LAND TO THE SOUTH OF FUNTLEY ROAD, FUNTLEY

Appellant's Closing Submissions

Introduction

1. For all the many documents before you, sir, the question is simple:

> Do the scheme's harms **significantly** and **demonstrably** outweigh its benefits, judged against the consented baseline of the 2020 consent for 55 homes on this site which the Council agrees gives rise to no material harm?

2. That is the test posed by §11(d)(ii) NPPF. And it is, the parties agree, the determinative test in national policy for both appeals.

3. Which means that, as Mr Jupp agreed, for the Council's case to succeed, you would have to find a level of harm which both **significantly** and **demonstrably** outweighs what the Council accepts to be **substantial** benefits associated with this scheme. Otherwise, as he agreed, the appeal should be allowed and planning permission granted.

4. That sets a very high bar indeed for the Council's evidence to reach. In reality, to justify dismissing the appeal, the Council would have to show you evidence of harms of the highest order. Of a considerable scale, magnitude and seriousness. Otherwise it will not have provided enough to meet the test set by national policy.

5. Meeting that bar is not an easy task for the Council in a case like this because it has supported significant residential development on the northern part of this site, which it refers to as

"*urban fringe,*"[1] for several years – both by promoting it as a housing allocation in every version of its emerging Local Plan since the original 2017 draft,[2] and by granting planning permission for up to 55 homes and a community building in 2020.[3]

6. So unusually for housing appeals of this kind, there is no dispute as a matter of principle that the Appeal 1 site is appropriate for a significant amount of residential development. And as we said in opening, the reasons for the Council's long-standing support for development on the site are not hard to find:

   (i) The Council's 2021 SHELAA described the site as "*an enclosed pocket of land which is enclosed by strong vegetation and is already subject to some built development*",[4] and found it to be "*suitable*" for residential development.

   (ii) The Council's landscape assessment work concluded that the site is "*less sensitive than the Meon Valley south of the M27, being formed of pastures and horse paddocks with somewhat scruffy, fringe character, bordered by woodland and the anomalous area of residential development north of Funtley Road adjacent to the railway line*".[5] This is not – as Mr Helme said – a mischaracterisation of the quote on the last page of ID4. The Inspector is invited to turn up the reference and read it in full. Unlike far wider assessment in CD.G2, the assessment at ID4 specifically deals with **this site**.

   (iii) The highways authority has confirmed in its SoCG with the Appellant that the site is well accessible on foot to a range of service and facilities, including doctor's surgeries,

[1] See the Council's May 2021 "*Sustainability Report for the Revised Publication Local Plan*", ID.04 pdf p.6.

[2] CD.F1, p.155, policy HA10.

[3] CD.H1.

[4] Mr Burden's appendix 20.

[5] ID4, final pdf page.

food retail stores, and schools for all ages. Still more amenities are accessible by bike, bus and train. Even now, Mr Jupp for the Council tells you that this site would be in a location with some sustainable transport options and that his evidence on this issue should not lead to the appeal being dismissed.[6] Which is unsurprising given that – as above – the Council has already permitted a substantial housing scheme on this site, and is proposing to allocate the site for housing in its plan. We return to this below.

(iv) 6 out of the original 8 putative reasons for refusal can – the Council accept – be addressed through the planning obligation. We're left only with allegations that (a) the scheme "*is not sensitively designed to reflect the character of the neighbouring settlement of Funtley and fails to respond positively to and be respectful of the key characteristics of the area harmful to the character and appearance of the countryside*" and (b) that the proposal is not "s*ustainably located*".

(v) The Council agrees that its shortfalls in housing delivery are substantial and, in relation to affordable housing, the picture is acute and unacceptable. There are, the Council agrees, no technical constraints. There are no outstanding objections from statutory consultees e.g. in relation to highways, drainage, flooding or anything else. If permission is granted, the Council agrees that our scheme will be delivered within 5 years. And the Council does not resist the appeal in respect of the appeal for a community park to the south of the site.

7. So the benefits associated with this scheme are very considerable. And in closing, we begin there, before considering whether the "harms" the Council alleges significantly or demonstrably outweigh those benefits.

[6] Jupp proof, 9.59-60.

The scheme's benefits are profound

(i) The delivery of market homes

8. The Council's Core Strategy ("**CS**") [**CDE.1**] was adopted in 2011 – before the 1st version of the NPPF, which brought about a "*radical*" shift in national policy when it made meeting **full objectively assessed needs** for housing "*not just a material consideration, but a consideration of* ***particular standing***".[7]

9. And it has consistently failed to deliver even close to enough homes in Fareham. In particular:

   (i) Looking back over the last 3 years, Fareham's latest Housing Delivery Test figure of 62% represents – Mr Jupp agreed – a persistent downward trend in delivery which is, in the language of FN8 NPPF – **substantial**.

