TOWN AND COUNTRY PLANNING ACT 1990 (AMENDED)

SECTION 78 APPEAL BY MAN ENERGY SOLUTIONS UK LIMITED

AGAINST THE REFUSAL OF PLANNING PERMISSION BY STOCKPORT METROPOLITAN BOROUGH COUNCIL FOR DEVELOPMENT ON MIRRLEES FIELDS, STOCKPORT

PINS Ref. APP/C4235/W/23/3325351

LPA Ref. DC/081719

CLOSING SUBMISSIONS ON BEHALF OF THE LOCAL PLANNING AUTHORITY

Introduction

1. The LPA's submissions are set out as follows by reference to the main issues identified in the CMC and at the start of the inquiry, namely:

   (1) The Effect of the Proposal on the Supply of Open Space

   (2) The Supply of Housing Land

   (3) Whether or not any adverse impacts of the proposal would significantly and demonstrably outweigh the benefits (the planning balance)

Main Issue 1: The Effect of the Proposal on the Supply of Open Space

Facts

2. Mirrlees Fields ('the Fields') have a history of recreational use stretching back over a century. The site was first laid out as a 9-hole course after Mirrlees Bickerton & Day moved to Hazel Grove in 1907.[1] Parts of the Fields were also laid out as football and cricket pitches.[2] Although the formal

[1] J Suckley POE, §2.8
[2] Mirrlees Fields Spatial Plan (CD6.7), Fig.1

recreational use of the ceased in the 1980s, they have since been used for nearly four decades by the general public for informal recreation.[3]

3. There is no doubt that the Fields are highly valued as open space by the local community and other members of the public; their quality and value as the *only* area of significant natural/semi-natural open space in the local area is acknowledged in the open space assessment undertaken by Knight, Kavanagh and Page ('KKP'); and their long-term importance has been recognised through designation as protected 'Strategic Open Space' in successive iterations of the statutory development plan.

4. The Appellant has been the owner of (the majority of) the Fields since around the turn of the millennium.[4] Although it may not have given consent for use of the Fields by the general public (and may have tried to communicate this via signage or other means[5]), it did not attempt to obstruct or prevent such use until after the Council refused this application when it erected the stock fencing along the PRoWs in April this year. However, it has not been very successful in preventing access since it is common ground that extensive sections of the fencing have been repeatedly broken down (and that this is currently costing the Appellant around £1,500 per month in repairs).[6] Furthermore, it has "always operated a consent system with local groups such as the Mirrlees Fields Friends Group ('MFFG'), Scout Association and local school children".[7]

The NPPF definition of 'open space'

5. Mr. Suckley did not dispute that, until the Fields were fenced, the public value of the site as 'open space', within the meaning of the NPPF, included recreational use of the Fields, even the though use by the general public was not authorised. Nor do Mr. Suckley or the Appellant go so far as to claim that its (very recent) attempt to prevent public access to the Fields takes them completely outside the definition now. However, they do

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[3] R6 Statement of Case (CD7.3), p.7
[4] J Suckley POE, §2.8
[5] J Suckley POE, §3.13
[6] J Suckley XX
[7] Planning Statement (CD1.64), §2.14

contend that the effect of the fencing is that the only basis on which the Fields still qualify or have any value as 'open space' for the purposes of the NPPF is by virtue of the use of the c.0.8ha of PRoWs within them and the visual amenity that they provide to footpath users.[8]

6. This, however, is demonstrably wrong. The definition of 'open space' in the NPPF is broad and inclusive, applying to "all open space of public value" so long as it offers "important opportunities for sports and recreation". This includes private open spaces to which the general public has no right of access at all, such as golf clubs and other private sports clubs, and also to sites which were previously in recreational use, such as the sports facilities of former FE colleges. As Mr. Suckley accepted in XX, it follows from the references to "public value" and "opportunities" that it is not necessary for there to be *public right* to use it, and nor does an open space have to be *actively* used, in order to fall within the definition.

7. The rationale for this is plain when the definition is read together with NPPF §§98-99: the policy objective is to prevent open space of any kind which offers significant opportunities for the public to engage in sports and recreation (and which can, incidentally, contribute to visual amenity) from being built on (and thus permanently lost) unless there is sufficient other open space to meet needs or it will be adequately replaced in one way or other. It would run counter to this objective to allow privately or publicly owned open space to be built on as soon as it is no longer actively used for sport or recreation.

8. It follows that it is wrong in principle to focus exclusively on the current use of the ProWs and the visual amenity enjoyed by users of the same and to ignore, or fail to give proper weight to, the Fields' long history of recreational use on the grounds that (a) the general public's use of the land over the last few decades has been unauthorised and (b) that use (and possibly also the permissive use by the groups that the Appellant "always" previously allowed to use it) ceased six or so months ago (or at least mostly ceased). This is because the longstanding use of the Fields is clear evidence

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[8] J Suckley POE, §11.118 and XX

of the fact that, particularly because of the lack of any similar open space in the area, they had, and still have, public value in the sense described in the NPPF.

