LAND SOUTH OF HENFIELD ROAD, ALBOURNE

APPEAL BY CROUDACE HOMES LTD

PINS REF: APP/D3830/W/23/3319542

CLOSING STATEMENT ON BEHALF OF

MID-SUSSEX DISTRICT COUNCIL

INTRODUCTION/STRUCTURE

1. These Closing Submissions are structured as follows:

    a. Accordance with the development plan

        i. Preliminary observations: common ground

        ii. Strategic/spatial policies

        iii. Harm to Landscape Character and Appearance (Main Issue 1)

        iv. Harm to Heritage Assets (Main Issue 2)

    b. Other Material Considerations: Is the Plan Up to Date?

        i. 5YHLS (Main Issue 3)

        ii. Other arguments why the Plan is not up to date

    c. Other material considerations: The Benefits of the Scheme

    d. The Planning Balance and Conclusions:

        i. If the plan is up to date/the "standard" balance

        ii. If the plan is not up to date: the tilted balance

2. In these submissions, witnesses are referred to by their initials.

ACCORDANCE WITH THE DEVELOPMENT PLAN

A. Preliminary Observations/Common Ground

3. As we observed in opening, the starting point for the determination of any planning application is section 38(6) of the Planning and Compulsory Purchase Act 2004: planning applications should be determined in accordance with the development plan unless material considerations indicate otherwise. In this regard, it is common ground[1] that:

    a. The first question which needs to be answered is whether the Appeal Scheme accords with the development plan;

    b. That question has to be asked by reference to the development plan as a whole. As such, it does not require compliance with every single policy. However, some policies (such as those which set out the spatial strategy and identify where development should go) are likely to be more important than others (for example, those relating to detailed design).

    c. The NPPF, the tilted balance, and the question whether the most important policies of the development plan are out of date are all "other material considerations", which only come into play after the first question has been answered.[2]

4. It is therefore significant that, if assessed in this way, it is also common ground that the Appeal Scheme is contrary to the development plan when read as a whole. In particular, Mr Brown agrees that:

    a. Policies DP5, DP12 and DP15 of the District Plan are spatial policies which define the circumstances in which development will be permitted beyond the built-up area boundary ("BUAB"). The Appeal Scheme does not fall within

[1] SB x-exam, day 4

[2] See also para 8 of Lord Carnwath's judgment in ***Suffolk Coastal*** **CDH.2**: s.38(6) is a "presumption that the development plan is to govern the decision, subject to material considerations, as for example where 'a particular policy in the plan can be seen to be outdated and superseded by more recent guidance."

any of the categories of development beyond the BUAB which should be permitted, and is therefore contrary to all three.[3]

b. The Appeal Scheme is also contrary to Policy ALH1 of the Neighbourhood Plan, as it does not satisfy either the third or fourth criterion of that policy.[4]

c. There will be harm to a Grade II listed building (Finches) and to Albourne Conservation area, which gives rise to conflict with Policies DP34 and DP35. Since these policies are intended to give effect to the statutory duties under ss. of the Planning (Listed Buildings and Conservation Areas) Act 1990, they should be given weight when asking the initial question posed by s. 38(6).

d. Non-compliance with these policies is not outweighed by compliance with other, more detailed policies of the plan.

e. Accordingly, permission should only be granted if there are "other material considerations" which outweigh that non-compliance with the plan as a whole.

5. In the light of these concessions, it is not strictly necessary (for the purposes of the first part of s. 38(6)) to go on and consider whether there are any additional conflicts with the development plan, over and above those which are not accepted by the Appellant. However, the Council considers that the conflict does go further, and those arguments will be relevant to the overall planning balance. In the circumstances, we detail them here.

B. Additional strategic/spatial policies

6. In addition to Policies DP6, DP12, DP15 and ALH1, the Council's first reason for refusal also alleges conflict with Policy ALH1 of the Neighbourhood Plan, which identifies four circumstances in which development beyond the BUAB will be supported.

[3] SB Main proof 4.24 re DP6, SB x-exam re DP6, 12 and 15
[4] SB main proof para 4.48, confirmed in x-exam

7. In x-exam, SB suggested that there was no conflict with ALC1 on the basis that the Appeal Scheme fell within the first circumstances, namely that it was

> "necessary for the purposes of agriculture or some other use which has to be located in the countryside."

8. In particular, SB argued that, as it is now necessary to breach the BUAB in order to meet housing needs, a residential development scheme such as the present should be regarded as a "use which has to be located in the countryside".

9. Self-evidently, this argument is dependent upon the Appellant's wider contention that the development plan is out of date, with the result that it is necessary to breach the BUAB. We respond to that below. However, even if correct, this would not be enough to avoid the conflict with ALH1. The wording which is used in ALH1 is not unusual, and is widely understood: it is intended to encapsulate those forms of development (such as agriculture, or certain kinds of outdoor sport and recreation or tourist attraction) which, by their very nature, could not be located in an urban area. It is patently not intended to cover a housing estate.

10. Consequently, there is conflict also with ALH1.

C. Harm to Landscape Character and Appearance (Inspector's Main Issue 2)

11. Policy DP12 states that "the countryside will be protected in recognition of its intrinsic character and beauty", and that development will be permitted in the countryside "provided it maintains or where possible enhances the quality of the rural and landscape character". The Council's reasons for refusal allege conflict with DP12 in two respects:

    a. Failure to maintain or enhance the quality of the rural and landscape character (RfR1); and

    b. Impact on the views from PRoWs 12 and 15.

Impact on Landscape Character

12. We start from the point that it is common ground that the Appeal Scheme will have an adverse effect on the character of the central field, even at year 15, when the planting and mitigation can be expected to have matured.[5] Critically (and despite Mr Boyle's whimsical references to ruining nice hills at Bath) CR confirms that this would be the case, no matter how well designed the new housing might be: even a proposal to construct the Royal Crescent would result in the permanent, irreversible loss of character which is considered adverse.

13. Pausing there, we note the scale of this change alone. The Appeal Scheme proposes the addition of 120 new houses in circumstances where the existing parish currently only has 270 households.[6] As RB points out, approximately 4.3ha of the central field would undergo a significant change in built footprint, hard surfacing or as residential garden space. This equates to approximately 41% of the existing built up area of Albourne.[7] On any analysis, that area over which the change would be experienced is substantial, in the context of the village as it stands.

14. Significantly, CR also accepts that the character of land can also be affected by development which takes place on directly adjoining land. The reasons for that are obvious, and will be readily experienced on site: although CR's analysis divides the Appeal Site up into different parcels, none of these is simply an isolated agricultural field – they are all part of a much wider, open landscape, with which they shares attributes such as land use and topography, and across which there are extensive views to both the north and south. Consequently (for example) what happens in one field is capable of affecting the character of the adjoining fields, and the setting of the village as a whole.

15. In these circumstances, the Council submits that it is obvious that the adverse effects on character which CR acknowledges would occur on the central field will also be experienced beyond the boundary of that field. As CR makes clear, there is no

[5] See LVIA Table 3 at p.35 of CR's main proof
[6] ID13
[7] Browne 5.7

intention to try and screen the new housing from public or private views.[8] If even well-designed new homes are adverse to the character of the central field, the Council finds it impossible to understand how the same is not also true of the impact of those same new homes on the character of the surrounding land. In that context, CR's conclusions that the impact beyond the central field will be beneficial because a "high quality built form will provide an attractive settlement edge", and "the new housing could provide an attractive, green settlement edge which is positive, outward facing and responds well to the countryside edge" are little short of perverse: the reasoning she applies to the impact on the central field is directly applicable to the surrounding area, and the sense that the southern field is part of a much wider agricultural landscape will be materially reduced.