   (ii) Looking forwards, there is a shortfall of between 441 and 2,195 homes in Fareham over the next 5 years measured against **minimum** targets. Whatever the precise figure is – and you are not required to decide on what it is – the parties agree the shortfall is **significant**. Of course, Fareham has not been able to demonstrate a minimum of 5 years housing land supply since before the adoption of its Part 2 local plan in 2015 – over 7 years of failure. Mr Helme's closings refer to the nitrates issue. But of course, that has only been a constraint on the Council's housing delivery in the last couple of years. There is no excuse for this chronic under-supply. The position is serious. Achieving the Government's long-standing objective is that LPAs demonstrate a **minimum** of 5 years supply of deliverable housing sites. It is a floor, not a ceiling, to

[7] See *Gallagher v Solihull* [2014] EWHC 1283 (Admin) §31 and §97-§98. Hickinbottom J's conclusions on these points were upheld by the Court of Appeal, [2014] EWCA Civ 1610.

delivery. And this Council is persistently and significantly failing to meet that minimum requirement of national policy.

(iii) And the picture is unlikely to improve in the short-medium term: NB the Council's evidence to this inquiry on the longer timescales for delivery at Welborne, and the plan inspectors concerns about whether the Council will be able to demonstrate a 5 year housing land supply if and when the plan is acutally adopted.

10. The consequence of these failures is that the most important policies in the development plan are **deemed** out of date by FN8 and §11(d) NPPF. But the policies are not only *deemed* out of date. They are substantively out of date too. That is because they are predicated on settlement boundaries which were designed to accommodate the development needs of another generation. As Mr Jupp agreed in cross-examination:

(i) The Core Strategy set out to deliver 186 homes a year. That is to be compared to the current requirement of 597 homes a year.

(ii) The drastically lower CS target was derived from an overall regional housing target decided in 2004: [**ID.05**], §5.2. Those are – Mr Jupp agreed – housing numbers to reflect the needs of a different generation. The settlement boundaries fixed by the 2011 CS were intended to accommodate that very much lower level of growth.

(iii) Which is why Mr Jupp agreed – and was right to agree – that the settlement boundaries on which the plans policies are based are not only *deemed* to be out of date. They are also substantively out of date because they reflect the development needs of almost 20 years ago.

11. That matters because we know that the boundaries in this plan are not allowing new development to come forward in Fareham at anything like the rates required in order to

meet its needs. At present, the Council is – the parties agree – failing important Government objectives of "*significantly boosting the supply of homes*" (§60 NPPF) in order to ensure that "a *sufficient number and range of homes can be provided to meet the needs of present and future generations*" (§8(b) NPPF).

12. This position is bleak. The local planning system is failing in its most basic task here. And those failures are having dire social, economic and environmental consequences: families unable to afford somewhere to live, unsustainable solutions with people being forced to find a home further away from where they work, shop and socialise. Economic growth which simply is not and cannot happen without sensible population growth. Land prices in Fareham, as Mr Brown explains in appendix TB11, have swelled well beyond the rates of the rest of the south-east in general. When it comes to this scale of failure to deliver housing, justice delayed is justice denied.

13. Again, Mr Jupp accepts that our scheme is deliverable within 5 years. That is so whether the time period for application of RMs is 12 or 18 months. So if permission is granted, we agree this scheme will make a meaningful and quick contribution toward the Council's housing land supply.

14. We agree that it is too soon to give more than (at best) limited weight to the emerging local plan's ability to address this issue. Indeed, Mr Burden explains there are fundamental problems with that plan. In all of those circumstances, Mr Jupp was right to accept that this schemes delivery of 125 homes (more than double the 55 consented in 2020) is a **substantial** benefit and would meet a significant need.

(ii) The delivery of affordable homes

15. Since 2011, this Council has delivered 620 affordable homes against a need of 2,106 homes. That record is incredibly poor. The total cumulative shortfall over that period is 1,486

homes. Delivery across all of Fareham in the last monitoring year was… 10. Only 10 affordable homes. Against a need of 234.

16. Mr Jupp agreed that this shortfall is **acute**. He agreed that the Council is failing to meet important needs for some of the most vulnerable members of society. Which means, again, that the Council is failing to meet the aspirations of national policy at e.g. §8(b) NPPF which tells us to ensure that "*a sufficient number and range of homes can be provided to meet the needs of present and future generations*" and at §62 NPPF to plan to meet the needs for different kinds of housing, including affordable homes.

17. Over 1,000 people are on the housing waiting list in Fareham. The under-supply of new affordable homes is chronic and will not be solved by the Welborne scheme which is proposing a mix of only 10% affordable housing. Mr Helme tells us in his closing that may end up increasing. But there is no certainty at all about that. For more detail, you are referred to Mr Burden's appendix 11 which is the report of Mr Steven Brown. None of Mr Brown's findings have been challenged. But that does not make them unimportant. On the contrary, the agreed evidence shows an acute and chronic problem in need of urgent solutions.

