one observed measurement only: queue lengths at junctions.

(2) Whereas the MAM validation drew upon a very broad data-set (both ATC and MCTC), the Appellant has relied on queue surveys taken on one-day only.

(3) In contrast to the MAM - which easily passes the criteria published by the DfT specifically for the validation of such model - the Appellant's modelling has not been tested against any published criteria.

170. Thus, even if the Appellant's modelling validated adequately against this single metric, it would be less credible than the MAM.

171. It does not validate adequately. Far from it.

172. Even on Mr Tucker's reported analysis[206], there are significant disparities between the modelled and observed queues. This is particularly true of the Lower Rainham Road/Yokosuka Way roundabout and Will Adams roundabout, both in the AM and PM peaks. For some of the arms on these roundabouts the model queues are

[205]

[206] Tucker Rebuttal, pp12-13, Tables 1&2

out by factors of 7, with the model predicting a queue of less than 2 vehicles (approx. 12m) on an arm, and observed queues *apparently* being 13 vehicles (approx .78m).

173. On the basis of this data Mr Tucker's original conclusion was that modelled queues at some of the junctions were <u>not</u> adequately comparable with observed queues on the ground.[207] His attempt to walk back from this conclusion in cross-examination was unconvincing and does nothing for his own credibility (a point to which we will return).

174. Furthermore, when the dataset underpinning the observed queue is interrogated, it can be seen that the observed queues reported in Tables 1 and 2 significantly underreport the actual queues on the ground. This is for two reasons:

(1) First, as the survey data explains, the enumerators stopped counting the queue once it was either out of sight or blocking back to the next junction. They would signify this with a + sign next to the relevant queue. This occurred at a number of junctions for a large period of the AM and PM peak hours, including the Lower Rainham Road/Yokosuka Way roundabout and Will Adams roundabout .[208]This was not reflected in the average queue lengths reported in Tables 1 and 2, which had assumed for the purposes of the average that the queue length was as reported.[209] This meant that the average observed queue lengths reported in Tables 1 and 2 are artificially restrictive, and not representative of the true position.

(2) Secondly, the modelled queues in Tables 1 and 2 were expressed on the basis of the average number of vehicles 'per arm'. In contrast, as became apparent from cross-examination, the observed queues reported in Tables 1 and 2 were reporting the average number of vehicles 'per lane'. Where there are multiple lanes of queues (as is the case, for example, in the east and west arms of Will Adams Way), both of which had queuing traffic, this had the reporting only half of the average observed queue. By way of illustration, Table 1 reports a modelled queue of 1.7 vehicles on the A2 East arm of the Will Adams

[207] This is the necessary consequence of his statement at para 7.9 of his rebuttal.
[208] See, for example, **[CD5.25] p309** - Lower Rainham Road/Yokosuka Way roundabout AM Peak; **[CD5.25] p384** - Will Adams roundabout AM Peak; **[CD5.25] p385** - Will Adams roundabout PM Peak
[209] See XX(RW) of Tucker Day 14 (You Tube) – 3:20:00 onwards

roundabout in the AM Peak. The reported average observed queue is 13 vehicles. In reality, for the vast majority of the AM Peak hour there are two lanes of queuing traffic where the queue *for each lane* is recorded as 15+. It follows that the total number of vehicles queuing *at this arm* of the roundabout for the majority of the AM period is at least 30 (and quite possibly many more – we simply cannot tell). Thus, the observed queue at this arm is *at least* 17 times greater than the modelled queue, and quite possibly much greater.

175. It follows that a comparison between the modelled queues and observed queues – the only metric by which the isolated junction modelling has been validated – fatally undermines the credibility of the outputs of the Appellant's modelling.

176. For this reason alone, the outputs of the Appellant's modelling must be disregarded.[210]

Accuracy and appropriateness of the competing models

177. Even if the decision-maker were to put aside the significant issues in relation to validation of the Appellant's modelling, the MAM is a far more appropriate model to use in the current context. The functionality it possesses in comparison to isolated junction modelling – neatly captured in Mr Jarvis' original proof of evidence[211] - means that, quite apart from issues of validity of the base model, it will produce a more accurate forecast of the impacts on the road network.

178. The benefits of the MAM over isolated junction modelling were rehearsed at length during the inquiry, and are not repeated in full in closing. However, the key differentials are as follows.

179. **Holistic assessment of the network** – the MAM enables an assessment of the complex traffic interactions of a large and congested urban area such as Medway. Most notably it takes account of link capacity issues (caused, for example, by pedestrian

[210] Having been shown the problems with his own validation Mr Tucker's retort was that validation of his baseline models doesn't matter (contrary to his earlier answer), because of the proposal to physically changing the layout of the junction as part of mitigation works. On that perverse logic the accuracy of future year models including mitigation can simply never be known. Moreover, it begs the question: how can you design a mitigation scheme to address issues with the current layout if the accuracy of the existing results are unknown?

[211] See Jarvis Proof, para 3.3, Table 1

crossings, bottlenecking, side roads etc); whereas, by their very nature isolated, junction assessments are incapable of accounting for such matters.

180. In an attempt to minimise this important functional difference, Mr Tucker has sought to argue that the MAM shows that there are no capacity issues on the links/corridors, and that the increase in journey time (and overall deterioration in network statistics) is solely due to issues at junctions.

181. However, the MAM does not show as much. As Mr Jarvis confirmed in XIC and XX[212], it is clear from the microsimulation modelling that the deterioration in journey times and network statistics is caused by a combination of the junctions being overcapacity and link capacity issues. This is particularly true on the A2, where there are a number of potential causes of delays on the links including signalised pedestrian crossings (three sets between Will Adams and Bowaters, and four sets east of Bowaters) , a reduction in the number of lanes, causing bottlenecking (particularly to the east of Bowaters), as well as bus stops and side roads. The effect of these link capacity issues – particular the pedestrian crossings, and bottlenecking - can be observed from watching the microsimulation videos.