16. In x-exam, CR explained that her overall attribution of the labels "beneficial" or "adverse" was the result of a net assessment, in which harms were balanced against benefits. This, at least, allows for a recognition that there would be some harm to character. However, it calls for careful scrutiny of what are alleged to be the countervailing benefits. In this regard, in her Table CR-2,[9] CR has taken into account a number of alleged "benefits" which simply do not stack up. In particular:

    a. Given that it is the built development which will adversely affect the character of the central field, it is difficult to understand how the introduction of new homes is a landscape benefit. The fact that residents of the new homes would be able to access the countryside is simply double-counting a benefit found elsewhere on CR's list.

    b. For the reasons we have outlined above, the provision of a "high quality built form" might be regarded as mitigation of the adverse impact of the new housing, but it cannot be a benefit. The same may be said of the proposals to set the new housing back from Henfield Road and to "provide an attractive green settlement edge"

[8] Main proof para 6.6
[9] CR main proof p. 36

c. Whilst the proposal will introduce new areas of public open space, Albourne is hardly a densely built up area where this is in short supply: existing residents already have ready access to the countryside through the network of footpaths and lanes around the village. Any benefits associated with the proposed publicly accessible parkland have to be set against the extent to which this (through the paths, signage and introduction of activity) will itself be an urbanising influence.

d. The provision of replacement hedgerow to compensate for that which will be lost as a result of the development should be regarded as mitigation, rather than a benefit.

e. As there is no reason to believe that any of the existing trees on site would be removed if the appeal is dismissed, the retention of existing trees is not a benefit.

17. Accordingly, the Council invites the inspector to agree with RB that the adverse impacts on the character of the landscape will extend significantly beyond the central field. In particular:

a. The character of setting to FP15 will be substantially altered from a tranquil and undeveloped arable field on both sides to a path which lies directly adjacent to a residential road and associated housing.

b. There will be a notable change in the character of the Albourne settlement edge, with built development encroaching further into agricultural land, introducing a sizable urban extension. As Mr Zeidler observes:[10]

> "This development would change the immediate sense of walking out into open fields with all-round views … to one of walking along the edge of a town with associated street lighting and boundary vegetation."

[10] ID17 para 6

c. The character of the Millennium Garden will be materially altered. Currently (and accurately) described by CR as a "small, reflective space", the immediate rural surrounds of the Garden would be replaced by the proposed car park/drop-off space for the new school, with short-distance views across it to new housing. This would represent a substantial intrusion of urban character. The idea that this change would be beneficial is simply not credible.

d. These changes would be permanent and irreversible.

Visual Effects

18. Both CR and RB agree that there will be visual effects on the surrounding area. However, as indicated in RfR2, the most important of these will be those on the users of FP12 and FP15. Not only will these be the places from which the impact on views is most marked, but users of the public rights of way are among the most sensitive receptors to change. Although CR suggests that "walkers using the PRoWs are passing through the Site their way to a destination"[11] the reality is that most users – certainly of FP15 – will be using it in pursuit of outdoor recreation, where the purpose is to be in and enjoy the countryside, rather than to get to at a particular place.

19. The magnitude of the effects is something which is best assessed on site. However, it is with good reason that the Appellant's LVIA Addendum states that the views from the PRoW are "visually dramatic and evoke emotion".[12] CR also recognises that FP15, in particular is an "important route for residents to gain access to the countryside which forms the setting to the village". At present, that sense of gaining access to the countryside is one which (as Mr Zeidler's statement[13] observes) is experienced almost immediately upon entering the Appeal Site when leaving Albourne.[14]

20. CR accepts that the change in views from FP15 to the north will be adverse, but nonetheless concludes that the overall effects will be beneficial.[15] The reasons for this

[11] CR Main proof para 8.27
[12] See the table at p. 5 (intersection of Perceptual(Scenic)/ Indicators for the Site) CD A.16
[13] ID17 para 6
[14] See, for example, View 5a at p.26 of the LVIA Addendum CD A.16.
[15] Main proof para 8.28, cf. LVIA Table 4 at p. 39

are extremely difficult to understand: views of the central field are an extremely significant part of the experience of walking along the footpath, and the adverse consequences of the loss of the views over this field cannot be outweighed by the perceived "benefits" of changing the southern field from agriculture to parkland. Once again, CR's conclusion is based on her views that:

a. features such as the "high quality built form" and setting back the new housing from FP15 should be seen as a "benefit", rather than as mitigation of the harm;

b. the mere retention of existing features (such as existing views and boundary vegetation) is a benefit;

c. the educational value of features such as signage boards and way-markers outweighs the disadvantages of the urbanising effect this will have.

21. As with CR's conclusions on landscape character, the Council invites the Inspector to conclude that her assessment of the "valence" of the impact on the views from both FP15 and FP12 is fundamentally wrong. The Appeal Site is already an attractive landscape, which is not in need of "improvement", and – no matter how well-designed the new housing may be – it is difficult to understand how views of a new housing estate could ever make up for the loss of the current long-distance views, or the ability to obtain instant, panoramic access to open countryside when leaving the village. The impact will be harmful and, in the case of FP15, substantially so. Although the impact on FP12 will not be as great, it will still be a moderate adverse effect.

22. As such, the Appeal Scheme gives rise to additional conflict with Policy DP12 of the MSDP.

D. Policies DP34 and DP35: Harm to Heritage Assets (Main Issue 1)

23. As we have already observed, the Appellant accepts that that there will be some harm to both Finches and the Conservation Area. However, the harm alleged by RfR3 is more extensive than that. In particular:

a. While it agrees with TC that the harm to both Finches and the Conservation Area is "less than substantial", the Council considers that it lies at the "moderate-high" end of that range;

b. In addition, the Council considers that there would be moderate harm to a further 5 listed buildings.

The Conservation Area

24. Although it is not specifically identified in the Council's published summary of the Conservation Areas in Mid-Sussex[16] as one of the features which contributes to the character of the Albourne Conservation Area, it is common ground that part of the CA's significance lies in its status as a small, rural village which would, historically, have been surrounded by farmland.[17] Its historic interest includes both the fact that (although this is not certain) it is considered likely that it was a planned settlement, and in its historic connection with the surrounding landscape.[18] TC readily agreed that the words "surviving agricultural" in his summary of the Appeal Site[19] were not simply descriptors: they were identifying a particular aspect of the contribution which the Appeal Site makes to understanding the significance of the CA.

25. In this regard, we note that:

a. The whole of the Appeal Site is currently still in agricultural use, which directly abuts the Conservation Area boundary;

b. CD F.10 specifically identifies "the attractive countryside views to the west and south" as one of the key features which contributes to the character of the Conservation Area. It is common ground that the reference to views to the west embraces the Appeal Site;

[16] CD F.10, p.4
[17] TC x-exam
[18] CD D.3 p. 2
[19] In CD D.3, p. 3

c. In those views, both the central and southern field can be seen. Similarly, there are extensive views over the Conservation Area from FP15.

d. The relationship between the Conservation Area and its agricultural setting is also clearly evident in the kinetic experience of moving along FP12, and along FP15. In the case of the latter, when moving from The Street and away from the village, there is an almost immediate transition from the Conservation Area to the agricultural setting. Travelling in the opposite direction, the likely planned nature of the Conservation Area is readily identifiable from the clear the boundary between the Conservation Area and the Appeal Site, which is evident in the approach towards Albourne along FP15.

