MIRRLEES FIELDS, MAN ENERGY SOLUTIONS UK LTD, STOCKPORT

CLOSING SUBMISSION OF THE APPELLANT

INTRODUCTION

1. The context for this appeal is the national imperative to boost significantly the supply of housing (NPPF 60). There is a recognition from Central Government that the planning system has simply failed to deliver sufficient homes for a protracted period of time and this can no longer be tolerated. The housing crisis, exacerbated by soaring build costs, inflation, repeated rises in interest rates and the cost of living (a daily news story), has been expressed most recently in the White Papers *Fixing Our Broken Housing Market* (2017) and *Planning for the Future* (2020).

2. This is a national imperative which has a clear local expression.[1] There has been a failure of the Plan-led system in Stockport for the last two decades. Consequently, there is between a **2.64 year** and **4.08 year** housing land supply.[2] The LPA is therefore failing to meet the *minimum* requirement of national policy (to deliver a 5 year supply) against a *minimum* housing requirement by a significant margin. There have been no up to date housing allocations since 2006 to address the shortfall of **1,000 to 2,794 homes**. This is a position which needs to be remedied urgently. The need for affordable housing (AH) is even more acute. There is an affordable housing shortfall in excess of 1,000 per annum. There are over **4,500 households in "priority need"** on the LPA's Housing Register *now*. Lower quartile affordability has risen exponentially, such that even modest housing is 9 times income and is unaffordable to vast swathes of the local population. This is the antithesis of the NPPF (60, 61 and 63), which seeks to boost the supply of housing to meet the up to date objective needs of <u>all</u>. The Council recognise that they are facing a "*housing crisis*".[3]

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[1] See evidence of Jon Suckley, Ben Pyecroft and Neil Tatton

[2] See HLS SoCG

[3] Stockport Housing Strategy and XX of CG

3. In that context, the Appeal site is a vacant site in the urban area, which is an ongoing management and maintenance liability for a private company (MAN Energy), who operate in a highly competitive market. It is designated as a Green Chain and Strategic Open Space but it is private land and there is no lawful access to it (save along the linear routes of the PROW). Since the early 2000's, the Appellant has sought to find a viable and sustainable long term future for the site, which would facilitate lawful public access and ecological improvements, to the benefit of local residents (many of whom are MAN employees). No public grant/subsidy is available. Neither the Council nor local residents have been able to take on the liability. Accordingly, this proposal has been conceived to provide an endowment for management and maintenance in perpetuity, for the benefit of the public. The Appellant has worked closely with Officers and the MFFG since 2007. It is to the Appellant's credit that such an approach has resulted in a scheme which is supported by Council Officers and the Charity Group of local residents (MFFG) which has long sought sustainable public use of the site. CG agreed that the process has been "*unimpeachable*".

4. This is a proposal which simultaneously addresses the urgent shortfall in market and affordable housing, with significant economic benefits, on an accessible site surrounded on all sides by the urban area, while providing a viable and long term strategy for the management, maintenance and enhancement of 80% of the Appeal site for lawful recreation and ecology, providing (on balance) equivalent or better provision. Such an outcome is significantly preferable to the (agreed) fallback position, which will be implemented if consent is refused, so that the site can be sold (inevitably to developers). There is (literally) no alternative proposal for the site. It is that rare development which provides benefits to all 3 roles of sustainable development (social, economic, and environmental) and will provide an enduring legacy for the local population. It was (understandably) recommended for approval on 2 occasions (CD 3.1 and CD 3.2).

<u>THE APPEAL PROPOSAL</u>

5. This appeal concerns an outline application for the erection of up to 200 dwellings (up to 100 of which will be affordable), alongside landscaping, site infrastructure and the creation of a considerable area of public open space. All matters are reserved.

6. It is common ground that the site is 26.88ha of private land owned by the Appellant. Lawful public access is restricted to 4 PROW (124S, 125S, 126S and 127S), 2 of which cross the site, and equate to about 0.8ha. Otherwise (it is agreed), there is no lawful authorised public access to the appeal site (OS SoCG at 2.3).

7. Housing is proposed on 4.4.ha[4] of the site (16%). The LPA's Officers requested that the amount of housing was increased from 150 to 200 homes (50% of which will be affordable) because 45d/ph was considered to be the appropriate density for such a sustainable location.[5] Approximately 21.71ha will be made available for public use for recreation, comprising: (i) 3.41ha of residential amenity public open space; and (ii) 18.3ha of informal public open space. It is proposed that the 18.3ha of informal POS will be transferred to the Land Restoration Trust ("the Land Trust"), with an endowment of £1,537,278 and a restrictive covenant that ensures the land will used solely for the purposes of open space and recreation in perpetuity. The Land Trust was created specifically to manage and maintain open spaces for the benefit of local communities. As a Registered Charity, it must abide by its charitable purposes (JS App 8). The endowment is sufficient to secure future management and maintenance of the site and the proposed ecological enhancements (JS App 8). Future public access and the transfer to the Land Trust[6] will be secured by s.106, prior to the commencement of housing development. The content of the s.106 agreement is agreed.

8. Accordingly, if planning permission is granted, 80% of the site (21.71 ha) will be made available for lawful public use in perpetuity, with a sustainable funding mechanism to ensure it is managed and maintained. It is agreed that the proposal would authorise and guarantee greater public access across the site in perpetuity (PSoCG at 4.2). Conversely, if this appeal is refused, the Appellant will implement its fallback position. It is common ground that the Appellant has a Permitted Development Right to erect a 2m boundary (fence/wall) along the PROW and around the Appellant's private ownership (PSoCG at

[4] The access road is 0.77ha = 5.1ha

[5] JS at 5.5 *et seq*

[6] The Appellant is confident that the Land Trust will be the relevant body, but flexibility has been added to the s.106 allowing for an alternative body be approved by the Council. The Council's oversight ensuring that any alternative body is appropriate.

2.6). Such a boundary treatment could be impermeable and would reduce views across the site, especially from PROW 126S. It is agreed that the prospects of such a fallback position occurring are real and not theoretical.[7] Indeed, it has already been implemented in part through the erection of a 1m post and wire fence, which has (regrettably) been the subject of criminal damage. Such damage does, however, demonstrate a clear desire (demand) from local residents for active use of the site. The proposal is demonstrably preferable to the fallback position. Astonishingly (after 20 years), the LPA and the PMFG simply "don't know" what should happen to the site (XX of EL and CG).

<u>DETERMINATION BY THE LPA</u>

9. At the time of the determination, there was: (i) no criticism of the scope or content of submitted assessments; (ii) no outstanding requests for further information; and (iii) no objection from statutory consultees (PSoCG at 3.8).

10. In two Committee Reports, the application was recommended for approval (CD 3.1 and 3.2). It was accepted *inter alia* that the tilted balance applied, given the Council's lack of a 5YHLS, the provision of up to 200 homes (50% affordable) which would assist the Council in meeting their period of "*prolonged significant undersupply*", whilst the securing of 18.30ha of informal open space (and 3.41 of formal open space) meant any adverse impacts would not significantly and demonstrably outweigh the benefits (to which significant weight attached). The Committee Reports were audited by a planning lawyer to ensure they were robust, and CG has no criticism of them (XX of CG).

11. Nonetheless, on 27th January 2023, the application was refused by Members for a single Reason for Refusal ('RfR'):

The application is contrary to saved Policies UOS1.2 'Protection of Strategic Open Space' and NE3.1 'Protection and Enhancement of Green Chains' of the Stockport UDP Review, Policy CS8 'SAFEGUARDING AND IMPROVING THE ENVIRONMENT' of the Stockport Core Strategy DPD, and paragraph 99 of the National Planning Policy Framework. The adverse impacts of the granting the development, resulting in the loss of a large area of high quality Strategic Open and natural green space in an area of open space deficiency, would significantly and demonstrably outweigh the benefits proposed by the

[7] CG at 5.50 and 5.51 and Officer Report (CD 3.2)

development, when assessed against relevant policies of the adopted development plan and the NPPF when taken as a whole."

12. The single issue concerns Open Space. The Council's evidence at this Inquiry does not raise any new/different point which had not been considered in the Reports recommending approval. The Council has confirmed in the light of PMFD's evidence (XX of CG) that it has no issue with ecology, landscape and visual impact, arboriculture, high quality design, highways, flooding or diversion of FP 126S. It is common ground that strength of feeling is not a material consideration (XX of CG). Such feeling is (at best for opponents) equivocal given MFFG (and their 1800 Members) now support the proposal. It is not known how the Members might have voted had MFFG supported the scheme at the time of the determination.[8]

13. The Appellant is not seeking a costs award against the Council. However, that decision does not mean that Members should be viewed as having acted reasonably in refusing the application contrary to Officer recommendation. As this Closing will show they were substantively unreasonable in doing so given the overwhelming evidence that this is a sustainable much needed development resulting in, at most, limited harm. The unreasonableness of the Members' decision – while not resulting in a costs application – is relevant context to the Inspector's consideration of the Council's case.

MAIN ISSUES

14. The Main Issues reflect the Reason for Refusal:

    (i) The effect of the proposal on the supply of open space;
    (ii) The supply of housing land; and
    (iii) Whether or not any adverse impacts of the proposal would significantly and demonstrably outweigh the benefits (the planning balance). It is common ground that this proposal should be determined in accordance with the tilted balance in NPPF (11)(d)(ii).

[8] Whilst MFFG did support the proposal at the time of the Members' decision, this was not communicated to the Council and the objection remained extant (XX of JS).

15. Applying s.38(6), the Main Issues fall to be determined in accordance with the development plan, unless material considerations indicate otherwise. It is, however, agreed that the tilted balance is determinative of the Appeal, applying s.38(6) (XX of CG).

THE DEVELOPMENT PLAN

16. So far as relevant, the statutory development plan comprises:

- The Stockport UDP Review 2006 ('the UDP'), of which certain policies were saved in 2009 (CD 4.21);
- The Stockport Core Strategy ('the CS'), adopted in 2011 (CD 4.2).

17. The adoption of the UDP and CS pre-dates the publication of all versions of the NPPF (first published in March 2012). They were not formulated, produced, or examined in accordance with the NPPF. They are out of date and inconsistent with the NPPF. There is an urgent need for a new statutory development plan. Indeed, this LPA risks having its plan-making powers removed. This reduces the weight to be attached to Policies UOS 1.2, NE 3.1 and CS8.

(i) The UDP (2006)

18. The UDP is an old style Plan. It was adopted in 2006, under the revoked statutory regime of the Town and Country Planning Act (1990). The Plan period was 1998-2011. The UDP planned for just 5 years. The Planning and Compulsory Purchase Act came into force in 2004. There has, therefore, been a requirement for a replacement Plan for two decades (XX of CG). When the policies of the 2006 Review were saved in 2009 (14 year ago), the SoS required that the UDP was replaced "promptly". Such a directive had greater force, given the UDP period expired in 2011.

19. The UDP housing requirement was a mere 220 d/pa (2002 to 2011), derived from RPG for the North West (RPG13 March 2003), applying a PPG 3 methodology and 1996-based population projections. This is ~1/5 of the current LHN (1,125 d/pa). 8 allocations were made to meet this need to 2011, totalling a mere 611 units (of which

only 501 have been delivered[9]). Having planned to meet that level of housing need to 2011, the UDP (and proposals map) established the settlement boundaries, the extent of the Green Belt and areas of policy of restraint (Green Belt (GBA 1.1), Green Chains (NE 3.1) and Strategic Open Space (UOS 1.2)). The UDP therefore has (i) an area inside of which housing is in principle *acceptable* to meet the housing requirement to 2011; and (ii) areas inside of which housing is in principle *restrained* for environmental protection and because they were not needed to meet the housing requirement to meet the need for 220 d/pa to 2011. CG agreed that the two areas are the logical obverse of each other. Accordingly, as CG conceded, the effect of the UDP proposals map is to constrain housing to an area which was only intended to meet a highly constrained need to 2011 (more than a decade ago). In that context, CG accepted that:

(i) The effect of the UDP is to significantly constrain market and affordable housing delivery; and

(ii) There is a need to review the balance between the need for housing and the need/areas of policy restraint.