9. The Appellant's reliance on the Court of Appeal's judgment in *Renew Land Developments*[9] to justify such a narrowly focussed approach is based on a misconception of what the case decided. What the Court was specifically considering at [37] was whether the judge below had been right to find that the inspector in that case had erred in law in applying a particular policy on '*public* open space' to land which the owner said that they would fence off if the appeal was dismissed. The Court held that the inspector had not so erred because the definition of '*public* open space' in a relevant local policy (which was completely different from that in the NPPF or any of the relevant plan policies in this case) applied not only to land which was publicly owned but also "if a formal agreement exists to state that an area of land in private ownership is available for public/dual use".[10] Thus, the fact that the owner may have intended to end the agreement and exclude the public if the appeal was dismissed did not prevent the land from falling within the relevant definition at the time the appeal was determined. The observation that "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 permission" was made in that context. All the Court was saying therefore was that, in deciding whether the land was within the scope of that definition of 'public open space' had to be determined at the date of the decision, which – according to that definition - required consideration of whether or not it was publicly owned or there was a formal agreement for dual use at that time, not what the position which would be or might be in future. It was not saying that, in determining whether any land anywhere is open space (or what value it has as open space) for the purposes of quite differently worded policies, the past use of the site and/or its potential for use as open space, must necessarily be disregarded. On the contrary, applied to this case, it simply means that the decision on whether the land falls within the definition depends on whether it has public value within the

[9] Renew Land Developments v Welsh Ministers [2020] EWCA Civ 143 (CD5.26)
[10] Ibid, at [10] and [37].

meaning of the NPPF definition, not that all that can be taken into account when deciding whether it has public value is its current use.

10. The Appellant's stance is also perverse. Firstly, it defies common sense to suggest that the long history of the use of the site for recreational purposes should be treated as irrelevant or as having no weight at all when considering what public value it has as open space. Secondly, the Appellant's own case as to the benefits which will flow from the proposed transfer to the Land Trust *presupposes* that the site has considerable public value for use as informal open space. Thirdly, the notion that the entire site could qualify as open space simply on the basis of having PRoWs running through it and attractive views of the Fields implies that the concept of open space is so etiolated or watered-down that it could apply to almost any field in the country, so long as it has a PRoW running through it, which would vastly extend the scope of NPPF §99 and the protection from development it affords. By the same token, it implies that open space assessments ought properly to assess the need for, and supply of, land that contributes to visual amenity for users of PRoWs, which seems more than a little bit odd and implausible, particularly since the NPPF deals with PRoWs separately from open space in §100 which also only explicitly seeks to protect and enhance PRoWs' functionality, as opposed to any incidental visual amenity they may offer.

11. Furthermore, it is an error which goes to the heart of the Appellant's case because it underpins Mr. Suckley's assessments of national policy compliance, development plan compliance and the planning balance.

National policy compliance

12. NPPF §§98 and 99 provide that:

> *98. Access to a network of high quality open spaces and opportunities for sport and physical activity is important for the health and well-being of communities, and can deliver wider benefits for nature and support efforts to address climate change. Planning 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. Information gained from the assessments should be used to determine what open space, sport and recreational provision is needed, which plans should then seek to accommodate.

99. Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:

a) an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or

b) 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; or

c) the development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former use.

13. The Open Space Assessment Report ('the OSAR') prepared by KKP was expressly undertaken in the context of NPPF policy and the PPG – in particular, the requirement in NPPF §98 (then §73) for an up-to-date assessment of the needs for open space, sports and recreation facilities and opportunities for new provision and the requirement for 'soundness' in relation to local plans.[11]

14. It would be surprising, therefore, if KKP had deliberately intended to adopt a definition of 'open space' for the purposes of the assessment which excluded, in principle, land which would qualify as open space, and have public value as such, under the NPPF definition.

15. However, that is the sole basis on which the Appellant challenges the report's findings in relation to the Fields and their role in the supply of natural/semi-natural greenspace in the Stepping Hill sub-area (and Stockport as a whole). That is, they take the purely 'technical' point that, applying the definition set out on p.2 §6 of the Open Space Standards Paper

[11] Open Space Assessment Report 2017 (CD4.16), §§4, 9-13.

(‘OSSP’) (which they take to require public rights of access), the OSAR was wrong was to have included the Fields within its assessment of the supply of that typology and should, accordingly, have concluded that there was not merely a substantial deficit but a complete absence of such supply in the Stepping Hill sub-area.

16. That argument, however, has no merit. Firstly, it is plausible to think that KKP considered the definition on p.2 as a kind of (abbreviated or muddled) shorthand for the definition of ‘open space’ in s.336 of the TCPA 1990 (i.e. “land *laid out as a public garden*, or *used for the purposes of public recreation*, or land which is a disused burial ground”). Secondly, it appears however that they did not appreciate that the definition of ‘open space’ in the TCPA differs from the definition in the NPPF. Thirdly, nevertheless, it did not stop them from taking into account privately owned open space, which could not be considered as ‘*public* open space’, for the purposes of their assessment. This is true not only in the OSAR but also in the OSSP – see for example p.50 of the OSSP which, like the OSAR, identifies the Fields as a natural/semi-natural greenspace of high quality and high value, §56 which talks about seeking to “increase access to private strategic sites” and the general inclusion of e.g. golf clubs. Therefore, it seems unlikely to have been a mistake. Finally, even if were, it would not change the agreed fact that, applying the *NPPF definition*, the site was and remains ‘open space’ within the natural/semi-natural greenspace typology.

17. Therefore, the Appellant’s argument goes nowhere because, regardless of what was meant by the definition in the OSSP, it is clear from the OSAR that, applying the NPPF definition, the appeal site represent the only supply of that open typology in the Stepping Hill sub-area and there is no *substantive* dispute that this means that there is a deficit of -1.16ha per 1,000 in that typology in this sub-area judged against the 1.8ha per 1,000 FiT standard (as well as a smaller -0.16ha deficit in Stockport as a whole).[12]

18. Consequently, the first aspect of the impact of the development on the supply of open space is that it would result in the direct loss of *more than*

[12] Ibid, Table 5.1, p30

4.4ha of the sole source of supply of this open space typology in the Stepping Hill sub-area. That is because it is not just the 4.4ha hectares on which the proposed housing itself will be built which would be lost, but also some (as yet undetermined) proportion of the 3.41ha proposed as residential amenity open space. Therefore, it appears likely that the proposed development would result in the direct loss of something in the range of 20-25% of the current supply of natural/semi-natural greenspace.