26. It is common ground that the Appeal Scheme will adversely affect the extent to which the Appeal Site makes this contribution to significance. In particular:

a. Views out from the Conservation Area to the west will no longer be of two agricultural fields. Although the extent to which the residential development on the central field would be visible will vary, it will nonetheless be seen. The replacement of the agricultural setting by housing is adverse.

b. That residential development will also affect the kinetic experience of moving out from the Conservation Area into the countryside. Whether one is using FP12 or FP15, the abruptness of the boundary between the settlement and the surrounding agricultural landscape will be significantly reduced. In this regard (and as TC agreed) the question is not (as suggested by Mr Boyle KC) whether Albourne would still be perceived as a "small rural village surrounded by agricultural land", but whether the Conservation Area would be read in that way.

c. The same will be true on the approach to Albourne from FP15. The sense of arrival will begin at a much earlier point, as soon as the walker experiences the new housing estate on the left hand side of the path. To a lesser extent, this would also be true of the approach along Church Lane.

d. Although it would not be as damaging as residential development, the redevelopment of the southern field to become public open space, with defined areas of planting, paths, display boards and the introduction of people will also change the character in a manner which is adverse. In this regard, Mr Boyle's attempts (in x-exam of EW) to suggest otherwise by salami-slicing the different kinds of agricultural and quasi-agricultural use which might take place was at odds with the evidence of his own expert witness.[20]

27. Against this backdrop, the only real dispute between the parties relates to the magnitude of the harm: TC considers it to be at the low end of less than substantial, EW places it at "moderate-high". In the Council's submission, EW's evidence is to be preferred:

a. Much of TC's analysis is based on the extent to which the <u>other</u> features which contribute to the character of the CA would not be affected. However:

i. CD F.10 is not a comprehensive Conservation Area appraisal. As we have already observed, both parties agree that a key aspect of the significance of the Albourne CA is its status as a small, rural settlement, even though this is not even mentioned in CD F.10.

ii. In any event, as TC accepted, the magnitude of harm cannot be determined simply by reference to the number of features which are affected, or the extent to which other important features are not.

b. In the present case, much of the evidence of the historic connection between the CA and the agricultural economy has been eroded by post-war development,[21] with the result that the Appeal Site now makes up a large part of the remaining landscape from which that historic connection can still be appreciated. In the Council's submission, it is all the more important because of that.

[20] See in particular TC Proof paras 6.33, 6.36, as confirmed in x-exam
[21] See e.g. TC proof paras 6.12, 6.13, 6.19, 6.27

The Listed Buildings: Souches, Finches, Hunters Cottage, Bounty Cottage and Spring Cottage

28. Although each of these properties is subtly different, four of them are located side by side on The Street, three share a common boundary to the southern field, and Spring Cottage lies just around the corner, to the south of the Appeal Site. They give rise to similar issues, and it is therefore helpful to deal with them together.

29. As we have already observed, TC accepts that there will be an adverse effect on Finches, but argues that there will be none on the other four. You may think it is of some significance that his evidence in this regard is at odds with the Heritage Statement prepared by his own practice, which concluded that at least two of the other listed buildings on The Street would be adversely affected.[22]

30. In x-exam, TC explained his reasons for distinguishing Finches from the other listed buildings by reference to two features: the intervisibility between Finches and the Appeal Site, and the fact that it was previously a farmhouse. In the Council's submission, those arguments do not stand up to scrutiny.

31. As to intervisibility, the extent to which there are views of or from Souches, Hunters Cottage, Bounty Cottage and/or Spring Cottage is a matter the Inspector will have to assess for herself on site. In doing that, we would simply ask her to bear in mind that:

    a. She will be seeing the Site at the height of summer, when trees are in full leaf. This is important, given that many of the trees in the gardens of the listed buildings are deciduous;

    b. Even at the moment, there are clear views of at least parts of properties other than Finches; [23]

[22] See CD A.17, p.22-23 "It is possible to conclude that Hunter's Cottage, Bounty Cottage and Finches … would result in a level of harm that could be described as less than substantial" but no harm identified to Souches or Spring Cottage; but cf. p.23 central column, identifying a low level of harm to Bounty Cottage, Finches and Souches, but no harm to Hunter's or Spring Cottages.

[23] See, in this regard, the views in Figs. 20 and 25 at p. 12 of the Built Heritage Statement CD A.17; and Views 5b and 6 at pp. 28 and 30 of the LVIA Addendum CDA.16. Though they are indistinct over that distance, buildings other than Finches are clearly visible.

c. Finches, Souches and Bounty Cottage all share a common boundary depth. To the extent that there are differences in the extent to which they can be seen, much of this is down to the way the gardens are planted. However, planting such as the shrubs in the rear garden of Souches is ephemeral, and can be lowered or removed at the will of the owner;

d. Views are not static. As EW explained, it is also important to consider the kinetic view as one moves from The Street to the Appeal Site. This is true of all the listed buildings, but is particularly relevant to Hunters Cottage, which does not actually abut the Appeal Site boundary – but is directly adjacent to FP15 as one moves from the Conservation Area to the southern field. Similarly, Spring Cottage is not only experienced from Church Lane, but also as one moves to or from Church Lane to the southern field via FP12.

32. As to the fact that Finches is a farmhouse, there is no evidence one way or the other as to whether the Appeal Site was ever part of the land actually farmed from Finches, i.e. as to whether there was a functional relationship between the two, but TC recognises that this is not necessary: it is the agricultural use which matters. However, his own evidence indicates that Souches, Hunter's Cottage and Bounty Cottage are all likely to have been agricultural workers dwellings.[24] As with Finches, these buildings have therefore also had a clear agricultural purpose, linked to the setting of the CA. There is no reason to distinguish them from Finches on this ground.

33. Finally, we note that (although this is not the reason why all of them were listed) it is common ground that Souches, Finches, Hunter's Cottage and Bounty Cottage have group value. In the Council's submission, it is difficult to understand how harm to one part of that group cannot affect the whole.

34. In the circumstances, we invite you to conclude that all five of these properties would be adversely affected. The magnitude of the effect is a matter which, again, is best assessed on site, but all of the arguments we have set out (above) in relation to the Conservation Area apply to these four listed buildings.

[24] TC main proof paras 6.41 (Hunter's); 6.54 (Bounty, confirmed in x-exam that the reference to "post-medieval worker" was to an agricultural worker); 6.74 (Souches)

Listed Buildings: Inholmes Cottage

35. Inholmes Cottage is in a slightly different category, as it sits on its own to the north of the Conservation Area. However, although it was overlooked in the Appellant's Heritage Statement[25] TC now accepts that the Appeal Site forms part of its setting. In particular:

    a. The northern field, and the point at which access will be taken into the Appeal Site, are visible from the listed building and its curtilage;

    b. The Appeal Site is part of the kinetic experience as one approaches Inholmes Cottage on Henfield Road.

36. In this context, the Inspector will see that much of the historic rural setting of Inholmes Cottage has been eroded – as TC himself observes,[26] the Appeal Site is one of the surviving "remnants of its rural setting". In the Council's submission, that makes its contribution to the significance of Inholmes Cottage particularly important: the Appeal Site is the most important surviving reminder of its originally rural backdrop, located (as it originally was) on the edge of a tiny settlement, with open fields to three sides. The loss of that rural character would be harmful to the manner in which the original context of Inholmes Cottage can continue to be appreciated.

Conclusions on heritage harm

37. In the circumstances, the Council contends that – in addition to the harm to the CA and Finches, which the Appellant accepts

    a. the harm to Finches and the CA is greater than that assessed by the Appellant;

    b. there is also harm to Souches, Hunters Cottage, Bounty Cottage, Spring Cottage and Inholmes Cottage;

    all of which adds to the conflict with Policies DP34 and DP35 of the District Plan.