20. It follows that the relevant policies of the UDP must be given reduced weight.

The Core Strategy (2011)

21. The Core Strategy (CS) was adopted in 2011 (2011-2026). It pre-dates the NPPF. It was based on the now revoked North West of England Plan Regional Spatial Strategy (March 2008), which relied on 2003-based HHP. It required 7,200 new homes between 2011 – 2026. (480 d/pa). The Council's Local Housing Need figure is now more than double that at 1,125 d/pa (HLS SoCG at 2.2). It follows (applying ***Hunston*** and ***Gallagher*** CD 5.20 paras 97-99) that the housing policies of the UDP and CS are significantly out of date and inconsistent with the NPPF. CG conceded that this is something that the LPA knew from 2012. Yet in the last decade, the LPA has failed to adopt a plan consistent with the "*radical policy change*" in the NPPF, with its greater emphasis on housing delivery (*ibid*).

[9] See UDP Policy HP 1.1 CD 4.21 and The HLSPS (CD 5.13) at p.5 and fn 6

22. Strikingly, the CS did not contain *any* housing allocations to meet this doubling in the housing requirement (220d/pa to 480 d/pa). Rather, the intention was to produce a later Allocations DPD, which provided allocations and considered site specific designations (such as Green Chains and Strategic Open Space).[10] However, whilst public consultation began in 2011, the ADPD ceased in 2014 because of the Council's inclusion within the GMSF. The Council then withdrew from the GMSF in December 2020 and in December 2022 put on hold the preparation of its emerging Local Plan (JS at 10.22). There is currently no progress on a new plan at all.

23. The consequences are that since 2006, there have been: (i) no housing allocations at all; (ii) no (re)consideration of site designations; and (iii) no new proposals map. The effect of the CS is the same as the UDP (XX of CG) because (even in the light of a significantly increased housing requirement) it is constraining housing development to an area designed to meet the need for 220 d/pa to 2011, with areas of policy restraint elsewhere (*supra*).

24. This Council has, therefore, totally failed in their duty of plan making over the last two decades. There are a number of significant practical consequences:

- The UDP and CS are inconsistent with the NPPF imperative to boost significantly the supply of homes to meet (as a minimum) objectively assessed needs applying Local Housing Need (NPPF 60, 61 and 63);
- The LPA has not been able to demonstrate a 5YHLS at any time since the adoption of the Core Strategy in 2011 (see BP 5.1);
- The LPA cannot demonstrate a 5 YHLS currently and there is a significant shortfall of at least 1,000 homes;
- The delivery of affordable housing is in crisis; and
- Even lower quartile affordability of homes has spiralled out of the reach of most local residents.

25. In summary, it is therefore beyond reasonable dispute (and agreed) that:

[10] See CD 4.2 at p.65/172 and XX of CG

- The evidence base on which the UDP/CS has been produced (the RSS) has been revoked and is out of date (whether or not there is a 5 year supply);
- The UDP/CS is not based on any assessment of OAN or LHN;
- The UDP is out of date and inconsistent with the NPPF (per ***Gallagher***);
- The CS is out of date and inconsistent with the NPPF (per ***Gallagher***);
- The Plans are based on a proposals map from 1998 to 2011;
- There have been no new allocations since 1998;
- There has been no review of site specific designations since 2006;
- A new Plan has been required since 2004;
- This was made clear by the SoS in 2009;
- This became even more important with the publication of the new NPPF (2012) and the introduction of LHN in NPPF (2018) with a housing requirement >1000 dpa;
- There has been a failure to adopt a plan in the last twenty years;
- No progress is currently being made with a new Plan;
- There is no reasonable prospect of Plan being adopted in the next 3-4 years.
- There is no reasonable prospect of a Plan meeting the *minimum* housing requirement of 1,125 d/pa in the short term at all

26. **It follows that there has been a total failure of the Plan-led system in this Authority**. The weight to be attached to alleged conflicts with the development plan need to be considered in this context. However, these are matters which are not considered in the evidence of CG *at all*.

27. Indeed, Senior Officers of the Council have expressly recognised that the UDP and CS contain policies which are evidentially out of date. The Report of the Deputy Chief Executive (Nov 2020) considered the consequences of leaving the GMSF. It states *inter alia*:

- The need for a bold spatial plan to guide development, investment and infrastructure has "*never been stronger*" (2.3);
- The Government has set a deadline of December 2023 to adopt a new plan. Otherwise there is a risk that plan-making functions will be removed from the Council (9.4);

- "*If insufficient new homes are provided to meet increasing demand then there is a risk that affordability levels will worsen and people will not have access to suitable accommodation that meets their needs The construction of new housing is also an important part of the economy, providing large numbers of jobs and often securing the redevelopment of ... underused sites*" [such as the Appeal site] (5.9);
- **The UDP and CS are "*ageing and contain policies which are evidentially out of date. This factor has been acknowledged by the Council since ... 2015*"** (9.3);
- Significant work has been undertaken to optimise the urban supply (9.9). The identified supply only meets 60% of the housing need. The gap between the supply and housing need is "significant" (9.10);
- The GMSF proposed 97ha (7 sites) from the Green Belt to meet only 73.4% of its *minimum* housing requirement (9.11). 25% of SMBC's housing need was exported to other GM authorities through the DtC (9.32). A Stockport specific Local Plan would need to meet its LHN requirement, including the redistributed 25% (9.32);
- If the Council resiled from the GMSF, the UDP and CS "*would quickly be considered out of date (beyond the extent to which they already are) ... the Council would likely find itself in a position of planning by appeal .. it would be increasingly likely they might be successfully appealed, with lack of adequate housing supply being a significant factor*" (9.34).

28. In that context, Council Officers expressly recognise the need for housing in the areas of policy restraint. As CG conceded, it is the position of Council Officers that:

"...the scope to increase supply in the urban area has already been fully and reasonably explored. It is considered unlikely that other districts in GM would be willing to take some of Stockport's housing need ... Consequently ... ***further land would either have to be released from the Green Belt or be taken from urban open spaces or employment areas (or perhaps most likely, <u>a combination of these</u>)***".[11]

29. Such a conclusion was reached on the basis of the need for housing to 2037. However, any new Plan (adopted at the earliest in 2026) would have to plan for 15 years as a minimum (2041). There would be a requirement for an additional 5,000 homes, all of

[11] *ibid*

which would need to be accommodated on a combination of Green Belt, urban open space and employment. This means the need for further housing on urban open space has only increased since 2020.

30. Further, Strategic Open Space is *not* a fn 7 policy (for NPPF 11(b)). Unlike Green Belt, it is not a policy area of "*particular importance*" that would provide "*a strong reason*" for restricting the scale, type or distribution of housing. In such circumstances, the uncontested evidence of JS is that this site would perform very well in any site assessment, given it is open space over which public access is not authorised and there is no other constraint to development.

31. **In circumstances where Officers have long accepted that housing will *inevitably* be required on both Green Belt *and* Urban Open Space, it follows (as CG expressly conceded) that <u>reduced weight</u> must attach to Policies NE 3.1, UOS 1.2 and CS 8**.

<u>5 YEAR LAND SUPPLY (5YHLS)</u>

32. There is a national imperative to boost significantly the supply of housing (NPPF 60). This requires LPA's to provide for the OAN for market and affordable housing and to plan to meet them, so far as is consistent with the NPPF (NPPF 11, 23 and 35(a)). <u>As a minimum</u>, LPA's are required to be able to demonstrate a 5 year supply of deliverable housing sites, plus a housing buffer (NPPF 74). There is also a requirement for policies to identify a supply of specific developable sites for years 6-15 (NPPF 68).

33. NPPF (2023) now requires that <u>the minimum</u> number of homes should be determined by a local housing need assessment, conducted using the Standard Methodology in NPPG (NPPF 61). The 5YHLS should be assessed against this figure, where strategic policies in an adopted plan are more than 5 years old (see NPPF 74).[12]

34. It is agreed that the standard methodology should be used as the housing requirement. This LPA must, therefore, deliver **1,181 d/pa** (1,125 plus 5% buffer[13]). The five-year requirement is 5,906.

[12] The NPPF is more complex than set out. However, this is sufficient in this case in Opening.

[13] CD8.9 Housing SoCG – para 2.6

35. There is between a **2.64 year** and **4.08 year supply.** There is a dispute about the level of deliverable supply between the Appellant (3,112) and the Council (4,821). There is a shortfall of 1085 homes (at best) or 2,794 (at worst). On either party's case, the shortfall is very significant. The dispute on the sites is addressed in an Appendix to this Closing Submission. It is clear from the Housing RTS that:

- Since lockdown, there has been double digit annual build cost inflation, with significant interest rates rises, leading to increased cost of finance, increase mortgage costs and falling house prices. The viability of housing projects, especially in the City Centre is very challenging;
- A detailed consideration of sites in the Town Centre demonstrates: (i) planning permissions expiring without implementation; (ii) implemented planning permissions stalling for a number of years; (iii) developers with planning permissions going bust; (iv) developers with planning permission trying to sell the site rather than build it themselves; (v) sites with planning permission being marketed for sale without formal offers; (vi) amendments to schemes. Indeed, it would appear that development is only currently viable in the Town Centre with very significant public subsidy. It is therefore concerning that Officers have advised that the absence of an up to date Plan will restrict SMBC's access to the Brownfield Land Fund and others (JS App 18 at 9.36);
- It follows that planning permission from even two years ago, formulated on the basis of a viability appraisal before that, is no evidence that a site is viable and/or deliverable (whether in the next 5 years or at all);
- There are 9 sites in issue (after the LPA conceded on 2). It should be noted that to reach 4.08 years, the LPA's best case assumptions need to arise in respect of each and every one of those 9 sites. On the basis of the evidence, that is not just implausible, it is incredible. On any fair application of the evidence to the NPPF and PPG tests of deliverability, the HLS is far closer to **2.64 years**.

36. In XX, CG conceded that: (i) the shortfall is "*significant*" on the LPA's supply and "*very significant*" on the Appellant's supply; and (ii) such a significant shortfall should

be remedied "*urgently*". In the absence of an emerging Plan, it can only be remedied through the grant of planning permissions.

37. Given the significant shortfall, the decision of the Supreme Court in ***Richborough Estates*** has a particular resonance (CD 4.42 at paras 55 and 83). The Court held *inter alia* (and CG agreed) that:

    (i) There is a recognition that where (as here) there is not a 5YHLS, the application of environmental and amenity policies with full rigour could frustrate the objectives of the NPPF; and
    (ii) Where there is a significant deficit against the requirement for a 5YHLS, this may mean that competing policies will need to be given less weight;
    (iii) This is a planning judgment.

38. In the light of a careful, comprehensive and robust analysis, the planning judgement of JS is that policies UOS 1.2, NE 3.1 and CS 8 must be afforded reduced weight (prior to a detailed analysis of their consistency with NPPF (99)). Again, CG agreed with such an approach (XX of CG). These are not, however, issues with which he has grappled anywhere in his evidence, which is significantly flawed as a result.

39. **In this case, it is common ground that the tilted balance (NPPF 11d) is engaged. Planning permission should, therefore, be granted unless any adverse impacts significantly and demonstrably outweigh the benefits.** There is no reliance on footnote 7 policies by the LPA (or any other party). This is an intentionally high policy hurdle for the LPA to jump (as CG accepted), given the failure to deliver the minimum 5YHLS.

40. The application of the test requires a robust identification of all of the benefits of the development (and a consideration of the weight to be attached to them) before a consideration of any alleged harm.