182. Mr Tucker's analysis, in contrast, is based solely on the Volume/Capacity sections ("V/C"). He is forced to argue that, because none of the links that he identified are recorded as operating at over 90%, it follows that all links are operating within capacity.[213] Mr Tucker's analysis is misconceived in a number of respects:

(1) First, as Mr Jarvis explained, the V/C outputs are derived from the macro model. They therefore do not account for queueing, bottlenecking etc which is only taken into account at the microsimulation level. Given that the microsimulation model within MAM does show that there are link capacity issues, it is perverse for Mr Tucker to try to use the outputs of the same model – at the macro level – to suggest otherwise.

(2) Second, Mr Tucker's reporting is selective. As the V/C presentation **[ID44] c**ompiled by Mr Jarvis demonstrates there are numerous links which are

[212] XX(JL)of Jarvis. You Tube 6:40:08
[213] Tucker Rebuttal 2, para 3.10

recorded as operating at over 90% capacity (even without the effects of queueing, bottlenecking etc.)

(3) Thirdly, the industry standard at which junctions or links are generally considered to be operating above practical capacity is 85%. Both Mr Jarvis and Mr Rand confirmed as much. The evidence shows that there are a wide range of links operating at or above this level of capacity even in the macro model.

183. **Vehicle behaviour** - the MAM takes account of individual vehicle behaviour such as lane changing, individual acceleration/deceleration, diversionary impacts and traffic routing based on congestion and travel times. The simplistic isolated vehicle simply cannot account for this behaviour, or the effects it may have on the network.

184. **Junction interaction/blocking back –** an important functional difference between the two models is that the MAM captures the complex interactions that occur between junctions, as well as between links and junctions on a corridor. In particular, it accounts for 'blocking back' – when a queue backs up through a junction, reducing its capacity. This is a phenomenon which is particularly evident in urban areas, where the network is already congested and there are multiple junctions in close proximity.

185. Isolated junction models cannot account for such blocking back. This means that, where blocking back is already occurring, or is likely to occur in the future, isolated junction capacity will over-estimate the junction's capacity.

186. We know that blocking back already occurs on the network, and will only increase if this development is permitted. We know it already occurs because the Appellant's own traffic surveys indicated that the enumerators stopped counting vehicles in a queue if that queue extended through the next junction. We know that it is likely to occur in the future year scenarios because the microsimulation model illustrates as much.[214] Indeed, it was partly based on this evidence that the Appellant, mid-way through the inquiry, proposed additional highway mitigation at Bowater roundabout[215]

[214] See Jarvis Proof, Figures 3 and 4, as well as the microsimulation video

[215] See A2 Junction Operation Review, paras 1 and 6. Jarvis 2nd Addendum Proof, Appendix A. This included to address the issues at both the toucan crossing and the bottleneck on the A2 eastboundmitigation to the east of the roundabout itself

187. Mr Tucker's response to the inability of isolated junction modelling to take account of blocking back is to claim that, because his modelling does not show any of the junctions to be operating over capacity, none of those junctions would cause queuing which would block back through another junction.[216] Therefore, he says, it is not a phenomenon with which we need to be concerned. However, Mr Tucker's logic is flawed on a number of bases:

(1) First, it is contingent on the isolated junction modelling being accurate in the first place. Given the significant disparities between the modelled and observed queues, this cannot be assumed.

(2) Second, it ignores the impact of queuing from junctions which he has not modelled.

(3) Thirdly, it ignores the potential for blocking back from elements on the network other than junctions, such as pedestrian crossings and bottlenecks. This is of particular relevance for the A2. By way of example, the microsimulation videos clearly show the blocking back effect of a pedestrian crossing to the east of Bowaters. The videos show how this reduces the capacity of Bowaters because traffic (heading west, either from the A2, or from Twdyall Lane) cannot flow through the junction onto the A2 eastern arm. This is evident in the AM Peak video from approximately 8:05am onwards. As Mr Tucker confirmed in cross-examination, although the LinSig model had been extended to incorporate the pedestrian crossings on the junction itself, it had <u>not</u> been possible to incorporate into the isolated junction modelling the effects from this pedestrian crossing. [217]

188. **Journey time analysis/overall network statistics** – importantly the MAM provides outputs in terms of predicted journey times along routes and corridors. As has been seen journey times can (and have) been used to validate the model. However, they are also an important indicator of the impact of a particular proposal on the network's performance as a whole. The same is true of the overall network statistics.

[216] XIC (JL) Tucker

[217] See XX(RW) of Tucker Day 14 (You Tube) – 5:15:40 onwards. DTA have not modelled the pedestrian crossings at Edwin Road and Guardian Court

189. The isolated junction modelling simply does not allow for this level of analysis to be undertaken.

190. It follows from the above that, even if the Appellant's modelling was credible – which it is not – it would not accurately capture the likely effects of the development on what is already a congested network. The failure to account for link capacity issues, for individual vehicular behaviour and/or for the complex interactions on the network, means that the isolated junction modelling simply does not deliver the level of accuracy which the MAM is able to provide.

(4) Credibility of the expert highway witnesses

191. The inspector is invited to find that the evidence given by the expert highway witnesses called by the Council was credible and reliable.

192. Mr Jarvis is vastly experienced in macro and microsimulation modelling. He is an expert in the field, having (amongst many other things) developed macro and micro transport models of large urban areas, most recently for Liverpool; developed his own micro-simulation models, including for Highway England schemes; and audited Aimsum models, including of Middlesbrough and audited the Brent Cross development modelling.