19. Given that this is the only site identified as making any contribution to the supply in this area, the deficit would also increase by a similar proportion. Therefore, the supply in future would, on any view, be less than 1/3 of the FiT standard.[13]

20. In addition to the direct loss of natural/semi-natural greenspace, the parts of the residential amenity area which might be managed as semi-natural greenspace would be fragmented and therefore would not serve the same functions or have the same value as the existing greenspace.

21. Accordingly, the starting point for assessing the proposal against NPPF §99 is that the proposed development would clearly have a very significant quantitative and qualitative adverse impact on the supply of open space in this area for all these reasons.[14]

22. Mr. Suckley contends that the retained open space within the proposed development would amount to replacement provision which be significantly *better* in terms of both quantity and quality space by virtue of securing public access to the retained open space, its maintenance and potential ecological enhancement.

23. However, there is no credible basis for disputing that the proposal would result in a significant *quantitative* loss of open space. Securing a public right to access the retained land may be an improvement in one respect but it is *qualitative* one, not a *quantitative* one. Therefore, it is not capable of directly mitigating the significant direct loss of more than 4.4ha of

[13] FiT Beyond the 6 Acre Standard (CD5.8)
[14] C Griffiths POE, §§5.23, 7.3 and 7.4

natural/semi-natural greenspace. Mr. Suckley wrongly conflates the two issues and thereby arrives at a conclusion which cannot be supported.

24. In addition, as already noted, Mr. Suckley's entire assessment of compliance with NPPF §99(b) is predicated on an artificially narrow view of the value of the site which is also untenable.

25. Conversely, it is the assessment of both Mr. Griffiths and the case officer[15] that we respectfully submit should be adopted in this regard, i.e. that the loss of, and harm to, the existing open space would not be outweighed by the (purely qualitative) benefits of the appeal proposal and, hence, the exception (b) in NPPF §99 is not made out.

26. Exception (c) can be dealt with relatively shortly. It was not relied on by the Appellant until Mr. Suckley produced his proof. Mr. Suckley and Mr. Cannock agree that it does not add anything of substance to their case, and Mr. Suckley did not dispute that the relevant test is in fact higher under exception (c) than it is under exception (b) (i.e. the benefits of the proposed development in terms of sports and recreation provision must "clearly outweigh" what is lost, whereas in the case of exception (b) they only have to be "equivalent" to it).

27. Consequently, even if exception (c) were capable of applying here, it is clear that it cannot be satisfied if exception (b) is not satisfied. However, the LPA maintains its submission that it is not apt in any event because 'the

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[15] Officer Report December 2022 (CD3.1), p.137: "As the open space is not surplus to requirements, the loss resulting from the development would not be replaced by equivalent or better provision in terms of quantity and quality in a suitable location, and the development is not for alternative sports and recreational provision, the needs for which clearly outweigh the loss, it is also contrary to paragraph 99 of the Framework. Under these circumstances, it states that the open space should not be built on… For the avoidance of doubt, however, despite the qualitative benefits to these open spaces that would be derived from this financial contribution, it will not compensate for the quantitative and qualitative loss of open space resulting from the development. The loss of this Strategic Open Space would result in significant harm, even more so because of the existing deficiency of open space in the Stepping Hill area. The quality and value of Mirrlees Fields has been assessed in the Council's 2017 Open Space Standards Paper as being high. The Paper outlines that assessing the quality and value of open spaces is used to identify those sites which should be given the highest level of protection by the planning system."

development' referred to in the exception means the development which results in the loss of existing open space, which in this case is the housing development and that is is clearly not "alternative sports and recreational provision". Alternatively, even if the Appellant's interpretation is right and the development means *all* the proposed development, that is clearly still not for "alternative sports and recreational provision". Firstly, the retained informal open space is only part of what is proposed and the other part (i.e housing) is clearly not sports and recreational provision all. Secondly, there is no *alternative* recreational provision proposed in any event (i.e. it is simply the retention of the residual part of the existing informal open space).

28. It follows that the proposed development is in direct conflict with national policy on open space. I will return to the importance of this in the planning balance later.

Development plan compliance

29. Unlike the position in relation to national policy, there is no dispute between the parties that the proposal conflicts with the development plan as a whole because of its impact on open space. There is, however, disagreement over the extent of the conflict and the reasons for it.

UDP Review Policy UOS1.2[16]

30. UOS1.2 provides that:

> *Within the areas of Strategic Open Space listed below and shown on the Proposals Map, only limited development will be permitted. Development which, by reason of its type, scale, siting, materials or design would be insensitive to the maintenance or enhancement of attractive green and open areas for public enjoyment and recreation will not be permitted. In addition, development proposals in strategic open spaces should: (i) protect them from increased overlooking, traffic flows or other encroachment; (ii) protect and enhance rights*

[16] UDP Review (CD4.21), p.44 (pdf numbering)

of way; and (iii) safeguard biodiversity and nature conservation area interests.

31. The Appellant accepts that there is conflict with the first and second sentences of the policy insofar as the proposed development would not be "limited development".[17] However, that is not the full extent of the conflict. In the LPA's respectful submission, there is also clearly additional conflict with the second sentence insofar as the development would not be "sensitive" to the "maintenance or enhancement" of the existing open space by virtue of amongst other things, the type and scale of development proposed (i.e. large scale housing development resulting a major quantitative loss of open space of more than 4.4ha).

UDP Review Policy NE3.1[18]

32. NE3.1 provides that:

Development which would detract from the wildlife or recreation value of the Green Chains identified on the Proposals Map will not be permitted. The Council will initiate and encourage measures to improve linkages and habitat value within and between these Green Chains, and, where appropriate, will require such measures through the development control process.