THE SOCIAL ROLE

Delivery of Market Housing

41. With a requirement of 1,181 d/pa, the total 5 year requirement is 5,906. **This LPA must now deliver over 1,000 homes each and every year (from now) just to meet the minimum requirement of the NPPF to meet a 5 year supply, against a minimum housing requirement**.

42. Average delivery since 2007/08 has been 508 d/pa[14]. Accordingly, CG accepted that housing delivery must double (from now) to meet the annualised requirement. It is unanswerable that the UDP/CS has failed to deliver sufficient homes, and unsurprising given it is hamstrung by settlement boundaries/policies of restraint set in 2006, when the annual requirement was 220 dwellings. **It is now common ground (XX of CG) that there must, therefore, be "an immediate step change" in the delivery of housing in this LPA**.

43. This is a benefit to which **very significant weight** must attach.

Affordable Housing (AH)

44. The Council recognised (CD 3.2) that there was an annual deficit of 549 affordable homes across the Borough, and a net deficit of 176 affordable homes per annum in the township of Hazel Grove, Davenport (East), Heavily, Offerton (West) (2018/19 to 2022/23). On examination, the need for AH is considerably more acute. The evidence of NT on the need for AH is not contested and has been agreed by CG (in XX).

45. Firstly, the annual need for AH has risen significantly, such that there is currently a very significant annual shortfall, due to the total failure of the LPA to Plan to make any new housing allocations and to meet identified needs (see NT at 2.5 *et seq*):

- HNA 2008 – shortfall of **519AH/pa**;
- HNA 2011 – shortfall of **662 AH/pa**;

[14] CD8.9 Housing SoCG – para 2.9

- HNA 2015 – shortfall of **931 AH/pa**;
- From 2015-2019 the gross AH need increased from 1626 to 1826 pa;
- HNA 2019 – shortfall of **>1000 AH/pa**[15].

46. Secondly, even on the flawed analysis of the HNA 2019, there is a need for 2,745 AH (2018/19 to 2022/23).[16] That is 88% of the Appellant's deliverable supply and there is no Plan or mechanism by which it can be met. 880 AH are needed just in the township of Hazel Grove, Davenport (East), Heavily, Offerton (West).

47. Thirdly, there were previously 4,000 households in "*priority need*" on the LPA's Housing Register (of 6,953 households). At the RTS, the Council confirmed that these figures had increased to now stand at around 7500 registered, with 4,500 in priority need (a rise in 12m which NT characterised as "unprecedented"). Mr Kippax mentioned how, for the first time in his 23 years with the Council, the Council were now forced to put people up in temporary Bed and Breakfast accommodation. The Director of Public Health (CD 3.2 at p.62/177) and EL (PMFD) specifically recognise the significant physical and mental health impacts of living in conditions which are unfit. As previous Inspectors have concluded, these are real people in real need *now*. CG agreed that their needs must be met "*urgently*" (XX of CG).

48. Fourthly, lower/median quartile affordability has risen exponentially, such that even modest housing is 9/10 times income (NT at 2.33). CG conceded housing is now out of the reach of a large proportion of the local population. This is particularly concerning given the absence of AH and spiralling private rents.

49. Fifthly, this LPA has managed a mere 122AH/pa between 2011 and 2023 (NT at 3.9). Against the CS annual housing requirement, there has been a shortfall in the delivery of 3,273 affordable homes, not quite all of the households now in priority need (NT at

[15] This is on the uncontested basis that the HNA 2019 has miscalculated the net AH need by discounting the gross need by taking account of new lettings to people already in AH. Such lettings do not constitute "new" affordable homes which are addressing the need, such that the gross figure should be reduced (see NT at 2.12). This is the only conclusion to reach, given the *gross* need has risen.

[16] NT at 2.14

3.14). Just 303 AH were delivered through s.106 agreement (28pa). This shows a direct correlation between the Plans being out of date and the clear failure to deliver market and affordable homes.

50. Finally, given the significant issues of viability in the Town Centre, such sites are not delivering any material AH without grant funding. The forward supply position is agreed to be 1073 units which equates to around 18% of the Local Housing Need requirement for 5,905 dwellings over this period and indicates that the Council will continue to fail in meeting its strategic objective that affordable housing should comprise 50% of all dwelling completions.

51. It is unanswerable that the Council are facing ever increasing need with no clear and effective strategy or policy to meet it. The Council is further hamstrung by CS policy H3 which is out of date (H3), coupled with an SPD (2003 - twenty years ago), which recognises on its face that it may be out of date. The affordable housing policy reflects the wider flaws with the Council's reliance on saved policies of the UDP and the Core Strategy. It was predicated on delivering on urban open space and Green Belt sites without allocating any such sites for development. In such circumstances, CG conceded that the Stockport Housing Strategy correctly concludes that: "***Stockport faces a housing crisis***" (NT at 3.4). Yet, there is no analysis of this crisis, which has been airbrushed out of his assessment of the merits of the proposal.

52. In XX, CG conceded that there is an acute/urgent need and the delivery of 100 affordable homes (50%) is a material consideration of "***very significant weight***".

Accessibility

53. It is common ground that this is an accessible site in the urban area, which surrounds the housing area on 3 sides. It is a sustainable location for housing development and the connectivity of the site will be further increased by the agreed footpath/PROW improvements, the provision of a pedestrian crossing on Bramhall Moor Lane and the upgrading of bus stops on Ringmore Road (see conditions 18 and 24). It is agreed that the highway impact is acceptable and there is no evidence to the contrary (see SoCG on Highways).

54. **The proposal therefore contributes significantly to the social role of sustainable development and such collective social benefits should be afforded <u>very significant weight</u>.** CG agreed that the social benefits must be aggregated.

<u>ECONOMIC ROLE</u>

55. Furthermore, the application has demonstrated the socio-economic benefits of the proposals. The unique economic benefit of this Appeal is that it will provide for a sustainable funding model for the 18.7ha of Informal Public Open Space. The £1.57m will be invested and the income will be spent locally on the management and maintenance of the POS. This is an economic benefit and *different* from the transfer of the land for public use (XX of JS).

56. The economic benefits have been set out by Richard Cook (Pegasus) and are not contested (XX of CG). They can be summarised as including:[17]

- £37.3m private investment in construction over 3.5 years;
- 201 FTE construction and supply chain jobs for 3.5 years;
- Construction workers spending £130k p.a. locally in Stockport;
- £1.2m spent locally on first occupation expenditure;
- 224 economically active residents, spending £2.5m in Stockport (£1.1m in Hazel Grove);
- £39.9 million of gross value added.

57. These economic benefits are an important material consideration in support of the proposal. Consistent with previous decisions and the NPPF (81), they should be afforded **significant weight** (JS at 12.67).

58. **It follows that the proposal derives <u>very significant support</u> from the social and economic roles of sustainable development.**

[17] See JS App 3

ENVIRONMENTAL ROLE

59. It is agreed that there is no material impact in respect of: (i) residential amenity; (ii) heritage; (iii) flooding; (iv) pollution; or (v) air quality.

High Quality Design

60. It is agreed *inter alia* that (Design SoCG CD 8.2):

- The housing is located in the most appropriate location within the site in response to ecological and arboricultural impacts (4.1);
- The proposal minimises landscape and visual impacts (EiC of AC);
- The Council requested an increase in the number of homes from 150 to 200 homes. A density of 45dph is the most appropriate density, given the sustainability of the site (4.2);
- The amenity buffer around the Mirrlees Oak is appropriate (4.3);
- The Design Code, parameters plans, conditions and RMA process will ensure that the housing will be high quality (4.4 and 4.5).

61. Accordingly, it is agreed that the proposal will deliver a high quality and well-designed development which makes an efficient use of the Appeal Site (Design SoCG). These are all objectives enshrined within the NPPF (Chapter 12).

Re-Use of Vacant and Under-used Land

62. Further, the site is currently vacant and without any beneficial land use. NPPF Ch.11 specifically supports the optimum/efficient use of vacant and under-used land in sustainable locations in the urban area (see NPPF (119), (120d), (124) and (125) and 125c)).

Landscape and Visual Impact

63. A TVA was submitted with the planning application (CD 1.67). It set out the landscape/townscape and visual impacts (Tables 2 and 3). There has never been any dispute with the scope, assessment, results, or conclusions of the TVA assessment (CD

3.2 and EiC of AC). Neither the RFR nor the LPA's SoC contains any reference to adverse impacts on landscape character, landscape elements or visual impact (CD 3.4).

64. It is agreed (in the OS SoCG) that:

- The site is Strategic Open Space and Green Chain (4.4);
- These are not policies of "*particular importance*" under footnote 7 NPPF (4.5);
- The site is not within an area of recognised landscape character (4.7). It is not a valued landscape (4.11). It is not, therefore, a landscape which is protected under NPPF (174(a));
- The site lies in the urban area (4.7). It is not "*countryside*". The intrinsic character of the site does not, therefore, even have to be "*recognised*" (NPPF 174(b));
- The landscape/townscape effects are agreed (4.12);
- The visual impacts are agreed (4.12);
- The impact to the landscape character of the site (overall) is *minor adverse*;
- The impact to Users of the Fred Perry Way (PROW 126S) is *moderate adverse*;
- The development would not give rise to significant adverse townscape, landscape or visual impacts (4.10);
- **The adverse effects on landscape elements, landscape character and visual amenity are "*localised*", essentially to the boundaries of the housing area (4.12);**
- **There would be "*no unacceptable harm*";**
- **The impacts identified in the TVA (CD 1.67) are "*deemed to be acceptable*";**
- **The landscape impact to the site is therefore acceptable;**
- **The visual impact to FP 126 is therefore acceptable.**

65. The uncontested evidence of AC is that, if there is a need for housing on greenfield sites (as the LPA accept *supra*), this site performs very well as a potential housing site in LVIA terms (EIC of AC). It is surrounded on 3 sides by the urban area. It has a very limited visual envelope which is constrained to the boundary of the housing (AC App 10) and lies in a highly sustainable location with good connectivity (such that Officers wanted more housing on the site). Indeed, the impacts are both localised and acceptable.

There is no material impact outside the site (see ZTV at AC App 10 and AC at 4.13). This is precisely the sort of site to which housing should be directed in LVIA terms.

66. It is common ground that the proposal complies with national and local policy in respect of the character and appearance of the area, especially CS 8 and NPPF 174 and 175.

Ecology

67. The ecological impact is addressed in the Ecological Assessment Report (CD 1.42). It was independently audited by the SMBC Nature Conservation Officer and the GMEU. **In the light of a number of further technical notes, the ecological impact (a net benefit) was agreed by Bowland Ecology, SMBC and the GMEU (CD 3.2). Significant weight should attach to such a powerful consensus of independent technical expertise**.

68. The Ecological SoCG records, in the light of the objections from PMFD:

- A sufficient scope of ecological survey and assessment has been completed;
- There is compliance with the relevant legal tests, including the Habitats Regulations, the WCA (1981) and NERC Act (2006);
- There is policy compliance with NE 1.1 and 1.2, NE 3.1, CS 8, SIE-3 and the NPPF;
- There will be no impacts to statutorily protected sites;
- Statutorily protected species have been surveyed, considered and protected, with appropriate mitigation identified;
- **Ecological and environmental benefits will be delivered through: (i) a BNG of 12.85% of biodiversity net gain; and (ii) low intervention landscape and ecological enhancements to the Informal Public Open Space through the OLEMP (CD1.59), which shows how the BNG will be delivered;**
- **There are no matters in dispute regarding ecological considerations.**

69. In that context, PMFG:

(i) Rely on a number of issues raised by CWT (who *support* the ecological improvement of the site);

(ii) Claim that the Appellant has failed to apply the precautionary approach "*required*" by s.17 EA (2023) in calculating the BNG (MR p. 7), such that it is flawed;

(iii) Claim that the proposals fails to deliver a BNG of at least 10% as "required" by the EA (2023) and NPPF 174d, 179d, 180d;

(iv) Assess the BNG as 0.48% (as claimed by CWT).