193. His written and oral evidence was comprehensive, balanced and transparent. He sought to engage with the questions asked by counsel and answered them objectively.

194. Mr Rand is an experienced transport planner, who has previously advised and given evidence on behalf of private and public sector clients on a range of transport related matters. His written and oral evidence was persuasive, with the judgments he made – and the basis on which he made them – clearly set out. He answered questions directly and without any obfuscation.

195. It is with some regret that the same cannot be said of the Appellant's transport witness, Mr Tucker. Although clearly experienced in the area of transport planning, he was wedded to the results of the isolated junction modelling and unwilling to countenance that his modelling may not be accurate even when faced with the disparity between his modelled results and the observed data. His mistrust of the

MAM modelled appears to stem from his lack of familiarity with Aimsun modelling: he confirmed that he has never developed, calibrated or validated an Aimsum model.

196. The concern regarding the credibility and reliability of Mr Tucker's evidence is cumulative: stemming from a range of issues with his evidence, and the way in which it was presented.

(1) Firstly, and of most concern, is the fact that Mr Tucker was selective in relation to the evidence that he chose to present in his proofs of evidence. There were two stark examples, both on important topics:

a. In his original proof of evidence Mr Tucker alighted upon two GEH statistics extracted from the MAM Model Validation report and, based on those statistics alone and in isolation, suggested that that "*the model does not accurately enough validate turning movements at junctions and therefore any output relating to junction capacity should be treated with extreme caution*".[218] He did so having cited the DfT Tag Unit M3.1 guidance[219], and he went onto imply that the PM Peak results failed the criteria within that guidance.[220] This exercise was selective and wholly misleading. As Mr Tucker accepted in cross-examination, the MAM base model does meet the DfT criteria in all respects – something that was expressly confirmed in the MAM Validation report itself. Mr Tucker's failure to mention as much – and to place any residual concerns he had in that context[221] – was a significant omission. Had it not been picked up, his proof would have left the reader with the impression that the MAM model failed to meet the validation criteria published by DfT. Which is demonstrably untrue.

b. In his rebuttal proof of evidence, Mr Tucker presented what purported to be average observed queues for the AM and PM peaks across a number of junctions. Mr Tucker confirmed that, together with a colleague, he was responsible for producing these statistics. The

[218] Tucker Proof, para 6.4.4
[219] Tucker Proof, para 6.4.3
[220] Tucker Proof, para 6.4.5
[221] It is notable that this criticism is not maintained. This cannot be explained away by the production of local validation results, which were entirely irrelevant to this particular criticism.

observe queue lengths are important evidence, as they are the sole basis on which the Appellant has sought to validate their modelling. They were produced directly in response to Mr Rand's criticism that no validation had been undertaken of the Appellant's modelling. However, as has been detailed above, in reality those averages were artificially restricted by the fact that the enumerator stopped counting vehicles in a queue at a given point. And thus, the average observed queue length was calculated from incomplete data. The result was to give the misleading impression that the modelled queues were closer in length to the observed queues than was actually the case. This was not recorded in Mr Tucker's evidence. The averages were presented in his proof without any caveat or relevant clarification. This significant omission was compounded by Mr Tucker's explanation that he had specifically considered this issue when compiling his evidence but did not consider it necessary in his proof to tell the reader that the data from which he had drawn the averages was incomplete. [222]

(2) Secondly, in his proof served only three weeks before the opening of the Inquiry, Mr Tucker's evidence to the Inquiry was that the original off-site mitigation proposed was "demonstrably sufficient".[223] On any account this judgment was demonstrably wrong. Only one week into the original inquiry the Appellant proposed a scheme of additional off-site highway works for the first time (see the Council's costs application for details). Nor was this a result of evidence arising at the inquiry: as Mr Rand had pointed out in his evidence (and is evident from the A2 Junction Review note), the Appellant's own modelling at the time demonstrated that a number of the junctions which became the subject of further mitigation would be operating over-capacity should the development go ahead.

(3) Thirdly, Mr Tucker was willing to run with Mr Lopez's point concerning the appropriate network against which to test the impacts of the development, despite this never being foreshadowed in any of his written evidence and even when (in answer to the inspector's question) this forced him to postulate the

[222] XX(RW) Day 14 of Tucker 3:23:30
[223] Tucker Proof, para 6.7.5

absurd position that, on this approach, only developments the size of new settlements could meet the severity threshold.

197. For these reasons, to the extent that the Inspector or Secretary of State's decision is to be influenced by the credibility and accuracy of the evidence given by the highways witnesses, it is submitted that the Council's evidence is plainly to be preferred.

(5) Impacts of the development on the local highway network, in terms of capacity and congestion

198. The impacts of the development on the local highway network are clearly and accurately set out in the Sweco assessment reports, as well as the proofs of evidence of Mr Jarvis and Mr Rand. In particular, the Inspector and Secretary of State are invited to have regard to, and place significant weight on, the following (as representing the most up-to-date evidence):

(1) Lower Rainham Report Impact Appraisal Addendum 3a (Sweco, March 2021) **[ID34a]** – with particular regard to scenarios 5A (2028 scenario, MAM trip generation) and 6A (2028 scenario, Appellant trip generation)

(2) Mr Rand's Addendum Proof of Evidence (April 2021) – most notably, section 2

(3) Mr Jarvis's Addendum Proof of Evidence (April 2021) - in particular section 2 to 5

(4) The microsimulation videos – which compare the 2028 reference case with Scenario 6A.