[25] CD A.17, p. 14
[26] TC main proof para 6.100

E. Conclusions on Accordance with the Development Plan

38. It is common ground that the Appeal Scheme is contrary to the development plan as a whole, simply by virtue of the conflict with the spatial element of policies DP6, DP12 and DP15, and the conflict with Policies DP34 and DP35 which arises as a result of harm to Finches and the Albourne Conservation Area. However, for the reasons outlined above, the conflict goes further than that: it extends to material harm to the character and appearance of the rural landscape, contrary to Policy DP12, and additional conflict with DP34 arising out of the harm to Souches, Bounty Cottage, Hunter's Cottage, Spring Cottage and Inholmes Cottage.

OTHER MATERIAL CONSIDERATIONS: IS THE PLAN UP TO DATE?

39. At this Inquiry, the Appellant's principal[27] "other material consideration" flows from the fact that, although it was less than 5 years old (and therefore still "up to date") when the Council refused permission on 25 November 2022, the District Plan has now passed its 5th birthday, with the consequence that para 74 of the NPPF requires the Council's housing requirement to be determined by reference to the standard methodology, rather than by reference to Policy DP4. As a consequence, SB argues that the policies which are "most important for determining the application" are out of date, with the result (so it is said) that the "tilted balance" under para 11 of the NPPF is engaged.

40. The argument that the most important policies are out of date is put in a number of different ways. In our submission, each of these arguments is flawed. We take them in turn.

A. 5YHLS (Inspector's Main Issue 3)

41. Under fn8 of the NPPF, the requirement that the "policies which are most important for determining the application" is deemed to be met if the Council is unable to demonstrate a 5 years supply of deliverable sites. On the basis of AR's evidence, the

[27] SB x-exam

Council believes it can demonstrate a supply of 5.04 years, with the result that that fn8 is not engaged. In contrast, SB contends that the supply is only 4.3 years.

42. Before turning to the detail of the sites which are in dispute, it is helpful to begin with a summary of the relevant principles:

    a. Although, in his evidence in chief, SB referred to the fact that 5YHLS calculations are rarely exact, and that 47 dwellings was only 0.8% of the requirement, in x-exam he accepted that the question posed by para 11 is binary, and requires the decision-maker to come to a decision one way or the other, however artificial the precision in that answer may be.

    b. The relevant definition of "deliverable" is that set out in Annex 2 of the NPPF. This divides sites in to two categories: so-called "Category A" sites which should be considered deliverable unless there is clear evidence that homes will not be delivered within 5 years; and "Category B" sites, which should only be considered deliverable where there is clear evidence that housing completions will begin on site within 5 years.

    c. Further detail on the meaning of deliverable is found in the PPG, which refers to the need for "robust, up to date evidence".

    d. There is no definition of what constitutes "clear evidence". The requirement to demonstrate a realistic prospect of deliverability does not mean that a site's delivery must be certain or probable,[28] nor is the test whether it is "highly likely".[29]

    e. There is no requirement that the "clear evidence" takes the form of a SoCG between the Council and a site promoter. In principle, there is no fundamental difference between this and less formal methods of gathering information.

[28] See the SoS's decision on the Woburn Sands appeal (CDI.1) cited by AR main proof at 3.6.2-3.6.4
[29] See the Williamsfield Road appeal (CD I.2) cited by AR, main proof at para 3.6.5; the Queensberry Lodge appeal (ID6) para 124

Where there are no responses from a site promoter, it is acceptable to rely on the judgment and expertise of officers to assess the likelihood of delivery.[30]

f. Although it is not appropriate to use more recent information to include additional sites that may have come to light after the base date of an assessment, it is permissible to use subsequent information which supports or confirms the inclusion of a site which is already in the supply.[31]

43. Against this backdrop, we turn to the sites which are in dispute.

Land West of Freeks Lane, Burgess Hill – ref 969

44. This is a Category A site with reserved matters permission for 460 dwellings. This site was the first of the Northern Arc sites to be progressed and has already delivered 50 units. The developer (Vistry) is contractually obliged by Homes England to deliver an average of 8 dwellings per month, or 96 d.p.a.. Delivery of the remaining 410 units would only require 82 d.p.a., which is comfortably less than that contractual requirement. As AR explained at the 5YHLS roundtable session, these contractual obligations (like those placed on other housebuilders on the sites discussed below) create a substantial financial and reputational incentive for delivery targets to be met. In short, Homes England have the ability to require build programmes to be accelerated, with the most sever consequential action for failure to comply being that a housebuilder's build lease is terminated and the site is transferred to another developer.

45. Whilst AR acknowledged that there have been delays in the delivery of the Eastern Bridge and Link Road, there has been significant progress on this infrastructure: the majority of the road has been completed up to binder level, the bridge structure is complete, as are the majority of the drainage works, with the result that the bridge and link road are due to be completed by Autumn 2023, with the junction onto Isaacs Lane by early 2024.

[30] Ibid, cited by AR main proof at 3.6.7
[31] Woburn Sands, cited by AR main proof 3.6.8-3.6.9

46. The housing trajectory for Oakhurst indicates that 199 dwellings are due to be completed in November 2024. Given the significant period between the anticipated completion of the Eastern Bridge and Link Road and the anticipated completion of 199 dwellings at Oakhurst, there is no reason why the past delays in delivery of this infrastructure will impact on build rates.

47. Although SB accepts that the site is deliverable, he argues that delivery will not exceed 50 d.p.a.. However, as this is a Category A site, the burden is on the Appellant to produce clear evidence that the 410 will not be achieved. In the Council's submission, SB's arguments do not come close to that. The remaining 410 dwellings should all be included in the 5YHLS.

Brookleigh, phases 1.5 and 1.6

48. This site has reserved matters permission for a total 249 dwellings. As a Category A site, the starting point is that it should be considered deliverable unless the Appellant can show clear evidence to the contrary.

49. Whilst there have been some delays to the commencement of development, the site is subject to the same contractual obligations as Freeks Lane, with a requirement of 6 dwellings per month or 72 d.p.a.. Progress is being monitored by Homes England, who remain confident that the delays to date will not impact on overall delivery.

50. SB suggests that there are a number of pre-commencement conditions which have not been met, but as AR explained, that is not correct. Discharge of conditions 6, 7 and 8 is not needed for this parcel to meet deliver targets. The Council has received applications in relation to conditions 10, 11, 13, 14 and 22. The only condition for which it has not received a discharge application is condition 5. The Council is confident that these decisions will be issued at the end of August: as AR explained, they have a committed resource of 1.5 FTE Planning Officers dealing specifically to this site and the others within the Northern Arc.

51. The difference between SB and AR is only 24 dwellings. Although a build-out rate of 120 d.p.a. is high, as SB accepted it would only take Bellway Homes an uplift of 15%

over their average rate of delivery on all sites to achieve this. Moreover, this would lead to the site being completed by March 2026, so there would be an additional 2 years beyond the Council's estimate before the end of the 5 year period. This is more than enough time for any slack to be caught up, even if the HE contractual requirements are not enforced.

52. Accordingly, all 249 units should be included.

Linden House, Southdowns Park – ref 1113

53. This is a Category B site, with outline planning permission for a 14 unit apartment block granted in 2021. SB argues that, in the absence of any further evidence relating to submission of reserved matters, there is no evidence to include it in the 5YHLS. However, the reason why the developer has not progressed the 2021 permission is because it has since made a revised application for 17 flats. That application is being progressed, and is no longer subject to the need for a viability appraisal, as the applicant has agreed to pay the commuted sum. An extension of time for determination has been agreed up to 8 September 2023. Consultation responses on the application from the council's heritage and urban design teams do not suggest impacts which are materially different to those which were predicted for the approved scheme.