70. Such propositions are demonstrably and unanswerably flawed:

- PMFG's evidence is not supported by any technical ecological evidence. CWT have not attended to be questioned. Indeed, it is not accepted that CWT's response is informed by technical ecological input (XX of JJ). There is no contrary ecology evidence (surveys, assessments, metrics etc) to be tested at all;
- Section 17 EA (2023) is irrelevant to the ecological assessment (see CD 6.21). It requires the SoS to propose a policy statement on environmental principles, for the purposes of policy-making by Ministers (s.17(1) and (2)). There is no requirement on the Ecologists or the Inspector to apply the precautionary principle in s.17. PMFG's contention is wrong. It follows that *all* of the criticisms of the BNG calculation which rely on the application of such a precautionary principle are legally flawed and irrelevant;
- It is equally wrong to claim that the EA(2023) and NPPF "requires" a BNG of 10%. Section 98 and Sched.14 EA (2023) will make provision for BNG to be a condition of planning permission. However, whilst the EA gained Royal Assent in 2021, as yet: (i) the EA has not come into force; (ii) necessary secondary legislation has not been passed to allow the scheme of the Act to operate; (iii) the Biodiversity Metric (BDM), which is central to the calculation of BNG, has not been published by the SoS; (iv) consequently, there is no published policy/guidance on the calculation of BNG against the BDM; (v) the Act *may* come into force (at the earliest) in Jan 2024; however (vi) transitional provisions mean that Act will only apply to applications for major development made *after* Jan 2024 i.e. the Act has no application now and will have no application to determination of this application/appeal. In such circumstances, the ecological criticisms of PMFG are of no material relevance;

- The NPPF does not require a 10% BNG. Rather, it requires a net gain, which (on either the Appellant's or CWT's evidence) it provides. There is agreed compliance with the NPPF;
- CWT's latest response (CD 6.23), on which PMFG relies, is identical to a previous response (CD 6.4) which raised two points (i) veteran tress (addressed below) and (ii) the BNG calculation. The criticisms of the BNG calculation are based on the flawed application of the precautionary principle (*supra*). Further, such criticisms were specifically addressed (i) by Bowland Ecology in an updated BNG metric; (ii) the GMEU responses to the SMBC ecologist (CD 4.49); (iii) the SMBC ecologist (see CD 3.2) and the Planning Officers of the Council (CD 3.2). The BNG calculation of 12.85% is agreed by Bowland Ecology, SMBC Nature Conservation Officer, GMEU Senior Ecologist, the LPA Planners and Members after a critical audit. The CWT/PMFG points have been comprehensively rejected. Further, GMEU conclude that (even if valid) the BNG would still be greater than 10% (CD 4.49);
- In such circumstances, the detailed criticisms of the BNG do not need to be addressed. They are, nonetheless, addressed in the written and oral evidence of JJ (which is not repeated).

71. It follows that the grant of consent will result in: (i) significant OLEMP works prior to the transfer of the site to the LT (at the developer's costs); (ii) significant ongoing management and maintenance of the site for ecology, in accordance with an agreed LEMP and management Plan. This is the only and best means of balancing the competing demands of recreational use and ecological enhancement (PMFG have no different/better solution). The Council conclude that ***significant weight*** should attach to the environmental benefits (set out in the PSoCG at 6.8). There is no reason to reduce the weight because there is no double counting (the benefit of public access to the informal open space is *not* a listed environmental benefit, as CG accepted).

<u>Arboriculture</u>

72. The Appellant does accept that there will have to be a limited loss of trees and vegetation to allow for the development to be delivered. This includes 1 Cat A tree, 37 Cat B trees, 6 Cat C trees and the removal of 2,190m2 of Category C vegetation. There is no material ecological impact from such a loss (*supra*). However, this is more than

offset by the planting of 267 new native trees on the Site, as well as providing £205,759 to fund 1,150 trees on greenspace sites, a new orchard and a new wildflower meadow in the Stepping Hill area.

73. The Appellant and the Council have reached agreement on all matters in relation to trees[18] including that the proposal is acceptable despite the loss of a tree with veteran characteristics as it would be unreasonable to insist on its retention owing to its evident structural defects, reduced vigour and limited future contribution. However, the R6 take a different approach and disagree with the parties both in relation to (i) T1's veteran status and (ii) whether it should be retained.

74. By the end of XX of Mr Wells, the dispute had narrowed to two discrete points.

75. The first was whether the NPPF required a potentially veteran tree to have all three characteristics (age, size and condition) or just required one. Mr Wells accepted that if the NPPF required all three, he did not dispute the expert evidence of Mr Jewell – who set out that the age[19] and size[20] of T1 would not meet any of the recognised thresholds for a veteran tree. On that basis, the tree is not veteran and there is no conflict with policy.

76. Mr Jewell's interpretation comes from the glossary of the NPPF (in full):

*A tree which, because of its age, size **and** condition, is of exceptional biodiversity, cultural or heritage value. All ancient trees are veteran trees. Not all veteran trees are old enough to be ancient, but are old relative to other trees of the same species. Very few trees of any species reach the ancient life-stage.* (Emphasis added)

[18] CD8.1

[19] CD9.5.1: 3.4 to 3.8 Jack Jewell Proof – T1 age range between 82 and 138 years which is below the Woodland Trust typical 150 – 300 range

[20] CD9.5.1: 3.9 – 3.12 Jack Jewell Proof – T1 girth of 2.073 below the Woodland Trust and Natural England thresholds.

77. Policy must be interpreted objectively, in accordance with the language used, read as always in accordance in its proper context[21]. Applying those principles to the definition, it is clear that all 3 criteria are required. This comes from the use of 'and' rather than 'or' but also from the second part of the definition that makes clear veteran trees must be '*old relative to other trees'*. The R6 Party approach of focusing only on condition is directly contrary to both of those elements of the Annex 2 definition.

78. The heart of the R6 Party's definition seems to be through reliance on the PPG, which they interpret as allowing for a veteran tree to be young. However, the law is clear as to the relationship between the NPPF and PPG. As Lievan J set out in **Solo Retail Ltd v Torridge DC** [2019] EWHC 489 (Admin):

33….In my view the NPPG has to be treated with considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out therein, under para 18 of ***Tesco v Dundee****. As is well known the NPPG is not consulted upon, unlike the NPPF and Development Plan policies. It is subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan. It can, and sometimes does, change without any forewarning. The NPPG is not drafted for or by lawyers, and there is no public system for checking for inconsistencies or tensions between paragraphs. It is intended, as its name suggests, to be guidance not policy and it must therefore be considered by the Courts in that light. It will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in* ***Tesco v Dundee*** *applied to the Development Policy there in issue.*

79. Equally Dove J in **R. (on the application of Menston Action Group) v Bradford MDC** [2016] EWHC 127 (QB) noted that the PPG is "*subservient to policy for which it provides practice guidance*" and "*the PPG could not override that reading of the primary document".*

80. Given the objective interpretation of the NPPF is clear that a veteran tree must have all three characteristics then even if the PPG did contradict this, what **Solo Retail Ltd** and **Menston** make clear is that the NPPF must be followed. This is important because

[21] **Tesco Stores v. Dundee City Council** [2012] UKSC 13 at paras 18 and 19

PMFG's interpretation would lead the Inspector into a legal error, which could be the subject of a statutory challenge.

81. Therefore, (i) the objective interpretation of the NPPF; (ii) Mr Jewell's interpretation (as the only arboricultural expert to give evidence); and (iii) Inspector Sims interpretation in the Oakhurst Rise appeal[22] all align in a veteran tree having to be of sufficient age, size <u>and</u> condition. Accordingly, as the R6 party concede on that basis, T1 cannot be veteran and NPPF 180 does not apply.

82. However, even if (wrongly) that condition is sufficient, the expert evidence of Mr Jewell (the only expert who has visited the tree) is that T1 is not of sufficient condition to be veteran. Mr Jewell agrees with the GMEU that T1 has "*veteran characteristics*" but that does not make a tree veteran. There are 14 potential veteran characteristics, of which T1 only has 2 – a particularly relevant point given the Natural England guidance makes clear: "*The more the tree has the stronger the indication that it is a veteran tree'*[23]". This is why Mr Jewell confirmed in XiC that, even on condition alone, this tree would not be considered veteran.

83. Therefore, on either the Appellant's or R6 Party's interpretation of the NPPF, the only expert evidence before this inquiry confirms that T1 is not veteran and thus 180 c) of the NPPF does not apply.

84. The Appellant has addressed NPPF 180 (without prejudice to such submissions) for completeness. The R6 Party rightly conceded (and agreed with the Council[24]) that the compensation strategy for the loss of T1 is suitable. That leaves "wholly exceptional reasons" (the second area of dispute).

85. The "wholly exceptional reasons" are demonstrated by this Closing (read as a whole). The exceptional reasons comprise (i) arboricultural reasons and (ii) the wider benefits of the scheme, which justify the loss of a single potentially veteran tree in poor

[22] AP2: Para 57

[23] CD4.22 – section 2.2.1

[24] CD8.1, X of Arboricultural SoCG:

condition and with limited lifespan. The condition of the tree is plainly relevant to considerations of wholly exceptional reasons, as GMEU and the Council recognise. From a purely arboricultural perspective, T1 would be categorised as Cat U which is for "“*trees that have a serious, irremediable, structural defect, such that their early loss is expected due to collapse”.* Mr Jewell set out[25] a Cat U would normally have a 10 year or less lifespan. It cannot be the case that a tree with less than 10 years expected lifespan can be used to justify refusing to deliver the numerous significant benefits of the appeal proposal. Further or alternatively, the wider benefits of this proposal (set out in detail in this Closing and addressed in the evidence of JS) demonstrate compliance with the NPPF. T1 is not veteran, but even if it were, then there would be wholly exceptional reasons for its removal and a suitable compensation strategy is in place. 180c) is met either way.

Re-Alignment of PROW 126S

86. Mr Gosling (DG) considers that the re-alignment of the PROW through the development is contrary to DEFRA C1/09, such that permission should be refused. That proposition is multiply flawed for a number of reasons (with which DG agreed):

(i) This is an outline application with all matters reserved. This appeal concerns the principle of development. The RMA will address matters such as design, layout and footpath routes. If the LPA/PINS needed further detail, there is a statutory power to request it (art 5(2) DMPO 2015). There are, however, no outstanding requests for further information and no objections from consultees;

(ii) The housing masterplan (CD 1.3) and PROW Improvements Plan (CD 1.20) are illustrative only. The PROW shown on them are not for determination at this stage. Condition 18 will ensure 126S is retained along its existing alignment or along a new alignment to be agreed with the LPA. Further, the PROW will be improved (in accordance with an agreed scheme);

(iii) There is no objection to the proposed diversion by the PROW Unit (CD 3.2 at p.128/177) (CD 3.2 at p.145/177), the Case Officer or Members of the Planning Committee (see RFR at CD 3.4);

[25] Response Isp Q.

(iv) The professional Officers of the Council considered that the proposal complied with Policies L1.8, L1.9 and CS 10 (CD 3.2 at p.146/177);

(v) *Policy* CS 10 post dates *guidance* in DEFRA C1/09 and does not contain any prohibition on the re-routing of PROW along estate roads. Significantly greater weight should apply to the more up to date policy, with which the proposal complies.