33. The Appellant's position on compliance with this policy has changed during the course of the inquiry.

34. In his proof, Mr. Suckley accepted that there was at least partial conflict with the policy insofar as the proposal would result in a loss of (at least) 4.4ha of identified Green Chain. Although he did not say so expressly, it was implicit that was because he accepted that it would detract from its recreational value, given that the identified no harm to wildlife value.[19]

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[17] J Suckley POE
[18] UDP Review (CD4.21), p.17 (pdf numbering)
[19] J Suckley POE, §11.79

35. However, in his evidence in chief, he changed his position on the basis that, since he and Mr. Griffiths agree that 'detracts' means 'no net harm', his view that the proposed development would result in better recreational provision, in quantitative and qualitative terms, implies that there would no net harm to the site's recreational value. Nevertheless, since that judgment was wrong for reasons I have already explained, it follows that there would in fact be such 'net harm' and therefore that there is also conflict with this policy.

Core Strategy Policy CS8[20]

36. It is agreed that the following parts of the policy are the relevant ones for the purposes of the reason for refusal:[21]

> *Strategic and Local Open Space3*
>
> *3.290 In general terms development that does not safeguard the permanence and integrity of areas of Strategic and Local Open Space will not be allowed. There may, however, be situations in which other factors determine that the need to continue to protect existing assets are outweighed by the interests of achieving sustainable communities, in particular with regards to delivering mixed communities, meeting wider leisure needs, improving participation in the use of recreation facilities and improving parks. In such situations the objective of achieving sustainable communities may be best served by the development of limited areas of open space. Such development must be designed to meet a high standard of sustainability and pay high regard to the local environment.*
>
> *3.291 In addition there may be circumstances where satisfying overriding community needs such as affordable/social housing may justify loss of open space. The Council's Sport, Recreation and Open Space Study audits the current level of supply against relevant assessments of demand. Also relevant is the nationally recognised*

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[20] Core Strategy (CD4.2), p.102
[21] Planning SoCG (CD8.8), §5.6

Fields in Trust "6 Acre" standard which consultation confirms is an appropriate minimum standard to be applied to the borough. Such circumstances will only be considered acceptable where the study identifies a relative higher provision of recreational open space within an Area Committee area compared to other Area Committee areas in the borough. Any development resulting in a loss of open space within an area of relative high-levels of provision will be expected to off-set that loss by making improvements to existing open space or providing (at least) equivalent new open space in a Committee area of relative low provision so as to help not exacerbate the under-supply situation that exists across the borough as a whole.

37. Mr. Suckley accepted that the proposal conflicts with §3.290 but only insofar as it would involve the development of more than a "limited area of open space" and with §3.291 but only on the basis that the area is not one where there are "relative high-levels of provision".[22]

38. In the LPA's submission, however, both the degree of conflict and the reasons for it are more extensive than Mr. Suckley accepts. In addition to the points cited by Mr. Suckley:

(a) The development would clearly not safeguard the "permanence" or "integrity" of the Strategic Open Space, contrary to the first sentence of §3.290;

(b) The need to "protect the existing asset" is not outweighed by the "interests of creating sustainable communities" (for reasons I will set out later in the context of the planning balance), it is also contrary to the first sentence of §3.290 for this reason;

(c) The Council does not accept that there are "overriding community needs" which justify the loss of this open space (for reasons, again, that I will come to in the context of the planning balance), and so is

[22] J Suckley POE, §11.112-114

also contrary to – or is at least not supported by - §3.291 for this reason;

(d) Even it did fall within the exception for "overriding community needs" (which it does not), and even if it were an area of relative high-level provision (which it is not), the development ought still have sought to "off-set the loss" by providing "(at least) equivalent new open space in a Committee area of relative low provision" (which the Appellant has not attempted to do), and is therefore is also contrary to §3.291 for this reason.

39. Accordingly, there is more extensive conflict with all three relevant development plan policies cited in the RfR than Mr. Suckley accepted, notwithstanding the fact that he accepts that the proposal would be contrary to the plan looked at as a whole.[23]

40. I will return to the questions of whether any these policies are out-of-date and the weight to be given to the conflict with them and the plan as a whole in the context of the planning balance later.

Conclusion on Main Issue 1

41. The proposal is contrary to both national and local planning policy, including the development plan as a whole, due to its impact on open space. The statutory presumption is therefore that permission should be refused (as Mr. Suckley accepted in XX) and there is a clear direction given by NPPF §99 is that the site should not be built on.

<u>Main Issue 2: The Supply of Housing Land</u>

42. The Appellant will no doubt make lengthy submissions lamenting the LPA's failure to adopt a new plan over many years and the length of time that there has been a shortfall against the 5-year requirement. However, as you noted previously, it is not the function of a s.78 appeal to chide a LPA in relation to such matters and, in any event, the reasons for these things are

[23] J Suckley POE, §11.132; Appellant's SOC (CD7.2), §10.3; CD1.64 Planning Statement (CD1.64), §12.7

more complex and nuanced than the Appellant will perhaps acknowledge. Nevertheless, it is not necessary to go into them here.

43. Furthermore, the core facts concerning housing land supply which you need to make your decision are relatively few in number and – for the most part – uncontroversial.

44. In particular, it is common ground that:

   (a) There is a shortfall against the 5-year requirement;

   (b) The contribution of the appeal scheme to reducing the shortfall should be given significant weight even if the LPA is correct as to the level of the shortfall; and

   (c) The contribution of the scheme towards meeting the acute need for affordable housing in the area should be given very significant weight.