199. The detail of that evidence is not repeated is these closings, which seek only to summarise the key outputs in respect of each subnetwork (and referencing the Scenario 6A statistics, given these are the most favourable to the Appellant).

Subnetwork 2

200. By any metric, the residual cumulative impacts on subnetwork 2 would be severe.

201. In terms of **junction impacts,** even in the 2028 reference case, two of the junctions in this network are already over capacity in the AM Peak – Lower Rainham Road/Yokosuka Way roundabout and Eastcourt Lane/South Avenue. Nor is this a question of the delays being just above the threshold for a F-rating ('forced or breakdown flow, demand> capacity'): both exceed the relevant threshold by a considerable margin.

202. The development will considerably worsen the situation. In the AM Peak, three further junctions would operate over capacity, including the key Bowaters and Will Adams roundabouts. Once again, the average delays at these junctions are significantly over the threshold for an LoS rating of F.

203. In the PM peak, four junctions will operate over capacity, with junctions on the A289 near the Medway Tunnel now operating over capacity, in addition to two junctions on the A2, including Bowaters Roundabout.

204. In terms of **journey times,** the increases from the 2028 Reference Case (which of themselves evidence some delays) are substantial. The **A2** is particularly badly affected, with westbound journey times increasing by over 5minutes (80%) in the AM and PM peaks, and eastbound journeys increasing by over 10 minutes (89%) in the AM Peak and over 8 minutes (119%) in the PM Peak.

205. This gives rise to journey times for a 3.3km stretch of the A2[224] of around 12 minutes heading westbound in both peaks, over 21 minutes heading eastbound in the AM Peak and over 15 minutes heading eastbound in the PM Peak.

206. Journey times on the **A289** are also significantly worsened, experiencing an increase in journey times of between 27%-100% as compared to the 2028 reference case.

207. The impact of the development is also felt on the overall **network statistics** with travel times increasing in the AM Peak by 23% relative to the reference case (193 to 238 in terms of seconds per km); delays increasing by 38% (119 to 165 in terms of seconds per km); and mean queues by 73% (from 489 vehicles to 846). Similar increases are experience in the PM peak.

[224] Jarvis, Rebuttal, Table 2.

208. Even if there were no impacts outside of this subnetwork, the residual cumulative impacts on subnetwork 2 – which incorporates two of the important arterial routes in the local highway network – would be severe.[225]

Subnetwork 3

209. The impacts on subnetwork 3 are more focused, but no less severe.

210. The additional mitigation, in the form of signal optimisation to give greater green time to the A2, has served to improve the journey times on this part of the A2.

211. However, this has come at a cost of transferring the delay to the side roads, including Meresborough Road and Moor Park close.[226]

212. In terms of **junction impacts** the A2/Otterham Quay Lane/Meresborough Road junction would operate over capacity in both peaks, with the delays at the junction being particularly extensive in the PM Peak.

213. The overall **network statistics** underscore that the supposed mitigation has not remove the problem, just shifted it to another part of the subnetwork. Travel times increase by 45% (from 233 sec/km to 339 sec/km), delays by 72% (from 147 sec/km to 253 sec/km) and mean queues by 124% (58 vehicles to 130 vehicles) in the AM Peak. Once again similar increases are experience in the PM Peak.

Subnetwork 7

214. The issue with subnetwork 7 has always been the queues and delays created by the development traffic in the AM Peak heading westbound on Lower Rainham Road.

215. It is not hard to see why. The development will cause flows heading westbound on Lower Rainham Road to virtually double in the AM Peak, from 582 vehicles/hour in the 2028 Reference Case to 1032 vehicles/hour in Scenario 6A. Of course, using the Council's trip generation, the increase would be markedly greater.

[225] It is noticeable that, even on the Appellant's modelling, for all its inaccuracies, a number of junctions within subnetwork 2 operate with an RFC in excess of 0.85, and therefore over practical capacity.
[226] See Addendum 3, Figures 15 and 16

216. As Addendum 3, and the microsimulation video, illustrate when the original mitigation proposed by the Appellant is modelled there would be extensive queuing at this junction for virtually the entirety of the peak hour. Travel times along this route (4km in length[227]) would be in the order of 16 ¼ minutes, an 127% increase on the 2028 Reference Case.

217. On any account this would constitute a severe residual cumulative impact.

218. The belated additional proposed mitigation at the Lower Rainham Road/Yokosuka Way roundabout (allowing two lanes to turn right onto the A289) serves to reduce the queuing on the Lower Rainham Road. However, it does not negate the severe impact. It merely shifts that impact to another arm of the roundabout and, in this instance, a different subnetwork.

219. As Mr Jarvis' evidence demonstrates[228] the effect of the additional mitigation cause there to be a lengthy queue on the northern approach of the A289/Yokosuka Way (see Figure 12). This is also reflected in the travel times for the A289 heading northbound. Whereas in the reference case the journey from Hoath Way to Church Street (approximately 5km) would take just over 10 minutes, in the with development scenario, including the additional mitigation, this would increase to 19 minutes and 31 seconds. This is virtually a doubling of the travel time relative to the reference case.

(6) Conclusions

220. The impact of the development on the local highway network in terms of congestion and capacity would be significant. The proposed mitigation does little, if anything, to reduce the impact, and in places considerable exacerbates the situation. Whether measured in terms of junctions capacity, journey times or overall network statistics it is evident that the residual cumulative impacts will be severe

[227] Jarvis, Rebuttal, Table 6
[228] Jarvis Addendum Proof, Section 4

VI. BENEFITS OF THE PROPOSAL

(1) Delivery of housing

Extent of Shortfall

221. As was explained in opening, that there is a significant need for housing in Medway is not in dispute.

222. However, the extent of the shortfall should not be overstated, as the Appellant has sought to do. The Council can demonstrate a housing land supply of 3.03 years.[229] This is a robust – perhaps even conservative – estimate of supply, noting the following:

(1) It is based on figures derived from the Council's December 2020 AMR, which is the latest published evidence on delivery.