(vi) There are a number of PROW improvements (set out in detail in the Technical Note on Highways (CD 9.1.4)). These will be secured by Condition 24;

(vii) DG does not even consider the PROW improvements (XX of DG);

(viii) DG accepted that the proposal would preserve and enhance the strategic recreational value of the PROW in compliance with Policy L1.8 (XX of DG);

(ix) DG accepted that Policy 1.9 is addressed expressly by the conditions;

(x) DG made no reference to CS 10. He accepted that there was compliance with it. Greater weight must attach to compliance with CS 10 than to any claimed conflict with Policy 1.8 (applying s.38(5));

(xi) On the agreed evidence, the proposal complies with the development plan;

(xii) DEFRA C1/09 (7.1 to 7.5) endorses approach taken in this outline application. It advises that estate roads should be avoided "... *wherever possible*..." DG therefore conceded that <u>there is no prohibition on the use of estate roads as claimed</u>. Whether this is possible, consistent with other aspects of high quality design, will be considered through the RMA. Such an approach is unimpeachable.

87. There is, therefore, no reasonable evidential basis for a refusal. On the contrary, the Officers concluded (CD 3.2) that the works to the PROW network would constitute "improvements" which would increase the accessibility and connectivity of the site (which is agreed to be an important component of recreational value). This is a further benefit to weigh in the balance.

88. The LPA accept all of the environmental benefits in the PSoCG (6.8) and collectively attach **significant weight** to them (CG at 6.20). It follows that this proposal delivers the economic, social and environmental benefits sought by the NPPF (on the basis of the agreed evidence). In aggregate, the benefits must be afforded ***very significant weight*** (XX of CG).

89. It is in this context that the impact to open space must be considered. Permission can only be refused where any demonstrable conflict with local and national policy (due to any net adverse impact on open space) significantly and demonstrably outweighs the benefits, to which very significant weight must attach (on either party's case).

OPEN SPACE

(i) Planning Policy Background

90. The Appellant submits that this Inquiry should focus on the land use planning impacts, rather than the interpretation and application of development plan policies which are out of date and inconsistent with the NPPF (cf CG Rebuttal). The LPA's case has relied upon confused and confusing submissions about the policy context, as it has no substantive case on the planning merits. Fortunately, CG accepted that the policy position can be put simply:[26]

(i) The proposal complies with NPPF 99(b) and (c);

(ii) If CS 8 is consistent with NPPF 99 (as claimed by the LPA), the proposal must also comply with CS 8;

(iii) If NE 3.1 and UOS 1.2 are consistent with CS 8 and the NPPF, the proposal must also comply with the UDP;

(iv) If CS 8 is inconsistent with the NPPF, greater weight should attach to the NPPF (NPPF 219);

(v) If NE 3.1 and UOS 1.2 are inconsistent with CS 8, greater weight should attach to CS 8 (s.38(5) P&CPA 2004) and the NPPF (NPPF 219);

(vi) It follows that NPPF 99(b) and (c) are the most important policies, on which this submission will focus;

(vii) The Appellant's case on NPPF 99 (b) and (c) is essentially the same;

(vii) If (which is denied) there is any net conflict with NPPF 99, such net conflict needs to be weighed in the tilted balance, with the conflict of the development plan.

[26] CG agreed with these propositions (on the basis that the proposal complied with NPPF 99(b) or (c)).

91. It is, therefore, common ground that NPPF 99(b) is the most relevant policy against which to test this proposal.

(ii) NPPF Paragraph 99

(a) Open Space of Public Value

92. **In the light of the XX of CG, the interpretation and application of NPPF 99 is agreed (**cf XX of JS**).**

93. It is agreed that the site forms existing open space. It is designated as open space in the development plan (UOS 1.2 and CS 8). It is "*open space of public value*" (NPPF Glossary). Therefore, the remaining parts of the definition (after "*...including...*") do not need to be considered, as they are types of open space of public value, to which the policy could apply (XX of CG). Accordingly, it is agreed that NPPF 99 applies.

94. NPPF 99 applies to "*open space of public value*" (see NPPF Glossary). Whether or not one adds "*public*" before "*open space*" makes no difference to the analysis (see ***Renew*** CD 5.26 at para 39 and agreed in XX of CG). Accordingly, CG's criticism of the Appellant's approach on this basis is flawed and wrong (see CG(R) at 3.27).

95. It is common ground that NPPF 99 is not a policy to which Fn 7 of NPPF 11 applies. Accordingly: (i) it does not displace the tilted balance (NPPF 11(d)(i)); and (ii) it is not a policy which would form a strong reason for restricting the overall housing requirement in plan-making (NPPF 11(b)(i)).

96. It is agreed that the definition of "*open space*" can include (XX of CG):

(i) Land which offers important opportunities for sport and recreation; and
(ii) Land which can act as a visual amenity.

97. Both have been taken into account in the assessment of JS (XX and ReX of JS). It is agreed that there can be 2 types of "*important opportunities*" (XX of CG):

(i) A sports pitch can provide a present opportunity for sport;

(ii) A site without lawful access could provide a <u>future</u> opportunity for sport and recreation <u>if</u> public access is allowed and the site is laid out for it.

98. Again, <u>both</u> have been taken into account by JS. It is agreed that "*recreation*" can be considered in 2 ways (XX of CG):

(i) "*Active recreation*" - the active use of open space;

(ii) "*Passive recreation*" - the public may enjoy looking at/over/across a site of open space. There is a clear relationship with visual amenity, although it may be wider (as it may involve e.g. hearing birdsong). There is, therefore, a clear relationship with landscape and visual impact i.e. the character and appearance of the open space which can be enjoyed by the public.

<u>(b) Public Value</u>

99. It is agreed that **the starting point is a proper understanding of the public value of the Appeal site** as Open Space (XX of CG and CG(R) at 3.1).

100. It is agreed (XX of CG) that the public value can be agreed (i) now; and (ii) on the basis of the Fallback (FB) position if consent is refused.

101. **<u>CG expressly agreed that policy should be applied to the open space existing at the time of the decision by the Inspector</u>** (XX of CG). That is the position of JS. Per Stephen Richards LJ in ***Renew*** (CD 5.26 at para 37):

"*...When planning permission is sought for a development, **the policy must be applied to the open space existing at the time of the decision** whether to grant planning permission.*" (emphasis added).

102. It follows that the impact to the public value of the open space in the FB position is a consideration in the tilted balance, which may have the effect of reducing the weight to be attached to any conflict with policy (agreed in XX of CG).

103. Despite such agreement, JZH nonetheless contended (XX of JS) that it was necessary to look both *forwards* and *backwards*. However; (i) the contention that you must look

forwards is directly contrary to the *ratio* of the ***Renew*** case on the FB position (the FB position is looking forwards); and (ii) no explanation is given as to how/why the public value of the site in the past can be relevant, given (a) the ***Renew*** case and (b) s.78 which requires this Inspector to look at matters afresh. Such points have, nonetheless, been considered for completeness.

(c) NPPF 99(b) - equivalent or better provision

104. Existing open space should not be built upon unless the loss resulting from the proposed development would be replaced by equivalent or better provision, in terms of quantity and quality in a suitable location (NPPF 99(b)). It is agreed (XX of CG) that the touchstone of the policy is whether there will be "*equivalent or better provision*". You consider whether the provision is "*equivalent or better*" in terms of quantity, quality and the suitability of the location. In this case, there is no issue over the suitability of the location (XX of CG).

105. **CG therefore agreed that the policy requires a comparison of (i) the public value of the open space now; with (ii) the public value of the open space if permission is granted. If the public value of the open space with permission is equivalent (or better), in terms of quantity or quality, there is compliance with the policy**.

106. "Equivalent" does not mean "the same" in either quantitative or qualitative terms. There can be change.

107. CG accepted that NPPF 99 applies where open space is proposed to be "*built on*". The policy is addressing the position where there will be a quantitative loss (in the first instance). Ordinarily, there will be an associated qualitative loss to the quantitative loss (in the first instance). The policy is therefore addressing the position where there will be a quantitative and qualitative loss (in the first instance) and is setting out the circumstances in which that will be acceptable and compliant with policy.

108. Accordingly (CG accepted), just because there has been a quantitative loss of open space overall, this does not mean there is a conflict with NPPF 99(b). The qualitative improvements to the open space which are left can provide "*equivalent or better provision*". This accords with **Turner** and **Brommell**.

109. If (which is denied), there is any conflict with NPPF 99(b), you weigh the net impact in the tilted balance i.e. if the provision is not equivalent (but marginally worse), it is the marginal adverse impact which is weighed in the balance. The weight to be attached to the net adverse impact in the tilted balance will depend on the difference in public value (and not just the words "should not be built on" (ReX of CG)).

110. In this case, the Appellant firmly asserts there will be a net improvement in the public value of the open space to which **very significant weight** should attach. **There is no adverse impact to weigh in the tilted balance at all.**

(d) NPPF 99(c) - alternative sports and recreational provision

111. If there is compliance with NPPF 99(b), there is compliance with the policy. The Appellant's case under NPPF (b) and (c) is (in substance) the same - there are benefits to the open space provision. Accordingly, this proposal accords with both NPPF 99(b) and (c).

112. The LPA raise an issue of interpretation, rather than substance, on NPPF 99(c). The LPA submits (JZH Opening at 20) that "*the development*" in NPPF 99(c) means "*the built development*". The Appellant submits that such an interpretation is flawed for (at least) 5 reasons:

(i) The NPPF does not restrict "*the development*" to "*the built development*". The LPA has simply added words and invented new policy;

(ii) "*The development*" means the development for which planning permission is applied. This proposal (*supra*) is expressly for *inter alia* housing and open space provision. There is no basis for excluding such open space provision from a consideration of "*the development*". Indeed, the housing development generates the £1.5m to secure the public use of the site in perpetuity. The housing and open space elements of "*the development*" are indivisible;

(iii) This proposal is, therefore, "*development ... for alternative ... recreational provision*". That proposition is unanswerable;

(iv) The policy can be interpreted and applied as written. If "*the development*" means the development for which permission is applied, there is no reason to add the word "*built*" into the policy. The policy makes perfect sense without it;

(v) The LPA interpretation would actually mean that development for housing and alternative recreation provision is actually just housing development and not development for recreation provision. Such an outcome is contrived and absurd. The whole *raison d'etre* of this proposal is to deliver the alternative enhanced recreation provision, for the benefit of the public in perpetuity.

(e) Baseline Public Value of the Open Space Now

113. **The baseline public value of the open space now is agreed** (XX of CG).

114. The site is 26.8ha. There are 4 PROW (FP 124, 125, 126 and 127).[27] Footpaths 124 and 126 (part) cross the site. 125, 126 (part) and 127 form perimeter routes in woodland around the site (CD 1.20). Otherwise, it is agreed that there is no authorised public access (OS SoCG at 2.3). The site is fenced currently with a 1m post a wire fence (XX of CG). The area of the PROW corridors comprises a mere 0.8ha (AC at 2.41 and XX of CG).

115. In the light of the OS SoCG, CG expressly agreed that the public value of the site comprises (XX of CG):

(i) **Active recreation on the PROW** - the ability to pass and re-pass along the PROW in an area of 0.8ha;

(ii) **Passive recreation and amenity** - the site provides passive recreation/amenity/visual amenity as you pass and re-pass along certain parts of the PROW, from which the site is visible. The housing area is visible from a 360m length of FP 126S only (XX of CG);

(iii) **Lawful active use of the site with permission** - Dr Hughes has identified 32 formal activities which have taken place with permission between March 2018 and Aug 2022. Since the site was fenced (April 2023) there has been a single event with permission (a photo shoot for a calendar). CG conceded there is no

[27] OS SoCG (CD 8.6) at 2.3

evidence of lawful use of the site with permission *now*. Further, there is no reasonable prospect of access with permission in the future, if consent is refused.