18. This position is – Mr Jupp agreed – **unacceptable**. Again, it is a symptom of a planning system failing in its most basic of tasks.

19. The position is clear. The shortfalls in delivery are *very* substantial. The needs are *very* substantial. The scale of the crisis in affordable housing and affordability is *very* substantial. These are real people in real need now. Their voices were not represented at this inquiry. And the delivery of homes to meet their needs is a benefit which should attract *at least* substantial weight. Which is why Mr Jupp was right to attribute **substantial** weight to this scheme's delivery of affordable homes.

(iii) Self-build

20. Since the 2012 NPPF, the Government has required local authorities to plan for a mix of housing which includes those who wish to build their own homes. The PPG tells us[8] that self-build or custom build "*helps to diversify the housing market and increase consumer choice*". And we're specifically told to plan to meet the needs of self-builders: §62 of the NPPF.

21. Unlike most areas of housebuilding, this is fortified by a statutory duty. Section 2A(2) of the Self-build and Custom Housebuilding Act 2015 (which was inserted by section 10 of the Housing and Planning Act 2016) **requires** local authorities to "*give suitable development permission in respect of enough serviced plots of land to meet the demand for self-build and custom housebuilding in the authority's area arising in each base period*".

22. This is a growing and increasingly important sector. But this Council has no plan-led approach to meeting needs for self-build or custom housing, and has failed every year to meet its legal obligations to grant enough permissions for self and custom build plots.

23. So we have a specific kind of housing, subject to specific statutory duties for which there are specific needs. Those are important needs this scheme would help to meet. So it's wrong of Mr Jupp to try to sweep that up as part of the general benefits of delivering housing.

24. The right approach was that taken by e.g. Inspector Masters in the Colney Heath appeal (and many other decision-makers elsewhere, including the Secretary of State). At Colney Heath,[9] the provision of 10 self-build plots was given substantial weight **in its own right**, and in addition to the weight given in that case to both market and affordable housing.

[8] PPG on "*Self-build and custom housebuilding*", §16a.

[9] Mr Burden's appendix 12, DL:50-52.

25. This scheme's contribution to allowing Fareham to meet its needs would be substantial. That contribution meets particular policy objectives. It is a benefit which should be afforded substantial weight.

(iv) Further benefits

26. The scheme's provision of a new community park, formal village green and amenity space will assist in addressing the identified open space deficiency in this part of Fareham. As Mr Burden explained, the park will provide significant areas of open space for informal recreation, with habitats enhanced through management and planting. The new connection over the motorway will make this space accessible to residents of north Fareham who currently suffer from acute shortfalls in access to open space. The offer of open space is considerably in excess of the Council's policy requirements. It will be a benefit not only to the residents of this scheme, but to those in Funtley and Fareham more widely.

27. The proposed community building will be a valuable local asset for which there is a real need. Albeit there is interest from the scouts – which is obviously to be welcomed – their letter at Mr Burden's appendix 15 makes clear that they could use the building alongside other community uses e.g. a local shop.

28. Mr Jupp and Mr Helme say you should close your eyes to those benefits which are already part of the 2020 consent for 55 homes. This may be where planning law departs from common sense. Because Mr Jupp accepted that e.g. the park and the community building are positive outcomes not only for our residents, but for the residents of Funtley and North Fareham more widely. As Mr Burden explained, it is a very odd position indeed to find a Council asking you to ignore these features which are benefits of the scheme. Nonetheless, given the scale of additional benefits which this scheme offers over and above the 2020 consent, this legalistic dispute on e.g. what benefits are "additional" or the difference

between "benefits" and "mitigation" makes no difference to the overall outcome of the tilted balance to which we return below.

29. The scheme will achieve more than 20% biodiversity net gain which, in the context of the Government's objectives in the NPPF and the Environment Act, is a point of considerable importance.

30. The wider benefits in terms of maintaining the local bus service, providing a bus turning within the scheme, footway improvement along the Funtley Road, foot and cycle access over the motorway and securing an extensive travel plan will enhance this area's sustainability not only for those who will live in this scheme, but for the residents of Funtley more widely. Again, we return to this below.

31. There are, as Mr Burden explained, no technical constraints to delivery. There are no objections from statutory consultees.

32. Taken together, this amounts to a very substantial suite of benefits.

33. What then are the harms which the Council says will significantly and demonstrably outweigh those benefits for the purposes of the balance at §11(d)(ii) NPPF? We turn first to a strange argument about the site's accessibility.

This site is in a sustainable location

34. You have been shown reams of detail on this. Mr Jupp and Mr Helme spent hours taking you through pages and pages of guidance documents and charting various distances for – in particular – walking from our site to local shops, services and facilities.