54. This is a brownfield site which is being actively progressed by the developer. As a flatted scheme, the entire development is likely to be delivered in one go. If permission is granted, the Council's next 5YHLS position statement will include all 17 units. It is entirely reasonable to include 14 at this stage.

Northern Arc at Burgess Hill

55. This is a large, strategic site which has outline permission for comprehensive mixed use, including 3040 dwellings. The site is owned by Homes England, and will be marketed as 5 distinct outlets, each of which will be the subject of delivery agreements similar to those in place at Freeks Lane and Brookleigh. Two of the development partners have already been selected, and are at an advanced pre-application stage, with reserved matters applications expected later this year. The quantum of development in each phase varies, from 34 dwellings in Phase 1d(b) to

259 dwellings in Phase 1c, with the sites being spread across the Arc, as shown in the SoCG between the Council and Homes England.[32]

56. On behalf of the Appellant, SB accepts that the site is deliverable, with initial delivery from September 2025, but challenges the delivery rates. However, both the SADPD Inspector and the Bolney Inspector have agreed with the Council's previous estimates, and reliance on Homes England's contractual mechanisms to deliver this flagship site.

57. The Council's current estimates for delivery are well within the parameters of the research by Lichfields, which shows that suitable sites can peak at between 400 and 600 d.p.a. Figures 11 and 12 of the Lichfields report show that greenfield sites build out at a higher rate, especially when they are in less affordable places (such as Mid Sussex). Figure 13 of the Lichfields report has only one data point for sites with 6 outlets, but for those with 4 or 5 outlets, it shows delivery of in excess of 300 dwellings d.p.a..

58. In the circumstances, it is entirely reasonable to conclude that the Northern Arc can deliver 752 units in the next 5 years.

<u>Selsfield Road – ref 832</u>

59. This site has outline permission for 35 dwellings. Although a Category B site, it is controlled by a developer which is a known housebuilder operating in the South of England) with clear intentions to develop the site for residential use. In particular, there has been clear progress in promoting of the site for allocation through to obtaining outline permission.

60. As AR explained, Mid-Sussex uses baseline evidence base of lead in times, build out rates and housing market conditions to understand the housing market and how sites would usually perform in their area. Typically, for a site of this size, the Council would expect a period of 2.4 years from receipt of an outline application to construction, with a build out rate of c. 30 d.p.a.. There is, consequently, ample time for submission of a reserved matters application and, at a relatively modest 35

[32] AR Main Proof, Appendix 1

dwellings, no reason why this site should not be completed comfortably within 5 years.

Hurst Farm ref 246

61. This site is allocated for residential development in the Haywards Heath Neighbourhood Plan, and is now the subject of a resolution to grant permission for up to 375 homes.[33] The Council considers that 215 of these can be delivered in the next 5 years. SB now accepts that the site is deliverable, but argues that the allowance should be reduced to 100 dwellings.

62. The Council's evidence for the higher figure is contained in the SoCG with Homes England[34] which sets out the anticipated timescales. Once again, delivery will be backed up by the contractual mechanisms imposed by Homes England on the sale of the site to developers. As the SoCG records, Homes England is confident that these delivery rates can be achieved.

63. In the Council's submission, this is more than enough to justify the inclusion of 215 units in the 5YHLS.

Firlands, Church Road and Hanlye Lane, Cuckfield

64. It is now common ground that the 75 dwellings from these two sites should be included in the 5YHLS.[35]

Land South and West of Imberhorne Upper School

65. This site is allocated in the SADPD for 550 dwellings. It is in the control of a developer, and the Council is currently expecting a hybrid application to be submitted in September this year, under which full permission will be sought for primary infrastructure, to enable a start on these elements whilst reserved matters approval is

[33] ID7
[34] AR Appendix 2
[35] ID10

sought for the housing. On this basis, Vistry anticipate that construction of the residential phases will commence in mid-2025, with completion of the scheme in 2031.[36]

66. The Council is only relying on the Imberhorne site for 75 dwellings. That is entirely achievable within the timescale which Vistry has proposed.

The remaining sites: Southway, Woodfield House, Hammerwood Road, the Old Police House

67. The arguments in relation to these sites are all the same, and it is therefore possible to deal with them together. In short, these are all sites which have been allocated in the SADPD for relatively modest numbers. The SADPD Inspector was satisfied that Southway, Woodfield House and the Old Police House could all be delivered within 5 years, and there has been no change in circumstances to disturb that conclusion.

68. Progress has been made since the SADPD examination towards the delivery of these sites. In the case of Woodfield House, there is a SoCG with Homes England, which explains that Bellway are in the midst of pre-application discussions with the Council, and will be contracted to deliver once permission has been obtained. This site is conjoined to Brookleigh phases 1.5 and 1.6, also controlled by Homes England, with Bellway as the house builder. SB accepts that phases 1.5 and 1.6 are deliverable. The owners of Hammerwood have identified a housebuilder. The Old Police House is in the control of a regional housebuilder, who has requested for a pre-application.

69. Given the size of these sites, and the way in which such sites usually perform in Mid-Sussex,[37] there is no reason why they should not be developed within the 5 year period, even if completion does not occur until towards the back end of that period. The Council has set out the clear evidence to demonstrate there is a reasonable prospect that housing will be delivered on these sites within five years.

[36] ID14
[37] See para 60 above

Conclusions on 5YHLS

70. For all these reasons, we invite the Inspector to agree with AR that the Council can demonstrate a supply of 5.04 years, and that the "tilted balance" is therefore not engaged by fn8 of the NPPF.

B. DP4 is out of date

71. Having regard to para 74 of the NPPF, it is common ground that DP4 itself is out of date. However, that is not enough - on its own - to engage the tilted balance under para 11 of the NPPF. In particular:

    a. As para 11 makes clear, it is only engaged when "the most important policies for the determination of [this] application" are out of date.

    b. DP4 was not cited in the Council's reasons for refusal. The reasons for this are obvious: as SB accepts, it is not a development control policy.

    c. In the circumstances, it is self-evident that it is not one of the most important policies for the determination of this application.

    d. This conclusion is fully supported by the only two previous inspectors who have considered this point: both the Bolney and Hazelden Inspectors found that DP4 was not one of the most important policies.[38]

    e. While those decisions are not binding, one of the key expectations of the planning system is that decision-making should be consistent. The reasons given by the Bolney and Hazelden Inspectors are directly applicable in the present case, i.e. these decisions are not distinguishable on the particular facts. Consequently, those decisions should only be departed from if there is some good reason for doing so. Although SB recognises that his position is at odds with them, he provides no cogent explanation of why they were wrong.

[38] See CD I.5 para 136; CD I.20 para 15

72. Consequently, the fact that Policy DP4 is no longer up to date is an argument that – on its own - goes nowhere. Nor does either (i) the fact that the policies which are the most important for determining the application were prepared against the backdrop of (and, to that extent, "predicated" upon[39]) that out-of-date requirement or (ii) the fact that settlement boundaries operate as a "constraint" to development[40] tell you anything about the extent to which those policies are still capable of delivering the housing which is needed to meet the updated needs. Rather – as SB himself recognises[41] – the real question is whether "boundaries are required to be breached" in order to meet an up-to-date assessment of need. If not, then there is no reason why those policies should be considered out of date, simply because some other policy in the plan sets an out-of-date requirement: even on the updated requirement, the plan-led system remains capable of leading the way.