45. Therefore, the principal controversial issues in relation to this main issue are, essentially, twofold. Firstly, whether the LPA has a 4.08 year supply (as it contends) or a 2.64 year supply (as the Appellant contends). Secondly, if the shortfall is as large as the Appellant suggests, whether it should be given "very significant weight" rather than just "significant weight".[24]

46. In relation to former, the sole dispute is in relation whether particular sites in the supply should be considered "deliverable".

47. It is agreed, as it must be, that the basic test is that set out in the definition of "deliverable" in the Glossary to the NPPF, i.e. "to be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years". As the Court of Appeal held in *St. Modwen Developments Ltd v SSCLG* [2017 EWCA Civ 1643 at [38], a "realistic prospect" does not require "certainty" or even

[24] J Suckley POE, §§8.4-8.6.

"probability" but primarily goes to a site's "capability of being delivered within 5 years"

48. However, this is subject to what are effectively deeming provisions, i.e. that in the case of sites which "do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years" (Category A) and, conversely, in the case of any site which "has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years" (Category B).

49. Paragraph 68-007 of the Planning Practice Guidance ('PPG') gives examples of types of evidence that may demonstrate deliverability:

> *Such evidence, to demonstrate deliverability, may include:*
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> - *current planning status – for example, on larger scale sites with outline or hybrid permission how much progress has been made towards approving reserved matters, or whether these link to a planning performance agreement that sets out the timescale for approval of reserved matters applications and discharge of conditions;*
> - *firm progress being made towards the submission of an application – for example, a written agreement between the local planning authority and the site developer(s) which confirms the developers' delivery intentions and anticipated start and build-out rates;*
> - *firm progress with site assessment work; or*
> - *clear relevant information about site viability, ownership constraints or infrastructure provision, such as successful*

participation in bids for large-scale infrastructure funding or other similar projects.

50. The Appellant's Housing Land Supply witness, Mr. Pycroft, suggested nevertheless that the Council's evidence in general was not clear for any of the disputed sites by analogy with three appeal decisions[25]. Mr. Pycroft did go on to state that he was "not suggesting the appeals refer to a principle because each case must be considered on its own merits but they show a clear theme". However, even if there could be said to be "themes" arising out of the previous decisions, they are not a principled or certain guide for deciding the issues which arise in this case, which the LPA submits should be based on the application of the words of the policy in the NPPF, the guidance in the PPG and the specific facts of each case.

51. Mr. Pycroft's first point related to the supposed retrospective justification of sites by reliance on evidence postdating the Housing Land Supply Statement and/or the agreed base date of 1 April 2023[26]. However, there is no coherent objection to considering such evidence so long as the sites are sites which were originally included in the supply.

52. Firstly, provided that this is so, there is no risk of the sort Mr. Pycroft raised (i.e. "effectively resetting the base date to [the day of the Inquiry discussion on 8 November] and any completions [in the intervening time between 1 April and 8 November] would have to come out").

53. Secondly, it is difficult to see how it could be valid (or even lawful) to adopt an approach which in principle requires a decision-maker to disregard relevant (and potentially very relevant) evidence going to deliverability simply because of the date it arose.

54. Thirdly, taking into account evidence arising after the base date does not inherently favour one side or the other, which is well illustrated in this case by the fact that the Council itself has accepted one of the contested sites

[25] CD9.3.2 §§3.12-3.21
[26] CD5.19 Green Road, Woolpit (PINS ref: 3194926)

should be discounted because of evidence arising since the base date (to which, it is noted, the Appellant and Mr. Pycroft did not object!).

55. Furthermore, as Mr. Johnson explained, insofar as the criticism was aimed at sites which did not have planning permission, at the time of their inclusion there had been discussions with others in the Council who were aware of the real prospect of the sites coming forward and the prospective success of planning applications, particularly given the Council's town centre regeneration project which is being undertaken (each of the sites without planning permission are in that area). Indeed, the developer who spoke about the Sainsbury's site confirmed the perception of Stockport by developers as a growing market as the increasingly high quality of schemes in the town centre means there is a strong benchmark value to support viability. This was supported by Paul Richards, the Council's Corporate Director of Development and Urban Regeneration/Chief Executive of Stockport Town Centre MDC, who confirmed that while they accept there is a general increase in costs and inflation that affects viability of development, the increased value in Stockport's town centre must also be considered. Thus, the accusation from Mr. Pycroft that deliverability is affected by inherent viability issues is clearly limited in this area. The inclusion of such sites was not, as implied by the Appellant, "guesswork"[27].

56. The second claim that the Secretary of State and Inspectors have concluded that it is simply not sufficient for Councils to provide agreement from landowners and promoters that their intention is to bring sites forward'[28] is not supported by authorities. Mr. Pycroft relies on an appeal at Gleneagles Way, Hatfield Peverel[29] for this proposition, and the fact that the ten sites removed from Braintree's 5YHLS for not having 'clear evidence' of deliverability had provided forms and emails from landowners, developers and agents with information including anticipated build rates and timescales for reserved matters applications. However, there is no finding in the

[27] CD9.3.2 §§3.12-14
[28] CD9.3.2 p3.15
[29] CD5.18 Gleneagles Way, Hatfield Peverel (PINS ref: 3180729)

decision that such evidence automatically carries no weight, just that the evidence in that case was insufficient.