(iv) **Unlawful active use of the site** - CG agreed that you should attach ***no material weight*** to the public value of active use of the site which has been facilitated by criminal damage of fences and which is unauthorised and unlawful. Such a proposition is self-evident. Neither the SoS/PINS nor the land use planning system can endorse the public value of the site for criminal damage and/or trespass. Such an approach would be anarchic and a flagrant disregard of private property rights. Further, you do not need fences for the site to be private and/or the use to be unauthorised and unlawful (ReX of JS). It is clear from the Spatial Plan 2014 (CD 6.7) that MAN, MFFG and CWT have erected signs and communicated with local residents to prevent unlawful access. There has not been "unfettered" access (whatever that term is meant to mean). It follows that, even if you (wrongly) consider the public value of the site in the past, it would still not be appropriate to attach material weight to unlawful use of the site (ReX of JS). The analysis does not change, even if one looks *backwards*;

(v) **Value as a future opportunity** - CG conceded the site did not have any public value as a future opportunity for active public use because there is no proposal, no prospect and no mechanism for such public use. There is no evidence to support such a future opportunity absent the grant of this planning permission. Again, the analysis does not change, even if one looks *forward*.

116. Accordingly, CG agreed that **<u>the tangible public value</u>** of the site as open space is derived from:

(i) The ability to pass and re-pass along the PROW;

(ii) The appreciation of the site from certain distinct lengths of the PROW from which the site can be experienced.

(f) The Public Value of the site if permission is granted

117. It is agreed (XX of CG) that the adverse impact to the public value of the site will be:

(i) A quantitative loss of open space; and

(ii) A qualitative loss of experience from those parts of the PROW network which will be able to see the housing area. There is not a qualitative loss to those parts of the site on which there is no development. CG agreed therefore agreed that the qualitative loss is experienced from a length of 360m from FP 126S as it crosses the site.

118. If permission is granted, there will be housing on 4.4ha[28] of the site (JS at 4.4). It is agreed (Design SoCG and XX of CG):

- The housing is in the most appropriate location on the site, for ecological and arboricultural reasons (4.1);
- The LPA required that 200 homes were developed on the site because 45d/ha was the appropriate density, given the sustainability of the location (4.2);
- Such a level of development and density is acceptable (4.2);
- The amenity buffer around the Mirrlees Oak is appropriate (4.3);
- The Design Code is acceptable. The Design Code and the RMA will deliver high quality development in the terms of NPPF Ch.12 (4.5);
- There are no design issues in dispute.

119. Accordingly, it is agreed that the housing which will be visible from the PROW will be of high quality and acceptable from a design perspective.

120. Further, whilst the housing will be visible from short lengths of the PROW, it is agreed that (OS SoCG CD 8.6 and XX of CG):

- The site is deemed to be in the urban area (4.7);

[28] The access road is 0.77ha. However, the majority of that area is already laid out as Mirrlees Drive.

- The site does not form part of a valued landscape for the NPPF (4.11);
- The adverse effects on landscape elements, landscape character and visual amenity are localised (4.12);
- There is no unacceptable harm to landscape elements, landscape character and visual amenity (4.12);
- There is no reference to landscape and/or visual impact in the RFR (4.12);
- The visual impact to users of 126S is moderate adverse (set out in the TVA and agreed in CD 8.6);
- The visual impacts identified in the TVA are "acceptable" (4.12).

121. Accordingly, CG agreed (in XX) that **the impact to the public value of the open space comprises:**

(i) A quantitative loss of open space of 4.4ha; and

(ii) A qualitative loss in terms of (a) visual impact, which is acceptable; and (b) landscape character/amenity, which is acceptable.

122. The beneficial impacts on the open space are also agreed (XX of CG and OS SoCG at 3.2):

- 18.30ha (68%) of the site will become Informal Public Open Space;
- This area will be enjoyed for active and passive recreation;
- There will be formal management and maintenance in perpetuity, in accordance with an agreed plan;
- There will be an endowment of £1.5m to secure such management and maintenance in perpetuity (see endowment statement at JS App 8);
- The site will be managed by the Land Trust (or other body agreed by the LPA or Specialist/Arbitrator);
- The LPA agrees that the Land Trust is an appropriate body to undertake the management and maintenance of the open space. They are a registered Charity which has been established specifically to manage open space in the public interest (see JS App 8);

- The LPA agree that there are other equally appropriate bodies which exist which could manage and maintain the site e.g. the Green Belt Company, Trust Green or CWT;
- The s.106 provides a mechanism which will secure public access in perpetuity, in the public interest;
- 3.4ha of the site will become Formal Open Space, which will be available to the public for active and passive recreation;
- The total of the open space to which lawful public access will be granted in perpetuity is 21.71 ha (80%) of the site;
- There will be ecological works (at the developer's expense) which will improve the appreciation of ecological on the site (the OLEMP works);
- There will be ecological management to allow continued enjoyment of ecology on the site;
- There is a balance to be struck between public access and ecological enhancement. The best means to strike the right balance is through the LEMP and open space management plans.

123. In that context, it is agreed that the development will authorise and guarantee greater public access across the appeal site in perpetuity. The area to which there is public access for active and passive recreation will increase from 0.8ha to 21.71 ha. This is a significant quantitative increase of 20.91ha (an area which 270 times greater than currently available).

124. In that context, there can be no reasonable evidential doubt that:

(i) The loss of 4.4ha of the site to housing would be replaced better provision in terms of quantity and quality, such that there is compliance with NPPF (99)(b); and

(ii) The benefits of the alternative recreational provision secured by the development will clearly outweigh the loss of the current open space, such that there is compliance with NPPF 99(c).

125. It follows that there is no adverse impact to weight in the tilted balance. Rather, the proposal will deliver a benefit to the public value of the open space to which very significant weight must attach.

(iii) Fallback Position

126. The FB position is not contested (XX of CB and PSoCG at 2.6). The landowner (the Appellant) has PD rights to erect a 2m boundary around the site. The design is at the discretion of the landowner (not the GPDO). It could be impermeable. CG conceded that the effect of such a boundary treatment would be to corridor the PROW. CG agreed that restrictions on public access could be both physical (a fence/wall) or legal (an injunction prevent unlawful access from persons unknown).

127. In the OR (CD 3.2) the Council accepted that (p.136/177):

- The site is privately owned;
- Future public access to the site could not be guaranteed;
- The "*likely result*" (if consent was refused) would be increased measures to prevent public access;
- There are no legal restrictions on the construction of a 2m high fence or other structure;
- There is a "*real prospect*" of the restrictions being implemented;
- The boundary treatment could be 2m tall and impermeable;
- Compared to the likely fallback position, the proposal is a benefit.

128. CG acknowledges the FB position in his evidence (CG at 5.50). He accepts that the prospects of the FB occurring is real (more than theoretical). In his written evidence, CG does not, however, explain either: (i) the impact of the FB on the public value of the site; or (ii) how he concludes that the FB position does not outweigh conflict with the development plan. His position is bare assertion, without *any* underlying analysis (see CG at 5.50 to 5.57). It is, therefore, critical that (in XX), CG conceded the following:

- The FB position is more than theoretical, it is real;
- That is also the Council's position in Opening (see para 37);
- The FB position is the erection of a 2m high impermeable fence;
- In the FB scenario, the public could pass and re-pass along the PROW but they could not see or experience the open space, save for the openness above a 2m high fence, situated either side of a 2m wide PROW corridor;
- PROW 126 (the Fred Perry Way) would be in an unattractive corridor which could be the subject of ASB and graffiti;
- There would be no lawful access to the site;
- There is no reason to expect that permission would be given to the public, given the purpose of the boundary treatment would be to prevent public access;
- There would be no works of ecological enhancement (OLEMP works) pre-transfer to the Land Trust;
- There would be no ongoing ecological management and maintenance. Indeed, there would be no maintenance regime at all;
- The site will have no lawful active use *at all*, at a time of a housing crisis and a local deficiency in open space.

129. Indeed, CG further conceded that:

- The site could be sold (at the unfettered discretion of the landowner) because the Appellant has made it clear (for at least a decade) that they do not want to own and manage the site (see Mirrlees Fields Spatial Plan CD 6.7);
- It is reasonable to assume it will be sold for best value on the open market;
- There is no evidence that local residents or local organisations/trusts can buy it;
- There is no other realistic purchaser of the site except developers;
- Indeed, the site is currently under option to Kellen Homes (a housebuilder).

130. **In that context, CG expressly conceded that:**

(i) The FB position, should consent be refused, is <u>worse</u> than the current position;

(ii) The FB position is "<u>significantly worse</u>" than proposed by this Appeal.

131. Such concessions are entirely consistent with the evidence of the Appellant, Officers of the Council, MFFG and Mrs Leonard (on behalf of PMFD). The evidence is entirely consistent on this point. It follows that: (i) the FB position must be a material consideration which outweighs any claimed conflict with the development plan (CG's bare assertion is now inconsistent with his oral evidence); and (ii) the FB position is a consideration of **very significant weight** in favour of development in the tilted balance. By contrast, the refusal of this appeal would be the antithesis of positive planning enshrined in the NPPF – a point illustrated by CG's staggering concession on FB: the LPA are actively seeking an outcome that will be worse in planning terms then even the current unpalatable situation.

(iv) Development Plan Policies

132. NPPF (98) requires that policies should be based on robust and up-to-date assessments of the need for open space, sport and recreation facilities (including quantitative or qualitative deficits or surpluses) and opportunities for new provision. The UDP was adopted in 2006. No open space assessment is available. Plainly the UDP policies are not based on a robust or up-to-date assessment. This must reduce the weight to be attached to the UDP Policies.

(a) UDP Policy UOS 1.2

133. It is agreed (XX of CG) that Policy UOS 1.2 can be interpreted in 3 parts.

134. Part 1 requires that "*only limited development will be permitted*". The use of the word "*only*" is clearly prescriptive (cf XX of CG). It is agreed that 200 new homes is not "*limited development*". That is consistent with PPG 17, which allows small-scale development (such as toilets). Accordingly, there is a conflict with that part of the policy. However, there is no such requirement in NPPF (99). It is agreed that a development of up to 200 homes *could* comply with NPPF (99)(b) and (c). Accordingly, Part 1 of UOS 1.2 is clearly inconsistent with NPPF 99. Indeed, this should not be controversial, as this was accepted by Officers (see OR CD 3.2 on p.135/177). It is agreed that *limited weight* should apply to UOS 1.2. CG's argument to the contrary is opaque, absurd, and plainly wrong. If (which is denied), CG's interpretation of UOS 1.2 is correct (and a development of up to 200 homes can comply with UOS 1.2, even though it is not limited development), then the proposal would then *comply* with UOS

1.2 (for the reasons given above). Policy UOS 1.2 is even inconsistent with PPG 17, which (para 16) requires LPA's *to weigh any benefits being offered to the community against the loss of open space that will occur*. That is consistent with NPPF 99(b) and (c) but is not the approach of the UDP.

135. Part 2 applies to "limited development" because it is the only type of development which is permitted. There is a specific reference to "type" and "scale" which is not found in NPPF 99. Development cannot be "*insensitive to the maintenance ... of attractive green and open areas...*" and CG accepted that this means that the permitted small scale development cannot lead to harm to the character and appearance of the open space. CG conceded that NPPF does'nt require that there is "*no harm*" to either the character (landscape) or appearance (visual amenity) of the open space. Further, NPPF 174 (a) and (b) seek to protect and enhance "valued landscapes" (which this is not). There is no NPPF policy which requires "*no harm*" to the character and appearance of the area. Finally, Part 2 makes no reference to the exceptions in NPPF 99 (b) and (c), which would permit development. Accordingly, Part 2 is also inconsistent with the NPPF and should be afforded limited weight.

136. Part 3 contains additional policy tests which are not found in NPPF (99). "*Increased overlooking*" is not a test in NPPF (99). Indeed, it is a bizarre policy requirement, given that the amenity value of the open space is part of its public value. NPPF (111) does not preclude increased traffic flows. Rather, the threshold is "severe". Finally, you cannot (by definition) develop open space without some form of "other encroachment". For those reasons, Part 3 is inconsistent with NPPF (99) and should be afforded limited weight. It is, however, agreed that there is no alleged conflict with UOS 1.2(i) - (iii).