73. The relevance of this to the present case is that the difference between the requirement under Policy DP4, and that calculated by reference to the standard methodology, is limited to a single year (2023/24) and amounts to 214 units. However, the 2022 SADPD allocated sites for 907 houses more than the DP4 requirement,[42] which[43] is more than enough to absorb the difference between DP4 and what para 74 of the NPPF now requires.

74. It is this point which provides the answer to SB's reliance on ***Suffolk Coastal***[44] where Lord Carnwath upheld an Inspector's conclusion that restrictive policies were out of date "to the extent that they derived from 'settlement boundaries that in turn reflect out-of-date housing requirements'".[45] By allocating over sites for 907 homes more than was required, the SADPD went well beyond simply "reflecting" the housing requirements in DP4, and created a pool of sites which could address an even greater need. There is, therefore, no basis for concluding that the development plan does not make adequate provision for housing needs throughout the remainder of the plan

[39] See SB main proof para 1.28
[40] See SB main proof paras 4.14, 7.20
[41] See SB main proof paras 4.14, 7.20
[42] Policy SA10, CD E.2 p. 36
[43] as long those allocations come forward so as to keep the 5YHLS topped up. However, if that were not the case, the tilted balance would be engaged in any event by virtue of fn8, and SB's arguments about DP4 would be superfluous. This discussion takes place on the assumption that the Council can demonstrate a 5YHLS, and the question is whether the tilted balance is engaged despite that fact.
[44] IDH.2
[45] Para 63

period, even with the updated requirement. In simple terms, the plan-led system is still capable of leading the way.

75. In his evidence in chief, SB sought to rebut this by reference to the recent indication from Crawley that it is likely to have an unmet need for some 7050 dwellings, for which it is likely to seek help from Mid-Sussex and Horsham.[46] In particular, he argues that this provides an independent basis, over and above the arguments about 5YHLS, on which to impugn the "up to date-ness" of the Mid-Sussex plan.

76. In the Council's submission, that argument is obviously nonsense. The only reason why the development plan is to be regarded as "out of date" is because para 74 tells us so. If it were not for para 74 (which crystallises the date at which a development plan requirement becomes out of date at 5 years) there would be no reason to challenge DP4 at all.[47] It is therefore telling that para 74 not only tells us when a plan requirement becomes out of date: it tells us what needs to be done in an "up to date" world. And what it says is that one should apply the standard methodology.

77. In those circumstances, there is simply no basis within the NPPF for SB's argument that – whether one does this as part of the 5YHLS calculation or as a new and freestanding basis for arguing that a plan is out of date - one should also add in the possible (but as yet unquantified) needs of adjoining authorities under the duty to co-operate. If para 74 had intended either of those things, it would have said so. The reasons why it did not is obvious:

    a. The mere fact that an adjoining LPA has unmet needs tells you nothing about the extent to which that unmet need will become part of the requirement for Mid-Sussex. That is a matter which can only be determined through the duty to co-operate discussions, and the local plan processes which follow. Until we have been through that process, there is simply no way of knowing how much (if any) of Crawley's needs should be added to the Mid-Sussex requirement.

[46] See ID11 para 12.39

[47] Alternatively, if it could be challenged, there is no reason why that challenge could not come in at any point between adoption of the plan and the five year period – which would completely undermine the point behind a "plan led system"

b. It would be utterly pointless for para 74 to require the 5YHLS to be calculated by reference to the standard methodology if a development plan requirement would be out of date in any event, simply because there had been no reassessment of the needs of adjoining authorities for more than 5 years. All it would have needed to say was that, if the development plan requirement is more than 5 years old, the tilted balance is engaged. But that is not what it does.

C. The Council's 5YHLS includes sites which were beyond the BUAB when permitted

78. In the Appellant's Statement of Case[48] it was argued that the most important policies of the current development plan were out of date because the Council's housing land supply is reliant on sites which – at the time when permission was granted – were outside the settlement boundaries. The permissions then referred to were all granted, on appeal, between 2017 and 2018, before either the District Plan or the SADPD were adopted. However, although this argument was reiterated in SB's proof of evidence[49], in x-exam he withdrew it completely, and indicated that his point now focuses exclusively on the more recent Hazelden appeal decision.[50]

79. In the Council's submission, the reasons for this volte face are obvious and correct. As M-JO points out, it is frequently the case that local planning authorities producing a new local plan will have a housing land supply which includes sites which – at the time when permission was granted – were beyond the settlement boundary, and where those sites will remain part of the 5YHLS post adoption of the new plan. If that historic legacy was enough to render a plan out of date, it would be impossible for the LPA ever to adopt an up-to date plan until it had completely flushed those sites through its system. That is obvious nonsense. Once a plan has "caught up", and has amended its boundaries to include those sites, it should be regarded as up to date. In relation to the pre-District Plan permissions, SB now recognises[51] that the development plan for Mid-Sussex has caught up.

[48] CD C.1, paras 4.128-4.139
[49] Paras 4.31-4.37
[50] CD I.20
[51] SB x-exam

80. Consequently, it is now only the 2020 Hazelden decision on which SB relies in order to maintain this argument. The difficulty with this is threefold:

    a. The Hazelden permission was not granted on the basis that the development plan was out of date: the Inspector specifically and expressly concluded that it was not. Rather, permission was granted on a straightforward application of the "other material considerations" test under s. 38(6). In the Council's submission, it would be bizarre if a permission which had entered the 5YHLS in that way became a reason for arguing that the plan was out of date.

    b. More importantly, even if the Hazelden permission is now essential to the Council's 5YHLS, that tells you nothing about whether <u>further</u> breaches of the settlement boundary are likely to be needed in order to maintain that supply. This matters, because that, ultimately, is what the NPPF is concerned with: is the development plan capable of leading the way, from this point on? If it is, then there is simply no justification for continuing to breach settlement boundaries, simply because one earlier permission has done this for reason unrelated to the 5YHLS issue.

    c. In this regard, it will be noted that the Hazelden permission <u>predates</u> adoption of the SADPD by two years. The SADPD redrew the BUAB to take into account additional allocations. SB accepts that the similar exercise carried out by the District Plan in 2018 was sufficient to allow that plan to "catch up" on permissions granted prior to that date, but fails to explain why the same logic does not apply to the 2022 SADPD.

D. The Emerging Local Plan

81. SB's third, alternative way of arguing that the most important policies of the development plan are out of date is by reference to the Reg 18 draft of the emerging local plan. In particular, he points to the fact that the Reg 18 draft indicates a need to

allocate additional sites. He suggests that this demonstrates that the existing local plan boundaries are out of date.[52]

82. In the Council's submission, this is patent nonsense. The existing District Plan and SADPD are intended to cater to needs to 2031. The new local plan will run to 2039. It is obvious that, in order to address the needs for an additional 8 years, there will be a need to make new allocations and amend the BUAB accordingly. That tells you nothing about whether the existing boundaries are adequate for the needs up to 2031.

83. This position might be different if the new allocations proposed in the emerging local plan were more than was required for the additional 8 years, but they are not: the Reg 18 draft proposes a requirement of 1,119 dpa, but identifies a need for only an additional 8,169 homes over and above those expected from the existing District Plan and SADPD allocations. In other words, having extended the plan period by 8 years, it requires only an additional 7.3 years[53] of supply. In other words, the current plan is already providing 0.7 years (or 783 dwellings) more than is necessary in order to meet the District's needs to 2031. Once again, this clearly demonstrates that it is not "out of date", even when assessed against an "up to date" requirement derived from the standard methodology.