57. Turning then to the reasons that the Council submits that the remaining sites should be considered deliverable.

58. The following are sites with planning permission and are in 'Category A'. The Appellant has not demonstrated there is clear evidence that the homes will not be deliverable within five years:

   a. Rock Row – the developer confirmed that works on making the infrastructure safe started in summer 2023, and that there was a logical timescale of completing work in the refurbished site before progressing to construction of the new building. Whilst the condition requiring commencement by 31 January 2021 had expired, Mr. Johnson confirmed that conversations with the relevant case officer concluded it was still deliverable. The developer provided a clear reason for confidence that the development would continue despite delays around sorting issues with the party wall with a listed building due to issues with trespassing.

   b. 2-6 Churchgate – Mr. Pycroft implied that the previous developer going into receivership meant there was an inherent viability problem, but Mr. Johnson confirmed that viability was not an issue as they had been offering more affordable housing. Mr. Pycroft claimed that the fact the site has not been sold despite being marketed means it is unattractive, despite the Council confirming there has been increased demand for units that town centre location, and the fact that there were conversations with more than one party ongoing which demonstrates evidence of competition, increasing the likelihood of it being sold and completed in time.

   c. 32-36 Lower Hillgate – Mr. Pycroft's 'clear evidence' was unconvincing, relying on the fact that the previous developer had decided to sell it, that it was undergoing sale by auction,

and that there had been an application to amend planning permission – but only for non-material design changes. Mr. Richards confirmed it had only recently gone onto the market and that there were no reasons why it would not be attractive to smaller housebuilders. Mr. Pycroft's assertion that there were viability issues was not supported by the Council's evidence of seeing sites coming forward with smaller housebuilders.

d. Royal George Village – for the reasons set out above, it is not accepted that the Council cannot rely on evidence showing the site as deliverable now, including the developers' timescale for housebuilding and the credibility of their phased approach. As Mr. Johnson stated, recognising a site as stalled (due to a developer going into administration) at the base date is not the same as it being considered unviable throughout the whole five-year period, especially given the Council's history of helping larger sites become unstalled; a new developer is now on board and they provided strong evidence to show work will commence in the near future and are on site delivering a mixed-use scheme at Stockport Interchange; and there were good reasons to consider it could still be delivered at that point.

59. The following are sites with planning permission and are 'Category B'. The Council has provided clear evidence that the housing will be delivered in the period:

a. Greenhale House – this site's planning permission has expired. Despite Pycroft's claim that the Council should have explained why the permission expired, there is no such requirement in the NPPF glossary definition. Regardless, the Council provided clear information on the status of the marketing to find the site a developer, including the timeline for launch at the end of 2023. The claim that it will have strong interest from developers is supported by financial analysis of the market from CBRE, and there is no reason

why a new planning application would be refused, having been accepted for residential development in principle.[30]

b. Sainsbury's, Warren Street – This is a significant site in the town centre there is a resolution to grant planning permission, and the s.106 is in its final stages. The developer has a record of delivering large-scale schemes and confirmed there were no viability issues as they anticipate being able to offer affordable housing. The developer also confirmed his timescale for construction and that there were no physical impediments to this.

c. Piccadilly Car Park – Mr. Johnson confirmed that as a delegated application, the process of planning permission is not unduly long, and that the case officer expected s106 issues to be completed imminently. The developer confirmed that agreements with prospective partners for delivery were at legal stages and there are no physical constraints to delivery.

d. Chestergate / King Street West – Mr. Richards pointed to verifiable evidence that the developer delivered a similar site in the locality in the last four to five months, making the proposed output in 2025 realistic. Furthermore, Mr. Johnson confirmed that the case officer had said that pre-application concerns re the design had been addressed, and that affordable housing did not need to be addressed in the s.106 so the process of obtaining permission was not necessarily going to take a long time.

e. Stockport 8 – Joe Stockton, of Muse Developments, is acting as development manager for English Cities Fund, and the fact they are collaborating is clear evidence of there being no impediment due to viability issues. Mr. Richards also confirmed that the current occupant had funding secured to relocate elsewhere, and that a contamination investigation had been done that showed no issues thus there is clear evidence of no physical constraints.

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[30] CD9.3.2 para.10.5

60. Accordingly, it is submitted that the Appellant has not met the required evidential threshold to remove any of the Category A sites from inclusion in the 5YHLS, and conversely that the Council has shown sufficiently clear evidence to justify the inclusion of the Category B sites, especially given the context of the Stockport town centre regeneration programme.

Main Issue 3: Whether or not any adverse impacts of the proposal would significantly and demonstrably outweigh the benefits (the planning balance)

Relevant principles

61. It is common ground that, as there is a shortfall in the 5YS, the 'tilted balance' in NPPF §11d is engaged by virtue of footnote 8 and that the weighting of considerations in the 'titled balance' has to be done by reference to an assessment against the policies in the Framework as a whole.

62. It is also common ground that there is no other binding rule of law or strict policy which requires you to give any particular weight to any policy or consideration – it is essentially a matter of pure planning judgement for you.

63. Finally, although this has not yet been specifically agreed as common ground, it is relevant to note (given that it has been suggested that the weight given to individual considerations needs to be aggregated or subtracted in various ways when striking the overall planning balance) that the courts deprecate an excessively legalistic approach to planning decisions, and in particular to the exercise of planning judgement in the attribution of weight and the balancing of competing material considerations.

64. For example, per Lindblom LJ in *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88 at [50]:

Excessive legalism has no place in the planning system… The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion.

65. See also per HHJ Eyre QC (as he then was) in R (Sefton MBC) v SSHCLG [2021] PTSR 1662 at [33]:

The claimant's argument is also flawed by taking metaphorical language unduly literally. The reference to "substantial weight" being given to harm is ultimately a metaphor as is the reference to the harm being "clearly outweighed" by other considerations. The exercise to be undertaken is not one of balancing weights on scales nor even one of saying that harm to the Green Belt is equivalent to a particular weight (say ten stone) while a different circumstance such as an applicant's family circumstances can never be rated as equivalent to more than a different weight (say five stone). Rather, the language of weight and weighing is being used to emphasise the importance of the Green Belt. It is used to make it clear to decisionmakers that they cannot approve inappropriate development in the Green Belt unless the considerations in favour of the development are such as truly constitute very special circumstances so that the development can be permitted notwithstanding the importance given to the Green Belt. The realisation that the reference to weight is ultimately a metaphor highlights a practical difficulty in the approach for which Mr Riley-Smith presses. How is the decision-maker to decide what is equivalent to "substantial + substantial"? The claimant envisages the balancing exercise being quasi-

mathematical but if that is the appropriate exercise then paragraph 144 fails to provide the decision-maker with guidance as to the values to be placed in the necessary mathematical calculations.