(2) It applies to a 5-year period of 1st April 2020 – 31st March 2025.

(3) All sites included within the supply benefit from the grant of planning permission (and did so as at the date of the AMR), save for three sites which have a resolution to grant subject to section 106.[230]

(4) Because the small sites (delivering 341 units) have fewer than 9 homes, they benefit from the presumption of deliverability.[231] Mr Parr accepted that he had produced no evidence, let alone the 'clear evidence' required, to rebut that presumption.[232]

(5) On the large sites, 5,332 (90%) of the 5,906 units benefitted from full planning permission. Again, Mr Parr accepted that these units benefited from the presumption of deliverability, and that he had not produced any evidence, let alone the 'clear evidence' required, to rebut that presumption.[233]

(6) Mr Parr did not seek to challenge the inclusion of the windfall allowance (603 units), which is modest, applies only to years 3-5 and is consistent with historic windfall delivery rates.

[229] SOCG, para 5.1 and Canavan Proof, para 6.13-6.14 (see Table calculating 5 yr HLS)
[230] XIC(RW) Canavan. See also Volume 2 of AMR
[231] NPPF, Annex 1, p68
[232] XX(RW) Parr
[233] XX(RW) Parr

(7) The Council had not sought to include in its deliverable supply – as it would have been entitled to do – any sites which did not benefit from the grant of planning permission (such as those identified in the SLAA, and/or Regulation 18 Plan). It has avoided doing so in order to ensure a robust supply.

223. In contrast, the assessment that the Appellant has undertaken[234] in support of their contention that the Council can only demonstrate a 1.78 year supply is both outdated and calculated contrary to guidance:

(1) As Mr Parr accepted, the supply information used by the Appellant was taken from the December 2018 AMR, and related to the period 1st April 2017 – 31st March 2018. There have been two further monitoring years since that date AMR December 2019 (April 2018-Matcj 2019) and AMR December 2020 (April 2019 – March 2020)

(2) This means that the supply information used by the Appellant is two years out of date. In these two years Medway has granted permission for a significant amount of housing.[235]

(3) As Mr Parr accepted, it also has the consequence that the five-year period which was being assessed by the appellant was the period 1st April 2018 to 31st March 2023.

(4) The supply information was derived from the Council's own 2018 AMR. Mr Parr did not undertake an independent assessment of deliverability. Nor has he done so in respect of the supply in the latest AMR, on which the Council relies.

(5) In order to reach a figure of 1.78 years, Mr Parr has factored in past-under delivery (shortfall) prior to the five-year period in question. This is contrary to the guidance set out in the PPG, which explains that past-under is not required to be included in the calculation of 5-year supply when, as here, the standard method figure is used for the requirement.[236]

[234] CD5.12
[235] See Canavan Proof, paras 6.25-6.26
[236] PPG on Housing Supply and Delivery *"How can past shortfalls in housing completions against planned requirements be addressed?* Paragraph: 031 Reference ID: 68-031-2019072 which states

224. It follows that the Council's calculation of housing land supply is to be preferred and should be considered a robust estimate of future supply.

Weight to be given to the delivery of housing in light of the shortfall

225. The Council accepts that, in light of the significant shortfall in 5-year housing supply, **substantial weight** should be given to the delivery of housing (at least to the extent this site can help meet this shortfall[237]).

226. Once again, however, the Appellant seeks to overstate its case. They focus largely, if not solely, on historic under-delivery[238] – a factor which is in any event captured in the standard method requirement, by virtue of the affordability ratio uplift (see fn 237). In doing so, the Appellant ignores the significant steps that the Council are taking to meeting housing needs, both in the short-term and strategically.

227. This factor is relevant to the weight to be given to housing delivery from this scheme, as well as the weight to be given to development plan policies.[239]

228. In the short term, this has meant granting a large number of permissions for sustainable residential development on unallocated sites outside of current development boundaries.[240] This has included granting permissions for sites within the Gillingham Riverside ALLI – albeit crucially only where the development in question would neither radically alter the character, nor undermine the functioning, of the valued landscape.

"Where the standard method for assessing local housing need is used as the starting point in forming the planned requirement for housing, Step 2 of the standard method factors in past under-delivery as part of the affordability ratio, so there is no requirement to specifically address under-delivery separately when establishing the minimum annual local housing need figure."

[237] Given that the appeal is reserved to the Secretary of State, with the inevitable delays that will bring; the application is at outline stage, with all matters save for access reserved; the extensive pre-commencement conditions, including an unusually onerous archaeology condition due to the prospect of important archeological remains being on site; and the fact that the Appellant does not have a house-builder on board, the prospect that the appeal site will make a meaningful contribution to the five year supply in question (i.e 1st April 2020 – 31st March 2025) is questionable.

[238] See XX (JL) of Canvan on the delivery figures set out at Canavan, para 6.20. This XX was also based on the demonstrably false premise that the existing housing requirement figure (derived from the standard method) was applicable from 1998 onwards. As ID32 confirms this is simply not the case.