F. Alleged inconsistency with the NPPF

84. The final way in which SB argues that the most important policies are out of date is by reference to their alleged "inconsistency" with the NPPF.

85. In this regard, as MJ-O readily acknowledged, the words used in policies such as DP12, DP34 and DP35 do not exactly track those which are found in the NPPF. That is hardly surprising, given that the development plan is expected to be the local expression of national policy. However, that does not mean it is inconsistent with the NPPF, and SB's argument to the contrary flies in the face of the views of three previous Inspectors who have considered the issue.

[52] SB main proof para 7.26
[53] 8,169 ÷ 1,119

86. Of these, the most important is the Inspector who examined the District Plan. Although some of the advice in the NPPF has changed since 2018, the NPPF was very much in existence at that date, and one of the tests of soundness against which the District Plan will have been assessed was the extent to which it was consistent with the NPPF as it then stood. In recommending that the District Plan be adopted, the Inspector will necessarily have concluded that policies such as DP12, DP34 and DP35 were consistent.

87. Critically, SB does not identify any relevant change to the NPPF which post-dates the adoption of the District Plan which might alter that assessment.

88. This is important, because it would have been open to anyone wishing to argue that these policies were inconsistent to raise that point at the local plan examination and – if they were still dissatisfied with the Inspector's conclusion – to challenge the subsequent adoption of the District Plan in the Courts. Self-evidently, that did not happen, with the result that the Plan was adopted on that basis. The Council respectfully suggests that it is not the role of any subsequent s. 78 appeal to challenge that decision. If challenges of that kind were permissible, it would undermine the whole point behind the plan-led system. The District Plan was found to be consistent with the NPPF at that time, there has been no material change in circumstance since that time.

89. In the present case, this conclusion is all the more compelling, because both the Bolney and Hazelden Inspectors also concluded that Policy DP12 was up to date,[54] and the Hazelden Inspector confirmed that the same is true of Policies DP34 and DP35.[55] Although Mr Boyle argues that this may be because he was not at those inquiries, both appellants were represented by counsel with extensive experience of housing inquiries,[56] and in the case of Policy DP12, it is clear from the Hazelden Inspector's reasoning that she was asked to consider precisely the same arguments as those now raised by Mr Boyle.

[54] CD I.5 para 137; CD I.20 para 23 (see also para 22 with regard to DP6, and para 24 with regard to ALC1)
[55] CD I.20 para 18
[56] Sasha White (now KC) and Christopher Young QC (now KC)

90. In the circumstances, Policies DP6, DP12, DP34, DP35 and ALC1 are not out of date, and should be given the full weight afforded to them by s. 38(6).

OTHER MATERIAL CONSIDERATIONS: THE BENEFITS OF THE SCHEME

91. As SB made clear, even if the most important policies of the development plan are not out of date, he maintains that there are still other material considerations – namely the benefits of the scheme – which justify the grant of planning permission. These submissions deal with the actual planning balance below: at this stage we simply set out the Council's position on some[57] of the alleged benefits on which reliance is placed.

Contribution to Meeting Need for Market and Affordable Housing

92. The NPPF makes it clear that it is national policy to boost the supply of housing and – in that regard – that housing requirements should be treated as a floor, rather than a ceiling. In those circumstances, the Council does not dispute that – whether we are in the "straight balance" or the "tilted balance" – the contribution the Appeal Scheme would make in these two respects is a matter to which more than limited weight should be given. However, in our submission:

    a. It is self-evident that the weight to be given to a benefit should be related to the extent to which it meets an identified need. In this regard, whatever label one attaches to the degree of weight at either stage, M-JO is clearly right to conclude that the contribution the Appeal Site would make to meeting housing needs should be greater in circumstances where the Council cannot demonstrate a 5YHLS than in those where it can. Indeed, if this were not the case, it would be difficult to understand the rationale for fn8. SB's rejection of this conclusion is impossible to reconcile with the emphasis which he himself places on need.

[57] For those not specifically dealt with in these submissions, the Council relies on M-JO's proof of evidence

b. If the tilted balance is not engaged (i.e. if the Council has a 5YHLS and the plan is otherwise up to date) the benefits associated with the provision of market and affordable housing, on their own, cannot logically be sufficient to outweigh the conflict with the development plan. If that were the case, there would cease to be any point in having a plan-led system for the delivery of housing.

The Community Shop

93. From SB's evidence, it appears that the genesis behind the Appellant's offer to provide a new community building, to include a shop, is the indication in the neighbourhood plan that the village was lacking a shop. However:

a. Part and parcel of the Appellant's arguments on sustainability is the fact that the Appeal Site has ready access by bus to the range of shops at Hurstpierpoint. As the Inquiry has heard from Ms Rottcher, these are even with walking distance for some residents.

b. In addition, there is already a community shop at Sayers Common, which is even closer.

c. The Neighbourhood Plan aspiration for a shop in Albourne is already being met by the proposed extra care development at the former Hazelden Nurseries site.

d. Although SB criticises the 28.4 sq.m. proposal at Hazelden Nurseries and compares it to the minimum 75 sq.m. which the Appeal Scheme s.106 would secure, this fails to recognise that the shop at Hazelden Nurseries is simply one of a number of facilities which will be available on the ground floor of that development. There is, moreover, no analysis of why a 75 sq.m. store is needed, or whether (in circumstances where there is already one community store in the area) a second would be viable.

e. In the absence of an identified purchaser for the community building, there is no certainty that the shop will be provided at all: the default provision under

the s.106 is that the building will be transferred to the Management Company, which then comes under an obligation to operate at least 75 sq.m. of it as a shop, but there is nothing to compel the Management Company to accept a transfer on those terms.

94. In the circumstances, the community shop is a matter on which only limited weight should be placed.

Land for the Expansion of the School

95. The Council's position on the expansion land is taken largely from the County Council's Statement of Case.

96. It is a matter of record that the Neighbourhood Plan supports the possibility of expanding the Albourne Primary School, and that the school itself would welcome the offer of additional land. However, the mere fact that something is seen by a sector of the community as a "benefit" is not a reason for giving it weight. In particular, under reg 122 of the CIL Regulations, matters contained in a s.106 obligation can only be relied on in support of the grant of permission if they are necessary in order to make the development acceptable.

97. In the present case, the primary school has capacity for 210 pupils, but currently has only 177 on its role. As the anticipated "yield" from the Appeal Scheme is only 27, it is obvious that the existing capacity of the school could not properly constitute a reason for refusal. If and to the extent that the Appeal Scheme is required to contribute to expansion required in order to address a wider growth in pupil numbers across the district as a whole, that requirement is met through the financial contribution. In those circumstances, it is the Council's view that it is simply not possible to attach weight to this offer.

The Car-Park/School Drop-Off

98. Again, it is a matter of record that the parish has been seeking a solution to problems of congestion associated with parents dropping off at and collecting from the school.

However, in a world where the Appeal Site is within walking distance of the school, and there is no highways reason for refusal, the connection between the drop-off area and the Appeal Scheme is tenuous at best. Once again, it is a matter on which only limited weight should be placed.

The Woodland School Land

99. The Unilateral Undertaking circulated last night also introduces the concept of an area, referred to as the Woodland School Land, which is to be located to the south of FP15 and transferred to the County Council and/or the primary School for school use. This is a feature which has not be presaged in SB's planning evidence, nor has there been any assessment of the landscape implications of locating an area which (as the Appellant's solicitor confirmed) is expected to be fenced off for the exclusive use of the school at the gateway between the existing village and the new public open space of which so much has been made. The need for this has not been explained at all – at best it appears to have been something which was on the school trust's "wish list". In the Council's submission, no weight should be given to this at all.