Whether Development Plan or Relevant Policies are Out of Date and Weight

66. It is also common ground now (whether or not it was to start with[31]) that the fact that footnote 8 applies so as to engage the 'tilted balance' does not automatically mean that each development plan policy cited in the RfR is deemed to be out-of-date on an individual basis – rather it is the 'basket' of "most important" policies which is deemed out-of-date on a collective basis (Mr. Suckley in XX).

67. The Council nevertheless accepts that the logical implication of the lack of a 5YS and the consequent application of footnote 8 is that the housing policies in the development plan are out-of-date and should be given reduced weight (save for Core Strategy Policy H-3 on affordable housing which, per the Secretary of State's decision in the Seashell Trust case, should still carry "significant weight" because it is "not inconsistent with the Framework, and the evidence supports the level of 50% as being a suitable requirement").[32]

68. Nevertheless, Mr. Suckley maintained his argument that the development plan as a whole and the specific policies cited in the RfR should be regarded as out of date on the basis that they are policies which restrict the location of new housing, and therefore are constraining the delivery of housing in accordance with the 5-year requirement.

69. Mr. Suckley and Mr. Cannock sought to justify this line of argument by reference to the Supreme Court's decision in *Richborough Estates*.[33]

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[31] Cf. J Suckley POE, §8.13: "The policies which are most important for determining the appeal are Policies UOS1.2 and NE3.1 of the UDP and CS8 of the Core Strategy. Due to the Council's failure to demonstrate a deliverable 5 year housing land supply, these policies are out of date. *It follows that they must be afforded reduced weight in the application of s.38(6) and the tilted balance*" (emphasis added).

[32] Seashell Trust SoS decision letter (CD4.38), §29.

[33] Richborough Estates and others v Cheshire East BC and others [2017] UKSC 37 (CD4.42).

However, given that the central ratio of the decision in that case was that former §49 of the NPPF, which deemed "policies for the supply of housing" to be out-of-date where there was a shortfall against the 5YS, should not be given a wide interpretation in order to embrace "restrictive policies in the development plan"/"policies restrictive of where development should go" this would not, prima facie at least, seem to be very fertile ground for them to base this argument on.

70. Furthermore, that is also the position on deeper analysis. In short, the Supreme Court was keen throughout the decision to emphasise that it is through the application of the tilted balance itself (which was, and still is, triggered by a shortfall in the 5YS, albeit via a slightly different method/mechanism now) that the NPPF seeks to boost the supply of housing in a 5-year shortfall situation, not through deeming broader environmental policies which may weigh against the grant of permission to be out-of-date because of their constraining effect on the location of new housing. See, in particular, [55] to [56]:

> *55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because <u>of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgement, unrelated of course to paragraph 49 which deals only with housing supply</u>. This may in turn have an effect on other related policies, for example for transport. <u>The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgement, not dependent on issues of legal interpretation.</u>*
>
> *56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed "out-of-date" under paragraph 49, which must accordingly be read in that light. <u>It also shows why</u>*

> *it is not necessary to label other policies as "out-of-date" merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgement for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the "tilted balance"* (emphasis added)

71. Therefore, the only degree of support that the judgment gives to the Appellant's case in this respect is insofar as it indicates that a decision-maker may choose to (but does not have to) adjust the *relative* weight given to so-called "restrictive policies" in the tilted balance in order to give greater weight to the need for new housing. That is all.

72. So far as the separate argument that the development plan policies cited in the RfR are out-of-date because of inconsistency with the NPPF, it is noted, firstly, that Mr. Suckley now accepts that NE3.1 is in fact consistent with the NPPF and due "full weight" (as he originally said in XiC) or, at worst, "moderate weight", in light of his view on the weight to be given to the need for new housing (as he said second time round).

73. Secondly, UOS1.2 and CS8 are not, as Mr. Suckley suggests, inconsistent with the NPPF. Whilst there are clearly differences between them and NPPF §99 (not confined to the reference to "limited development") that does not of itself imply that they are inconsistent. On the contrary, the differences, such as they are, are reflections of the fact that the subject-matter and purpose of the policies are not the same, even though they overlap (i.e. NPPF is concerned with the protection of open space as resource generally, whereas UOS1.2 and CS8 are concerned with the long-term protection of specific areas of *Strategic* Open Space). Therefore, just as there is no sensible argument that, for example, the Framework's more restrictive policy on isolated new homes in the countryside is inconsistent with its more liberal general polices on new housing, nor is there is a valid argument to that effect in the case of UOS1.2 and CS8 vs. NPPF §99. Thus, even if – as Mr. Suckley argued – UOS1.2 lacked an "internal balance" (which it doesn't

– see the second sentence re "insensitive" development), it still would not be a reason for treating the policy as out-of-date or giving it reduced weight.

74. Furthermore, all of the policies in RfR were examined and adopted in light of what was then extant government open space policy in PPG17. As Mr. Suckley in the end accepted, it is clearly reasonable to infer that the examiner did not consider them to be inconsistent with it. If so, nor is there any reason to conclude that they are inconsistent with NPPF policy on open space since, whilst the detail is different, the fundamentals have not changed (see in particular the definition of open space in Annex 1 of PPG17 and §§10-16 - which contain broadly similar content to NPPF §99 and, contrary to Mr. Suckley's suggestion, do not set out a general rule that development in open spaces should be restricted to "limited development").[34]

The Benefits of Granting Permission

75. Mr. Suckley contends, overall, that the social benefits of granting permission should be given "very significant weight"; the economic benefits should be given "significant weight" and the environmental benefits should be given "moderate weight".[35]

76. The Council does not take any issue with this *overall* attribution of weight, save in respect of the economic benefits for the following reasons.