[239] See *Gladman Developments Limited v SSHCLG* [2021] EWCA Civ 104 at [27]. See also Canavan Proof, paras 6.576-6.58

[240] See Canavan XIC and Proof, para 6.25 and 6.26

229. Notwithstanding the inevitable lag between grants of permissions and the provision of actual houses of the ground, the Council's positive approach to these applications has garnered real results: the number of dwellings completed in 2019/20 (1,130) was the highest ever number of residential completions since Medway became a Unitary Authority in 1998. And the number of units under construction last year was still higher (1,629).[241]

230. More fundamentally, through its emerging Local Plan the Council is seeking to meet is strategic housing needs in full. As Mr Canavan explained, each of the four scenarios promoted at the Regulation 18 Stage sought to deliver in excess of the local housing need figure for the Local Plan period. They did so without any reliance of delivery from the Appeal Site, which had been assessed by the Council to be unsuitable in its SLAA.

231. This alone exposes as a fallacy the proposition that, despite the considerable harms it will bring, this proposal is needed if Medway is to meet its housing needs.

(2) Delivery of Affordable Housing

232. The Council also accepts that **significant weight** should be given to the delivery of affordable housing given the large degree of affordable housing need in the area

233. However, the affordable housing need of the area must be seen in its context, and should not be over-stated, as the Appellants have sought to do.

(1) The starting point is that national policy does not require, or even expect, Councils to meet their affordable housing needs in full. This was true under the original NPPF (*Kings Lynn and West Norfolk v Secretary of State for Communities and Local Government* [2015] EWHC 2464 at [32]-[37]) and, remains the case under the current NPPF. As Dove J explained in Kings Lynn "*This is no doubt because in practice very often the calculation of unmet affordable housing need will produce a figure which the planning authority has little or no prospect of delivering in practice.*" (at 35).

[241] Canavan XIC and proof, paras 6.20&6.21

(2) Dove J's expectation is true of Medway. It is wholly unrealistic to expect the Council to delivery its assessed affordable housing need in full (744 affordable dwellings per annum)

(3) Medway has set itself, in its Housing Strategy, a target which it considers achievable of 204 affordable dwellings per annum.[242] Since that target was established in 2011/12 it has met 95%[243] of that target.

(4) In this case the Appellant is offering to secure a policy-compliant level of affordable housing. It is doing simply what policy requires, and no more.

(3) Other Benefits

234. Save for net the improvement in biodiversity which (assuming the Inspector considers the condition proposed to be reasonable) is a significant consideration which can be given **moderate** weight, the other benefits on which the Appellant claim are either of limited weight (e.g. economic benefits from construction jobs); simply meets policy expectations and therefore are neutral (e.g provision of community facilities); are unsubstantiated; (e.g economic benefits and jobs from transport infrastructure) or not material at all (e.g New Homes Bonus[244]).

235. These are matters set out in Mr Canavan's proof[245], which were expanded upon in his oral evidence. They are not repeated here.

[242]

[243] 204 x 9 = 1836 total requirement since 2011/12. The Council has delivered 1,754 affordable homes over that time. 1,745/1836 x 100 = 95.5%.

[244] Although local finance considerations, such as the new homes bonus, are capable of being a material considerations, it is only so far as the financial considerations are material to the application: s.70(2)(b) of TCPA 1990. As the PPG (Paragraph: 011 Reference ID: 21b-011-20140612) makes clear these can only be material considerations where it is shown that it would help to make the development acceptable in planning terms. This has not been done in this instance

[245] Canavan Proof, paras 7.10-7.23, and XIC (Canavan) noting that Mr Canavan explained that he had increased the weight to be biodiversity benefits having seen Mr Goodwin's and heard evidence (and on the assumption that the 20% net gain is secured by way of condition).

VII. OTHER CONSIDERATIONS

Emerging Local Plan

236. The Council does not object to the proposal on grounds of prematurity in the sense set out in paragraph 49 of the NPPF.

237. However, it does say that the emerging Local Plan is a material consideration of some importance in this case.

238. It is true that the Local Plan is at a relatively early stage, having only passed through the Regulation 18 stage. However, the Regulation 19 Plan is due to be published in the next few months (and likely before the decision in this matter is promulgated), with submission timetabled for December 2021 and adoption in December 2022.

239. Most significantly, and what singles this case out from the norm, is that Medway has been awarded £170m from central government, through the Housing Infrastructure Fund (HIF) for infrastructure improvements to enable delivery of the Local Plan. Significantly, the HIF bid was predicated on – and the £170m is ringfenced for - projects which will facilitate strategic growth on the Hoo Peninsula, including the delivery of up to 12,000 homes.[246]

240. The Council's planning for the expenditure of the HIF funding is well underway, as is evidenced in the latest consultation on the subject.[247] This includes extensive, detailed plans for the new rail infrastructure (reinstating a passenger service, and creating a new station on the Hoo Peninsula [248]); road infrastructure (consisting of six phases, involving strategic interventions on the local highway network[249]); and green infrastructure (the SEMS proposals[250]) which will unlock the growth.

[246] See Canavan, para. 6.35-6.53, together with the oral updates he gave in XIC(RW)
[247] Medway "New Routes to Good Growth" (January 2021) **[CD1.4]**
[248] **[CD1.4],** pp31-48
[249] **[CD1.4],** pp11-30
[250] **[CD1.4],** pp49-62

241. As Mr Canavan explained[251], the emerging Local Plan, and the support it has received from central government in the guise of the HIF funding, are relevant to this determination in at least four respects:

(1) First, as alluded to above, it demonstrates that the Council is taking meaningful steps to meet its needs, including housing needs. It is not an authority shying away from it responsibilities;

(2) Second, those steps involve long term planning, and an integrated approach (e.g. the delivery of strategic infrastructure, and environmental enhancements needed to unlock strategic development);

(3) Third, the Council's vision has been vindicated, at least to the extent of the award of the HIF grant; and

(4) Fourth, there is a clear vision for how the housing needed in Medway will be provided (which does not include strategic development in the area of the appeal site).