137. It is the Appellant's case that **there is a conflict with that part of the policy which precludes "limited development" and requires development of a limited type and scale. However, such parts are inconsistent with NPPF (99) and should be afforded "limited weight" in the tilted balance**. By contrast, if Policy UOS 1.2 is (somehow) consistent with NPPF 99(b) and (c), the proposal will comply with it.

(b) Policy NE 3.1

138. Policy NE 3.1 applies to (i) wildlife value; and (ii) recreation value (CD 4.21 p.17/139). The LPA do not take any issue with wildlife value (see CD 3.2 at p.138 and Ecology SoCG).

139. The policy precludes development which would "*detract*" from the recreation value of the Green Chains. It is agreed that "*detract*" means "*no net harm*" (JS at 11.53 and XX of CG). Provided "*detract*" and "*no net harm*" is interpreted and applied in a manner which is consistent with NPPF 99(b) and (c), the policy is consistent with the NPPF (EiC of JS).

140. JS considers (JS at 11.55 to 11.58) that the development does not detract from the recreation value of the Green Chain. Rather, there will be a "*very significant benefit to the recreation value of the Green Chain because public access in perpetuity to 21.7ha of the Appeal site would be secured by the planning obligation in the s.106 agreement*" (JS at 11.55). **On balance, the Appellant submits that there is compliance with Policy NE 3.1 (JS at 11.58) which JS sets out should be given moderate weight**. This is the same issue of substance as raised in NPPF 99 (b) and (c).

(c) Policy CS 8

141. NPPF (98) requires policies to be based on an up-to-date and robust assessment of Open Space. Policy CS 8 is not based on any assessment of open space at all. Rather, the designations of the UDP are simply rolled forward without further analysis (XX of CG). The Core Strategy is clear that site specific designations would be addressed through the ADPD (CD 4.2 at p.162/172). This is important because the latest Open Space assessment from the Council demonstrates that the site would not now be considered Open Space because the site is not accessible for use by the public (see CD 4.17 at paras 6 and 7 and XX of CG). This must reduce the weight to be attached to the policy designation of Strategic Open Space in the CS. As CG conceded: "*the designation as open space in the CS tells the Inquiry nothing about the public value of the open space*" (XX of CG).

142. It is common ground that the proposal complies with those Parts of CS 8 which address (i) Quality Places (CS 8 3.285); (ii) Green Infrastructure (CS at 3.286 - 3.289); (iii) Landscape Character (CS 3.293 and 3.294); (iv) Children's Play (CS 3.295); (v) Biodiversity and Nature Conservation (CS at 3.296 and 3.297); and (vi) Environmental Protection (CS at 3.298). The only alleged conflict is with CS paragraphs 3.290 to 3.292 (PSoCG at 5.6).

143. It is agreed that Policy CS 8 can be interpreted and applied in 4 parts (XX of CG).

144. Part 1 contains a general prohibition ("*In general terms*") against development which does not safeguard the permanence and integrity of Strategic Open Space (SOS).

145. Part 2 specifically recognises that there may be, however, situations in which the need to protect the open space is outweighed by the interests of achieving sustainable communities. This specifically includes delivering mixed communities (i.e. the delivery of market and affordable housing) and improving recreation facilities and parks. It is common ground that this proposal falls within Part 2. Part 2 is, therefore, consistent with the approach in NPPF (99) and NPPF (11) because it allows for a consideration of (i) whether there will be a benefit in the public value of the open space (NPPF (99) (b) and (c)) and (ii) allows consideration of the tilted planning balance (NPPF (11)). The proposal complies with this part of CS 8 which is consistent with the NPPF.

146. Part 3 requires that "*in such situations*" (i.e. the situations in Part 2) the objective of achieving sustainable communities "*may*" be best served by the development of "*limited areas of open space*". The Appellant has interpreted this to be a restriction to "*limited development*", which is consistent with Policy UOS 1.2 but inconsistent with NPPF (99). If that is correct, the proposal conflicts with the Policy but limited weight should attach to such a conflict (JS at 11.92). If the LPA is correct and the word "may" allows development which is more than limited, the proposal complies with Policy CS 8, is consistent with the development plan and should be consented *without delay* (XX and ReX of JS). It follows that LPA's case is *advantageous* to the Appellant.

147. Part 4 (CS para 3.291) begins "*In addition*". This means if the proposal complies with Parts 1 to 3, this Part does not need to be addressed. Part 4 is setting out "*circumstances*"

which are additional to the "*situations*" in Part 3. Part 4 specifies that the delivery of affordable housing can justify the loss of open space. This proposal (50% AH delivered by the 50% market housing) derives strong support from this Part of CS 8, with which it complies.

148. However, Part 5 provides that "*such circumstances*" (i.e. the circumstances in Part 4) will only be considered acceptable in an area where the Open Space Study identifies a "*relative higher provision of recreational open space*". Any development resulting in a loss of open space, in a higher provision area, will need to offset that loss by making improvements. Such an approach is inconsistent with NPPF 99. The exceptions in NPPF 99 (the criteria (a) to (c)) applies to all areas of open space. They are <u>not</u> restricted to areas of relatively higher provision. Indeed, in XX, CG agreed that such an approach would be "perverse" because it would permit equivalent or better provision of open space in areas of higher provision but it would not allow equivalent or better provision in areas of lower provision, where the need for open space is greater. Accordingly, Parts 4 and 5 of CS 8 are inconsistent with NPPF (99) (b) and (c) and "perverse". Limited weight must therefore apply to such Parts of CS 8.

149. It follows that the proposal *complies* with those parts of CS 8 which are consistent with the NPPF but *conflicts* with those parts which are inconsistent with the NPPF. On balance, the Appellant considers that the proposal conflicts with CS 8 but that limited weight can attach to such conflict in the tilted balance (JS at 11.112).

<u>(v) Open Space Studies</u>

150. CG agreed that the Open Space Studies are neither policy nor guidance. Rather, they formed background evidence to the GMSF, from which Stockport withdrew. Neither the Appellant (nor anyone else) has, therefore, been able to challenge the erroneous site specific assessment or conclusions of the Studies through the Plan process. CG agreed that the Studies are relied upon as evidence for 2 points:

(i) The public value of the open space; and
(ii) The existing level of provision in the Stepping Hill area.

151. However, the public value of the open space (now and in the FB scenario) is agreed. The content of the Studies (dated 2017) does not change the agreed public value. Further, **whilst the existing level of provision may be relevant to NPPF 99(a), it is of no relevance to NPPF 99(b) and (c) on which the Appellant relies**. In such circumstances, the Studies are of very limited relevance if any.

152. It is agreed that CD 4.16 and 4.17 have been produced by the same consultants and should be read and applied together (CD 4.17 para 1 and XX of CG). "Open Space" is defined within the Studies as "*Land set out for the purpose of public recreation*" (CD 4.17 at para 6). This means open space must be a defined site with clearly identifiable boundaries, "***freely accessible for members of the <u>public to access and use</u>, <u>and</u> meets one of the open space typologies***" (CD 4.17 at para 7). It follows from such a definition that the site is <u>not</u> Open Space for the purposes of the Studies. This was expressly conceded by CG. This is an important concession for 2 reasons: (i) it means that the analysis in the Studies is flawed and of limited weight and (ii) it means that had this site been considered through the Local Plan process, it would not have been protected as Open Space. Such conclusions are inescapable.

153. Further or alternatively, the site assessment is flawed and of no relevance to the public value of the site <u>now</u> or in the Fallback scenario. In XX, CG accepted that a high value site would be well-used and well-maintained (see CD 4.17 at paras 38 and 39). The site is neither well-used nor well-maintained now because there is no lawful access. There is no rational evidential basis for the contention that the site is of "high value" because it is inaccessible and cannot be used (cf p.54/56 CD 4.17).

154. Finally, whilst CD 4.16 provides a set of criteria for value (see paras 31 and 32), CG conceded that there is no site specific assessment and no explanation as to how numeric values of value have been derived (see Table 5.2 p.44/147 - site 445). The first criteria is, however, level of use. Applying CD 4.16 and 4.17 together, the inescapable conclusion (as CG conceded in XX) is that the assessment was undertaken on the fundamentally flawed premise that the site was freely accessible for the public to use. It is common ground between the LPA and Appellant that is not the case now. It was not the case in 2017 either. Accordingly, the attribution of value to the site is not just

opaque, it is fundamentally flawed and of no material evidential value. Nothing turns on such a conclusion, as the public value of the site as open space is now agreed (*supra*).

(vi) Summary

155. The Appellant submits the proposals for the open space constitute a benefit to which **very significant weight** must attach. Indeed, the proposals are supported by the Mirrlees Fields Friends Group (MFFG), a Registered Charity with 1800 Members (comprising local residents), whose constitution and charitable purposes seek to bring the Mirrlees Fields into wider community use. The MFFG were formed in 2007 and specifically recognise (despite their primary position) that there is no other realistic prospect of the site being made available for community use (JS App 7).

156. So whilst it is agreed that the proposal conflicts with policy UOS 1.2 because the proposal is not "limited development", the UDP is out of date and the policy is inconsistent with NPPF 99 (b) and (c). The proposal complies (on balance) with NE 3.1 and there is no claimed ecological impact to the Green Chain (*supra*). There is a partial conflict with CS 8 because (again) there is not "limited" development and the site is not located in an area of "relative higher provision". Officers accepted only limited weight can attach to the conflict with UOS 1.2. Only limited weight can attach to those parts of CS 8 which are inconsistent with the NPPF and with which there is conflict. Indeed, such policy issues would have been addressed had progress been made on site specific designations since 2011. Such limited policy conflict cannot (rationally or reasonably) significantly and demonstrably outweigh the benefits to which very significant weight must attach.

Application of the Tilted Balance

157. Indeed, it is clear that the LPA's application of the tilted balance is deeply flawed (see CG at 6.12, 6.16 and 6.20)

(i) CG has weighed (6.12) (i) the significant benefit of making 21.71ha of private land permanently available for public use against (ii) the loss of open space (a claimed significant negative impact). On balance, CG concludes that the benefit of the 21.71 ha of POS is a benefit of "very limited weight". That means CG has concluded that the benefits outweighs the harm. There is no other meaning. This is entirely consistent with the Appellant's case on NPPF 99(b) and (c);

(ii) The loss of open space is the only claimed unacceptable impact. If (on balance) the POS is a benefit (albeit of very limited weight), the loss of POS cannot (a) significantly and demonstrably outweigh the benefit of the POS or (b) significantly and demonstrably outweigh the benefit of the POS plus all of the other benefits. CG's evidence is internally inconsistent;

(iii) CG reduces the weight to be attached to the (agreed) economic benefits because he balances them against the loss of open space. If he had not, it must follow that he would attribute such benefits "significant weight" not "moderate weight";

(iv) CG sought to reduce the weight to be attached to the environmental benefits from "significant" to "moderate" on the flawed basis that benefits had been double counted. The position was corrected (in XX) and his conclusion of "significant weight" (6.20) remains;

(v) Having reduced the weight to be attached to the benefits (based on the loss of open space), CG relies (again) on the loss of open space as the negative which significantly and demonstrably outweighs the benefits (7.1). This is a clear and demonstrable double counting of land use planning impacts. The LPA's application of the tilted balance is demonstrably wrong.

158. Finally, in XX CG conceded that the sole land use planning impact to be weighed in the tilted planning balance was the loss of 4.4ha of open space, which can only be experienced from a 360m length of footpath, from which the landscape and visual amenity impact is agreed to be acceptable. On the basis that the policies must be applied to the open space existing at the time of the decision, CG expressly conceded that the tilted balance was passed and consent should be granted. As CG had previously agreed that this was the correct basis for the analysis (per ***Renew*** at para 37), it is unanswerable (even on the Council's evidence) that consent should be granted.