THE PLANNING BALANCE

A. If the plan is up to date: the straight balance

100. If the Inspector agrees that the Council can demonstrate a 5YHLS, and that the development plan is otherwise up to date, then in the Council's submission, the planning balance is a relatively straightforward exercise:

a. Section 38(6) advises that the application should be determined in accordance with the development plan unless there are other material considerations;

b. One of the most important "other material considerations" is the NPPF, para 12 of which states applications which conflict with an up-to-date development plan should not usually be granted. Far from indicating "otherwise", para 12 supports the s.38(6) presumption;

c. For the reasons we have outlined above, the contribution which the Appeal Scheme would make to meeting market and affordable housing needs cannot logically be sufficient, on its own, to justify departure from an up to date local plan.

d. Whilst the Appeal Scheme would deliver some other benefits, those are insufficient to outweigh the conflict with the development plan, the harm to heritage assets and the harm to the landscape.

B. If the plan is not up to date: the "tilted" balance

101. If, contrary to the submissions above, the Inspector concludes that the most important policies for determining this application are not up to date, the position becomes more complicated, and it is necessary to follow the sequence of questions posed by para 11(d) of the NPPF. In so doing, it is also necessary to have regard to the judgment in ***Hallam Land Management***.

NPPF Para 11(d)(i)

102. Under para 11(d)(i), the "tilted balance" will be disapplied if the application of certain policies – which include those relating to heritage assets - provides a "clear reason" for refusing the development proposed. In the present case, since it is agreed that there will be at least some harm to heritage assets, it is common ground that para 11(d)(i) is engaged, and accordingly that it is necessary to "go off" to para 202 of the NPPF, and to weigh that harm against the public benefits of the proposal.

103. Self-evidently, the answer to the para 202 question will depend on the nature and extent of the harm which is caused, and the weight which the decision maker ascribes to the benefits. Those are matters on which we have already set out our position. We simply pause to note that it is common ground[58] that the answer is not to be derived by asking the para 202 question in relation to each of the heritage assets in

[58] SB x-exam

isolation, but by reference to the cumulative harm to them all. In that context, if you agree with EW's evidence that the harm is not simply to the Conservation Area and Finches, but to five other listed buildings as well, we submit the case is clear. At the risk of mangling Lady Bracknell's second most quoted observation, while causing harm to one heritage asset might be regarded as unfortunate, causing harm to seven looks like a clear reason for refusal.

NPPF Para 11(d)(ii)

104. Even if the heritage harm is not enough on its own to disapply the tilted balance under para 11(d)(i), it is not the only harm which will be caused. Consequently, para 11(d)(ii) is engaged, and it is necessary to ask whether the adverse effects of granting permission would significantly and demonstrably outweigh the benefits. In the present case, the Council's answer to that question is unequivocally "yes".

105. Applying the judgment in ***Hallam Land*** , there are two parts to this equation. The first is the harm. In that regard, it is common ground that you should consider the harm which arises simply by reason of the conflict with the development plan, together with the harm to landscape and the cumulative harm to heritage assets.

106. The second is the weight to be attached to the reasons why the development plan is considered out of date. In this regard (and ass we observed in opening) the binary test posed by fn8 of the NPPF is a crude tool for assessing the extent to which it is genuinely necessary to set aside the development plan. As ***Hallam Land Management*** makes clear, in approaching the overall planning balance, the decision-maker's analysis needs be a little more sophisticated, and to place the simplistic "yes/no" answer to fn8 in context. This will include consideration of the extent of the shortfall, the implications of that for delivery, and the steps which the Council is taking to address the situation.

107. In this context, even if it is concluded that the Council cannot demonstrate a 5YHLS, there are in our submission a number of factors which materially reduce the significance of that:

a. Unlike the situation in many of the appeal decisions referred to by the Appellant, this is not a case where the Council has a poor track record of persistent under-delivery. This is the first major housing development appeal the Council has faced since adoption of the MSDP in 2018. In that time, there has not been a single appeal decision granting permission outside the settlement boundaries on the basis that the Council does not have a 5YHLS or that the plan is out of date. In other words, should the Inspector conclude that the Council does not have a 5YHLS, that will be the first time that this has been the case since 2018.

b. As AR's evidence demonstrates[59], Mid-Sussex has an admirable record when it comes to delivery. In the period since 2014/15, it has delivered a total of 8,723 dwellings, against a requirement of 7,884. Within that period, the highest rates have been achieved, consistently, since 2019. In the most recent Housing Delivery Test, the Council recorded 124%. Although the latest HDT has still to be published, AR's evidence[60] (which has not been contested) is that delivery since the last results has, if anything, increased still further. Indeed, one of the ironies of this case is that, if the Council cannot demonstrate a 5YHLS, that will in part be a consequence of that past over-delivery.

c. This point needs to be set against Mr Stephen Brown's concerns that some of the strategic sites which formed part of the 5YHLS relied upon by the SADPD Inspector have not come forward as quickly as was originally intended: in those circumstances, it is all the more notable that Mid-Sussex has <u>still</u> managed to over deliver. This is important, because 5YHLS is not an end in itself – it is simply a means to the end of ensuring delivery. While past delivery is not a guarantee of what will happen in future, it does mean that, if delivery should fall for a year or two, the Council should still be on target overall.

[59] Main proof, paras 7.3.1-7.3.12
[60] AR main proof paras 4.5.4-4.5.6

d. Although Mid-Sussex did not review the housing requirement set out in Policy DP4 when the SADPD was brought forward, the SADPD allocated sites for over 900 houses more than were required at the time. This is more than enough to make up for any increase resulting from the transition to the standard methodology. There is, therefore, a plentiful "pipeline" of sites which can be expected to come on stream;

e. There is clear evidence that the "pipeline" is already supplying such sites. As ID3, 4, 5 and 7 demonstrate, the Council has continued (and is continuing) to grant significant permissions on allocated sites. In particular, within a single month the Council has granted detailed permission for 290 new dwellings, and resolved to grant permission for 464 more. Not all of these sites are new to the 5YHLS: some will enable sites which are already included to progress to completions, others will enable sites which were not previously included to become part of the 5YHLS (see for example the resolution on Hurst Farm, which led to Mr Stephen Brown agreeing[61] that an additional 100 units should be added to the 5YHLS), while the remainder will start queueing up outline permissions which will feed into the 5YHLS in due course, as reserved matters are applied for. However, this is clear evidence that the pipeline of allocated sites is continuing to deliver.

f. Mid-Sussex is patently not an authority which is fighting shy of the plan-led system. As the adoption of its District Plan in 2018, followed by adoption of the SADPD and the publication of the regulation 18 draft of its new local plan in 2022 demonstrates, this is an authority which has embraced the need to keep its plan up to date and is working hard to do exactly that. As M-JO has explained, the Council is on track to publish the Reg 19 draft later this year, with a view to examination in public in 2024. Mr Stephen Brown fairly recognises that the Council's progress in this regard is "commendable".

108. In summary, if there is a shortfall in the 5YHLS, there is no reason to consider that this is likely to be anything more than a short-term blip, or that it is likely to

[61] ID10

prevent the Council from delivering the number of houses required, even while the shortfall subsists.

109. When all these matters are placed into the mix, it is the Council's clear view that – even on the tilted balance - the adverse impacts of granting permission significantly and demonstrably outweigh the benefits. Consequently, reverting to the overarching statutory framework, there are no "other material considerations" which justify setting aside the s. 38(6) presumption in favour of the development plan.

110. It is on this basis that we ask you to dismiss this appeal, and refuse permission.

PAUL BROWN K.C.

22August 2023

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