242. In addition, it is self-evident that development of this strategic-scale is better considered through the Local Plan process. It is through the plan-led process where alternatives can be tested (not least through the SEA/SA assessments); where strategic level interventions can be secured (most notably to transport infrastructure); and where a proposal's consistency (or otherwise) with the overall strategy for the area can be examined. None of this is possible in the current context.

243. The emerging plan context militates against the grant of permission, quite apart from issues of prematurity.[252]

[251] Proof, para 6.53 and XIC(RW)

[252] The mischief underlying a conventional prematurity objection is the prejudice which would be caused to an emerging local plan by a development proposal which the development proposed *"is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging plan"* (NPPF,para 49(a)) . Thus, in a prematurity case the harm caused is to the emerging local plan itself. In this case the Council is not saying the emerging plan would be adversely effected, or could not come forward. We say it is relevant that there is an emerging plan, underpinned by the HIF grant, which is likely to address the housing need in Medway, and will do so without requiring any provision from the Appeal Site. Moreover, we say it is that forum which is better suited for bringing forward such strategic level developments, with the necessary infrastructure requirements. These are material considerations in their own right.

Public-interest in a plan-led approach

244. Related to the above, is the general principle that it is in the public interest in having plan-led decisions. National policy emphasises that the *"Planning system should be genuinely plan-led"*.[253]

245. The point was made in lucid and forceful terms by Sales LJ in *Gladman Developments Limited v Daventry District Council* [2016] EWCA Civ 1146 **[CD4.10]**

246. He explained:

> *"A plan-led system of planning control promotes the coherent development of a planning authority's area, allowing for development to be directed to the most appropriate places within that area, and enables land-owners, developers and the general public to have notice of the policies to be applied by the planning authority to achieve those objectives. It is not in the public interest that planning control should be the product of an unstructured free-for-all based on piecemeal consideration of individual applications for planning permission." At [6].*

247. Sales LJ went on to explain that:

> *"significant weight should be given to the general public interest in having plan-led planning decisions even if particular policies in a development plan might be old. There may still be a considerable benefit in directing decision-making according to a coherent set of plan policies, even though they are old, rather than having no coherent plan led approach at all." At [40(iv)*]

248. Granting permission for this proposal would be antithetical to the plan-led approach: a strategic-sized development, which is contrary to the existing development plan on multiple bases, and which does not form any part of the potential housing scenarios for the emerging local plan. This is a factor which should weigh against the proposal.

[253] NPPF, para 15

VIII. PLANNING BALANCE

The Development Plan

249. The proposal is fundamentally at odds with the development plan in a number of respects.

250. As a starting point – and as Mr Parr agreed [254]- it is in breach of the development strategy of the Plan encapsulated within **Policy S1,** given that it is not located in the urban area, and constitutes "*expansion into fresh land…to the east of Gillingham*" which the policy specifies will be "*severely restricted*". Its location in the countryside, in circumstances where it is not allocated and does not fall within any of the appropriate uses defined by the policy, also renders the proposal in conflict with **Policy BNE25**, again as Mr Parr agreed. However, given the housing land supply position, and specifically the requirement to develop greenfield sites in order to meet housing need, these breaches are considered to carry **limited weight**.[255] As Mr Canavan explained, the Council would not refuse otherwise sustainable development on this basis alone.

251. More significantly, for the reasons set out in respect of issue 1 above, the proposal is in conflict with **Policy BNE34**. This is a fundamental breach given that the proposal would cause considerable harm to the landscape character of the area and significantly diminish, if not entirely eradicate, the functions played by the Gillingham Riverside ALLI. The economic and social benefits of the scheme do not come close to outweighing this harm.

252. This policy should be given full weight because:

(1) As Mr Hughes and Mr Parr agreed, the conclusions of the MLCA supports the continuing validity of the functions of the ALLI, and therefore provides an evidence base for the policy restriction;

(2) Mr Hughes agreed that the functions identified for the ALLI continued to have validity today, a position which was consistent with Mr Etchells,

[254] XX(RW)

[255] It is noted that Policy BNE25 also has a dimension relating to the character, amenity and functioning of the countryside. The Council does not accept that this element of the policy is out of date, but in this case as policy BNE34 is applicable that issue does not require determination.

(3) Mr Parr accepted that BNE34 is consistent with national policy, specifically NPPF, para 170 which required the protection and enhancement of valued landscapes, such as the ALLI.

(4) The policy is not a general restraint policy – it only prohibits development where material harm is caused, and where that harm is not outweighed by economic and social benefits of the proposal. It therefore incorporates an internal balance. That being the case, the housing land supply situation does not provide any proper basis for reducing the weight to be given to this policy,

(5) Finally, in the most recent appeal decision on this issue – Orchard Kennels[256] - the inspector gave detailed and cogent reasons for giving the policy full weight. The inspector and Secretary of State is invited to follow this decision (and, consistent with the principle of consistency in decision making, would be required to give reasons if they wished to depart from it).

253. In light of the fundamental conflict with development policy, which is to be given full weight, the breach of **Policy BNE34** should be given **significant, if not substantial, weight.**

254. On a related note, the proposal would also conflict with **Policy BNE47** given that it would transform Pump Lane – currently identified as an important rural lane – into a suburban through-road. This breach should be given **significant weight**.