159. That proposition can only be further re-inforced when one considers the impact of the proposal against the fallback position (which CG accepted to be worse in planning terms both against the proposal and existing situation).

160. It follows that there is no reasonable evidential basis for the refusal of this scheme (even on the basis of the Council's flawed analysis).

THE CONSEQUENCES IF PERMISSION IS REFUSED

161. The consequences of refusal are also a material consideration. This is a separate but related issue to the FB position. No party knows what to do with the site if consent is refused.

(i) MAN would be in precisely the same position as they have been for the last 20 years. They have a longstanding position that they have no interest in the site (CD 6.7) and it would be sold. It would be secured and fenced to facilitate the sale;

(ii) MFFG's worst fears are that the site is sold to a developer. They are not aware of another future for the site, if consent is refused;

(iii) PMFD might like to buy the site but in 3 years they have not even managed to register as a Charity. They "*don't know*" what to do with the site in the meantime (XX of EL);

(iv) Cllr Baynham did not know what she wanted for the site. She flittered (on 4 occasions) between wanting public access and accepting the FB position (she was unique on this position);

(v) The MP did not address this point and declined (sensibly) to answer questions;

(vi) CG confirmed that (despite being consulted for 20 years) Members have no positive vision/solution for the site at all. In the light of the process undertaken by MAN, that is a damning indictment on the Members of the Planning Committee.

162. Whilst JZH doubts that the fence will endure, this is because of the cost of repeated criminal damage to it. It would appear, therefore, that Members are advocating a position where (in the absence of any positive solution) a fence is erected but subject to such extensive criminal damage that the landowner gives up repairing it, allowing unlawful access to private land, which a private organisation will have to pay to address (in perpetuity). Such an outcome would put a local employer in conflict with the local community (many of whom are its employees) and would require significant involvement of the Police and Council. Such a dystopian outcome would be a huge waste of private and public resources and would create widespread disharmony. Such

an anarchic position cannot possibly be endorsed by the Secretary of State's Planning Inspectorate. It is the anthesis of positive planning (NPPF (39)).

SECTION 106 AGREEMENT

163. The planning obligation is agreed. All of the planning obligations are subject to a trigger. The Inspector must conclude that all of the obligations are "necessary" (in the terms of the CIL Regs and NPPF). There is only one matter in dispute: it concerns First Homes. However, the resolution of that issue does not impact on the decision to grant consent because the s.106 provides for two scenarios.

First Homes

164. The Appellant seeks to rely on national policy over H3 because H3 is out of date and has been further superseded by First Homes. The Appellant is seeking to apply up to date national policy and guidance (for fear of a refusal on this point). Counter-intuitively, the Council accepts that H3 is out of date (a point established in the Seashell Trust appeal) but nonetheless maintain that it should still be given significant weight.

165. The Council are relying on H3 to resist the Appellant's proposal to introduce First Homes into the tenure mix to provide 25% First Homes, 45% Shared Ownership (at SMBC transfer prices) and 30% Social Rent. This is contrary to the WMS – now enshrined in the PPG - which has made clear that: "*First Homes are the government's preferred discounted market tenure and should account for at least 25% of all affordable housing units delivered by developers through planning obligations*." H3 has further been overtaken by the introduction of the WMS on First Homes. The Appellant's position is unanswerably consistent with the PPG.

166. The Council's position is further confused by their informal "bottom drawer" (i.e not policy, SPD nor SPG) affordable housing documents[29] which both incorporate First Homes. Yet, the Council does not seek First Homes in line with these latest documents. The "reasoning" is that First Homes are not 'genuinely affordable' for Stockport, given the affordability for lower income households of shared ownership.

[29] Affordable Housing Requirements in Stockport Explanatory Note (CD4.1) and First Homes Policy Position Statement (CD4.5)

167. Such a contention is flawed on 3 bases:

- It would be irrational and absurd for the LPA to produce a policy approach, seeking to implement the Government's First Homes policy, if it did not intend to apply it and considered that it was unworkable;
- It is contested that First Homes would not be genuinely affordable for Stockport compared to shared ownership. As set out by NT, lower quartile affordability has risen exponentially (*supra*), while the Council's Shared Ownership model provides housing at 3.5 times median earnings. First Homes (with the 70% cap) would reduce the multiple of median earnings required to purchase a median price dwelling to 5.5[30]. Given the likelihood that many First Homes purchasers will comprise dual income households; they are likely to be affordable to a significant proportion of potential First Time Buyers who are otherwise excluded from the market;
- As the Council set out in the RTS, there is a need to provide AH to meet a range of needs. This is exactly NT's point: the purpose of AH is not *exclusively* to provide housing for those at the very lowest income but to provide housing for those who may not be on the lowest income but still cannot afford full market housing.

168. Therefore, at 70% of open market value, First Homes will meet the needs of some households that would otherwise be unable to purchase at full market value. They will clearly not meet the needs of all households that require affordable housing, just as provision of Shared Ownership dwellings at the Councils transfer prices will not meet the needs of households that can only afford dwellings for Social Rent. AH clearly covers a broad spectrum of incomes and different products will be better suited to certain households than others.

169. That is the very point of First Homes and explains *why* the Government require only 25% of the tenue mix to be First Homes i.e. to provide a range of AH to meet the range of needs. It is something which the Appellant’s proposed mix achieves (shared ownership is <u>also</u> proposed) and one that the Council fails to do. There was no clear

[30] Median House Price of £273,102 x 70% = £191,171. Divided by Median Earnings of £34,610 = 5.52.

justification given by the Council in the RTS for their approach and/or for national and local policy/guidance requiring First Homes to be disapplied in Stockport.

170. Overall, there is considerable agreement of the acute, urgent, and significant affordable housing need. The Appellant has provided the Inspector the option – through the blue pencil clause – of providing First Homes as part of the tenure mix to accord with national policy (which takes precedence over outdated local policy). However, on either tenure mix, the delivery of AH is a benefit to which **very significant weight** must attach.

CONCLUSION

171. In the context of (i) the need for an enduring sustainable future for the site in the public interest; and (ii) the very real need for more housing in Stockport now, it is clear that this proposal delivers not only sustainable development but an enduring legacy for this local community and generations to come.

172. It is, therefore, the Appellant's case that planning permission should be granted subject to conditions and the s.106 obligation.

GILES CANNOCK KC
PIERS RILEY-SMITH
Kings Chambers
14th November 2023

APPENDIX 1: HOUSING LAND SUPPLY DISPUTED SITES

At the end of the RT Session there remain 9 disputed sites between the parties[31]. Some of the sites do not have planning permission. Some don't even have a planning application pending determination. All 9 sites are in Stockport Town Centre where delivery is challenging. This is evidenced by the fact that on some sites planning permission has lapsed and on others a lawful start has been made but the site has since stalled. The uncontested sites in the Town Centre which are making progress such as the Bus Interchange site and Weir Mill rely on public sector funding. For those category b) sites, where the onus is on the Council to provide clear evidence to demonstrate deliverability, no viability evidence was presented that could be tested by the Appellant or considered by the Inspector.

Category a) sites in the Town Centre where planning permission had stalled at the base date

Rock Row (52 Dwellings)

Planning permission was granted on this site for conversion of the building to 31 dwellings and a new build extension (21 dwellings) almost 6 years ago. No explanation was given in terms of why the site has stalled. Instead, the Council and the developer for this site explained that there were outstanding listed building / party wall issues with the neighbouring listed theatre, the developer is "exploring" a meanwhile commercial use of the building in the short term and no timescales were provided for when the building would be converted to residential and the new build element provided.

2-6 Churchgate (24 dwellings)

At the base date, there was clear evidence that the developer of this site (Fulcrum) had gone into administration and the site was being marketed for development. This remains the case. Despite the Council's comments that there was demand for residential units in this location,

[31] During the RTS, the Council accepted that 52 dwellings at Hilton House (ref: STO01970) and 33 dwellings at 28-30 Princes Street (ref: STO2348) should not be included in the 5YHLS

and no issues in relation to viability, the site has been marketed for 14 months and has not been sold. It is unknown whether this site will be sold and if it is what the intentions of a future developer are.

32-36 Lower Hillgate (22 dwellings)

This site has had planning permission for almost 5 years. Whilst a start on site was made, the developer (Heaton Group) do not wish to complete the approved scheme because they have a) applied to amend the plans (the application for this was made over a year ago and has not been determined) and b) put the site up for sale by auction. It is unknown whether this site will be sold and if it is what the intentions of a future developer are.

Category a) site in the Town Centre with clear evidence that the site was not deliverable at the base date

Royal George Village (442 dwellings)

Planning permission was granted at Royal George Village on 31st March 2021. However, the permission had not been implemented by the base date. At the base date, the Council's own evidence was that the site was not viable. This is confirmed by Mr Johnson's appendix 1 which explains that viability was a constraint which has since been mitigated by the award of over £8 million from the GMCA Brownfield Housing Fund in Autumn 2023. Furthermore, at the base date, the developer and owner of the site (Investar) had entered into administration. Prior to this they had explained that a start on site had not been made due to "build cost inflation and interest rate rises". This site failed to meet the definition of deliverable at the base date and the inclusion of it now would result in resetting the base date without also taking into account completions and lapses between 1st April 2023 and now and reconsidering the position on other sites. The inclusion of sites which were by definition not deliverable at the base date would result in an unbalanced position.

Category b) sites in the Town Centre without planning permission or a planning application pending determination at the base date

Former Greenhale House (164 dwellings)

This site is owned by the Council. It had planning permission which has lapsed. The definition set out in the annex to the Framework confirms that in such circumstances the site is not deliverable. The Council now considers that it has clear evidence for the inclusion of this site on the basis that it will market the site in 2024 – and it therefore has not even been marketed. Consequently, there is no written agreement with a developer to confirm any of the timescales put forward by the Council for this site.

Stockport 8 (200 dwellings)

At the base date, a planning application had not been made. Nor is one expected for almost a year from now (in September 2024). There is a significant amount of planning and development work required before any homes will be delivered on this site. At the RTS the Council explained that the existing Stagecoach bus depot would first need to relocate and whilst an unidentified site for that had been found they were only at the pre-application stage for permission for that move. There is an absence of any cogent and clear evidence of deliverability of this site in the 5YHLS period.

Chestergate / King Street West (144 dwellings)

The clear evidence the Council had at 1st April 2023 for the inclusion of this site remains unknown. The Council now relies on the inclusion of this site based on the fact that a planning application has been made since the base date. Nevertheless, the application is still pending determination and the Council has not provided any clear evidence from the developer (Great Places) in relation to their timescales or whether the outstanding issues with the application have been resolved meaning it will be approved. There is no clear evidence in relation to viability or how long the S106 will take.

Category b) sites in the Town Centre without planning permission but a resolution to grant permission had been made by the base date

Sainsbury's (563 dwellings); and Piccadilly Car Park (98 dwellings)

Whilst resolutions to grant permission have been made on both sites, the S106 agreements had not been signed at the base date. This remains the case now. The resolution to grant permission at Piccadilly Car Park was made almost 3 years ago and for Sainsbury's in November 2022. The Council has not been clear why such lengthy delays have occurred. Viability evidence for these sites has not been provided. At the RTS, the developer for Sainsbury's noted that developing sites in the town centre in the current economic climate including high inflation, interest rates and mortgage costs is "challenging".

At the Piccadilly Car Park site, a development partner is required which will not be appointed until after the decision notice has been issued, and the developer was unable to confirm a date for first completions. It is noted that the Council placed delivery for the Car Park site at Year 5 so any slippage would take it out of the 5 year period.