77. Firstly, Mr. Suckley treats the endowment to be paid to the Land Trust as being a "very significant" economic benefit in its own right. However, it is – in truth – no such thing. It is not money that is going to go into the economy. It is simply a financial mechanism to enable the Land Trust to take the land and manage and maintain it in future (which Mr. Suckley already counts among the social and environmental benefits and so should

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[34] PPG17 (CO3). NB. Mr. Suckley appears to have misread the references in §16 of PPG17 to "small-scale structures" to support recreational use as a general restriction on all development in open spaces. If anything PPG17 and was was more permissive than NPPF §99 because it allowed for "local authorities [to] weigh any benefits being offered to the community against the loss of open space that will occur".

[35] J Suckley POE, §12.80

not be double-counted). At most, therefore, it will have some modest indirect economic benefit.

78. Secondly, Mr. Suckley relies on NPPF §81 in support of the argument that the construction and operational benefits should be given "significant weight". However, NPPF §81 is not directed at new housing or the incidental economic benefits thereof at all. Therefore, he is mistaken as to the existence of any policy basis for the weight he gives them.

79. Thirdly, Mr. Suckley accepted that the indirect benefits of new housing in this case were generic. Whilst the Council does not suggest that is a reason to give them *reduced* weight, it is just that they did not merit any significant weight to begin with. Mr. Griffiths' judgment that they are moderate weight is clearly correct.

The Adverse Impacts of Granting Permission

80. Whilst those benefits may be thought of as significant (or even very significant) judged overall, they plainly have to be set against the very significant adverse impacts of the development on open space/Strategic Open Space/Green Chain as described above,

81. Furthermore, as was also noted earlier, the balance must be struck by assessing the benefits and the adverse impacts by reference to what the policies of the Framework themselves say.

82. It is highly significant, therefore, that what the Framework says about what should happen in the case of a proposal to develop open space that fails to satisfy any of the exceptions in NPPF §99 is very clear: the space should simply not be built on. Thus, it is much more than simply a consideration to weigh in the balance, as Mr. Cannock suggested in XX of Mr. Griffiths.

83. Furthermore, the impact is particularly adverse in this case, given the extent of the loss, the existing deficit and the impact of the loss in significantly exacerbating that deficit. It is even more adverse bearing in mind the strategic nature of the open space in this case and the corresponding conflict with the development plan.

Overall conclusion on the planning balance.

84. Consequently, applying the 'tilted balance' in light of all of the above, the Council respectfully submits that the conclusion which should be reached is that the adverse impacts do significantly and demonstrably outweigh the benefits, such that permission should be refused.

The Fallback

85. It is notable that, despite setting out the fallback argument in his proof, Mr. Suckley did not seek to give any specific weight to it in his overall planning balance.

86. Moreover, when he was given the opportunity in XX to say whether it should be regarded as a decisive consideration if, that apart, the balance favour refusal (as the LPA submits it does for the reasons I have given), he declined to take it.

87. Accordingly, not even Mr. Suckley suggests that it should alter that conclusion.

88. In my respectful submission, he was right to not push the argument that far for the following reasons (although he did not necessarily accept all of them).

89. Firstly, there clearly is no "imperative" for the Appellant to implement the fallback position of a 2m high "impermeable" fence" despite the factors set out by Mr. Suckley at §2.17 of proof.

90. In particular, he abandoned the suggestion that the £20,000 annual costs the Appellant says its incurring in maintaining the Fields, the ASB issues he mentions, or the need to hold public liability insurance to address the risk of injury to trespassers would amount individually or collectively to an imperative reason to do so.

91. That was clearly correct. The costs are very modest for a company like the Appellant and if it has not been necessary to address them for 20+ years there is no reason why it should be imperative to do so now. In any event,

given what he told the inquiry about the capital cost of erecting the proposed fencing (c£150,000), the ongoing repair costs its incurring to rectify the broken down sections of the existing stock fence (£1,500 pcm), the need to maintain the Fields in any event (e.g. for health and safety/occupier's liability reasons or to avoid the service of a s.215 TCPA notice), and the corresponding need to continue to hold public liability insurance, it is entirely clear that there is would be no valid financial reason for the Appellant to erect nearly 2km of the sort of fencing it is threatening to erect.

92. Secondly, when asked whether he was able to give any cogent reason why it would be necessary for such fencing to be "impermeable" when the fencing that the Appellant previously erected around its own premises and some of the perimeter of the Fields was not, he could only say that it was the Appellant's "choice".

93. This was highly revealing because what it showed was that there is no need of any kind for it to do so and that the only reason that it can be suggesting that the fencing would be of this type is to make the fallback position as unattractive as possible in order to enhance its prospects in this appeal.

94. However, the reality is that this also makes the Appellant's argument extremely unattractive. This unattractiveness is exacerbated by the ease with which the argument could repeated in the case of other privately owned open space, and how that would fundamentally thwart the objectives of the policies in NPPF §§98-99.

95. Accordingly, the LPA respectfully submit that you should follow the example of the inspector in the *Renew Land Developments* case, where a similar fallback argument was not allowed to prevail and whose decision was then upheld by the Court of Appeal.

Conclusion

96. For all these reasons, therefore, the LPA respectfully submits that permission should be refused and the appeal dismissed.

<u>JOHN HUNTER</u>

Kings Chambers

14th November 2023