255. The harm caused to the significance of the listed buildings and two conservation areas give rise to breaches of policies **BNE12, 14 and 18**. As a matter of law, this harm must be given considerable importance and weight, and so too should the breach of the related development plan policies. These policies were adopted in the context of, and are consistent with, the legislative protection afforded by section 66 and 72 of the Listed Buildings Act 1990. The same is true of the NPPF. There is no proper basis for seeking to reduce the weight to be given to Policy BNE18, as Mr Parr seeks to do, simply because the policy does not directly replicate the balance found in NPPF, para. 196. In the recent case of *City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320, the Court of Appeal rejected this very argument, finding that "*The absence of an explicit reference*

[256] **[CD4.4]** See paras 24-29. Note that the inspector also gave reasons for disagreeing with the position adopted in the *Gibraltar Farm* appeal **[CD4.4]**, a much earlier appeal prior to the 2019 NPPF

to striking a balance between "harm" and "public benefits" in the local plan policies does not put them into conflict with the NPPF, or with the duty in section 66(1). Both local and national policies are congruent with the statutory duty."[257]

256. It follows that the breach of policies **BNE12, 14 and 18** should be given **significant** (indeed **great**) weight.

257. Finally, given the severe impacts on the road network in terms of capacity and congestion there is a breach of Policy T1. This policy ought to be given full weight, as Mr Parr originally agreed (both in the policy table and his oral evidence[258]). For the reasons set out above there is no material conflict with national policy. Accordingly breach of this policy ought to be given **significant weight**.

258. Despite Mr Parr's entirely unrealistic protestations to the contrary, the proposal is plainly in breach of the development plan as a whole.

NPPF

259. While the proposal finds support from some policies in the NPPF with which it would be consistent – chief amongst them, the objective of significantly boosting the supply of housing[259] - it would be contrary to a wide range of important policies in national policy.

260. It would fail to protect, let alone enhance, a valued landscape, **contrary to NPPF, para 107(a)**. The loss of such a significant amount of high quality BMV land cannot be considered to be consistent with the requirement to recognise the benefit of such land, still less to prefer areas of poorer quality agricultural land, **contrary to NPPF, para 170(b) and fn53.** And to allow a development to proceed in circumstances where there would be a severe residual cumulative impact on the highway network would be directly contrary to policy in **NPPF, para 109.**

261. In addition, the wide-ranging adverse impacts on designated heritage assets (to which considerable weight and importance must be attached) are not outweighed by the public benefits of the scheme, such that the proposal would be **inconsistent with NPPF, para 196.**

[257] At para 87
[258] XX(RW)
[259] NPPF, para 59

The tilted balance and the section 38(6)test

262. If the Inspector and Secretary of State accept the Council's case that the public benefits of the scheme do not outweigh the harm caused to the designated heritage assets (considered in isolation, without other harms), then the so-called tilted balance in para 11 would not apply. In such a scenario, it is clear that the section 38(6) tests could not be satisfied: In circumstances where the harm to designated heritage assets alone outweighs the benefits, it must logically follow that when all of the remaining harms are factored in, that material considerations could outweigh the breach of the development plan.

263. If the Council's position on NPPF, para 196 is not accepted then, due to the lack of a five-year housing land supply and the housing delivery test result, the titled balance would be in play. Thus, the decision maker would be required to ask: "would the adverse impacts of granting permission significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."?

264. It is settled law that, in answering that question, the decision-maker is entitled to have regard to the policies of the development plan: *Gladman Developments Limited v SSHCLG* [2021] EWCA Civ 104 **[CD4.15]** Indeed, at para. Lindblom LJ went as far as to state:

> *"It is clear, therefore, that a complete assessment under paragraph 11d)ii, in which "adverse impacts" and "benefits" are fully weighed and considered, may well be better achieved if relevant policies of the development plan are taken into account. This is not a substitute for discharging the decision-maker's duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. It is integral to that process."*

265. In this case the answer to the titled balance question is clear-cut.

266. The significant adverse impacts on the landscape character and visual amenity of the area, as well as the functioning of the ALLI; the harm caused to designated and non-designated heritage assets; the loss of over 50ha of Grade I and Grade II BMV land; the severe residual impacts on the highway network; the multiple breaches of both development plan and national policy, together with the consequent harm caused to the public interest in the plan-led system; all – individually[260] and collectively -

[260] The Council maintains that the harm caused to the landscape, designated heritage assets, agricultural land and highway network is of such a magnitude that any one of them in isolation (albeit taken together with the

significantly and demonstrably outweigh the benefits of the scheme, chief amongst them the delivery of housing.

IX. CONCLUSIONS

267. The Government objective of significantly boosting the supply of housing is an important part of national planning policy. But as the inspector in the *Gladman* case - whose decision was upheld first by the High Court, and very recently, by the Court of Appeal - remarked: *"it is not the be all and end all"*.[261] It is one, amongst a number of objectives, which includes; protecting and enhancing valued landscapes[262]; recognising the benefits of BMV agricultural land, and directing development to areas of poorer quality[263]; giving 'great weight' to the significance of designated heritage assets[264]; and avoiding development where the residual cumulative impacts on the road network would be severe.[265]

268. The significant harm that would be caused to each of these objectives, and the consequential breaches of related development plan policy, demonstrate that this proposal should be refused: it is inimical to the achievement of sustainable development.

Robert Williams

CORNERSTONE BARRISTERS

27th April 2021

consequential breach of development and national policy) would justify refusal on permission on the basis that the harm significantly and demonstrably outweighed the benefits.

[261] **CD4.15** *Gladman Developments Limited v Secretary of State for Housing Communities and Local Government* [2021] EWCA Civ 104 (para 17 of Judgment)

[262] NPPF, Para 170(a)

[263] NPPF, Para 170(b) and fn55

[264] NPPF, para 193. Reflecting the statutory presumption against development which harms the significance of designated heritage assets found in s.66 & s.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990

[265] NPPF, para 109