35. But we must not lose the wood for the trees. In the end, this is a question with a simple answer:

(i) The Council agrees you should **not** refuse permission on this point (taken on its own).

(ii) Mr Jupp attributes no more than moderate weight to the "harm" the Council say flows from this point. So – even if you accept the Council's case on this **in full** – it could not possibly significantly or demonstrably outweigh the very substantial benefits associated with the scheme.

(iii) Our scheme has the support of the highways authority which is – unlike Mr Jupp – professionally qualified to give input on highways matters. The SoCG with the HCC confirms that there is a range of facilities within an acceptable walking distance, including a doctor surgery, food retail and schools. It also confirms that the Fareham town centre and train station are well within an acceptable cycle distance. The HCC have reviewed and support the conclusions of the NMU audit at Mr McMurtary's appendix B. Their view on the acceptability of our scheme is clear, and it should carry **substantial weight**.

(iv) Mr Jupp is asking you to disagree with the considered and expert conclusions of the HCC. That is a very surprising request.

(v) The request becomes, with respect, very odd indeed once we realise that (a) this Council accepts the site is adequately sustainable and accessible for 55 homes, (b) the Council has confirmed that this is one of the **more sustainable** locations in Fareham,[10] (c) releasing this site for housing remains part of the Council's preferred strategy and (d)

[10] ID.04, pdf p.6.

all of the relevant routes and distances for e.g. walking and cycling are **the same** for the 55 scheme as for this scheme.

36. The Council accepts that all of these routes it has spent time taking you through are appropriate for the 55 dwelling scheme. It tells you that you're free to depart from its view that the 55 dwelling scheme is locationally sustainable. Again very odd – because it offers you **no evidence** at all to support such a conclusion.

37. Mr Jupp criticises the route from the Appeal 1 site over the motorway as being steep and unlikely to be widely used. But he didn't appear to understand that – as we have now heard – the footpath would be specified and adopted by the Highways Authority to their standards, including in terms of access by users of all kinds. Another non-point.

38. So in the end, the question is simple: if all of these various routes and distances are appropriate for the 2020 consent, why do the same routes become inappropriate this scheme?

39. The answer is also simple: **they don't**.

40. This argument about accessibility is a red herring. The acceptability of routes e.g. for walking and cycling **does not change** dependent on whether our scheme is for up to 55 or 125 homes. Those routes are **the same**. There is no allegation that the capacity of the highways or footpath networks will be exceeded. There is no allegation e.g. that the bus or local shops will be overrun. There is no allegation of any concrete harm of any kind at all. Even now after 2 weeks of evidence the Council has failed to identify any actual (as opposed to theoretical) **harm** which is said to flow from the increase in the number of homes on this site. There will not be any. The best Mr Jupp could do was to launch off into extreme hypotheticals that have not a thing to do with this case – i.e. increasing from 1 home to

1,000. Or even – in Mr Helme's more modest example – from 1 home to 15. All theory. No evidence.

41. Where Mr Jupp ended up was a claim that there would be "*more cars on the roads*". That is a generic and – again, with respect – facile point that doesn't substantiate an allegation of any **harm**, particularly absent any highways capacity or safety objection. Of course more houses bring with them more people. Some of those people will drive. But we know that Fareham requires many, many, many more houses across its Borough to meet acute needs. What really matters in highways planning terms is how those houses can be sustainably accommodated. And– as we return to below – the measures proposed through this scheme will support **reducing** the proportion of people using their cars. All relevant highways and junctions will function acceptably. And, of course, the sustainability credentials of this site will only be enhanced in the end when Welborne comes forward.

42. So not only is our scheme no worse than the 2020 consent in terms of locational accessibility. It is **better**. And that is because of the substantial improvement measures agreed with HCC. In particular:

(i) A contribution of £67,133 towards surfacing improvements linking the appeal site with Henry Cort College which will encourage increased levels of trips on foot from the appeal site, and be of material benefit to existing residents of Funtley.

(ii) Footpath widening along the Funtley Road.

(iii) Securing the provision of existing bus route 20 for a period of 5 years, including the provision of a bus turning facility within the scheme.

(iv) There are also substantial contributions toward school travel planning, along with a site-wide residential travel plan which seeks a 10% reduction in single occupancy car trips.

Mr Helme's closings imply that the provision of these measures amount to some kind of concession that the site is inaccessible. Again, very strange. We have spent months agreeing this package with the Highways Authority precisely to ensure that this scheme is accessibly located. Any site of scale – including the 55 consented baseline and also (at a much grander level) the Welbourne scheme – requires mitigation of one kind or another. That doesn't prove inaccessibility. The purpose of the mitigation is to ensure accessibility.

43. That this point really is a red herring is proven by Mr Jupp's agreement that our scheme **accords** with policy CS15 which requires the Council to "*secure sustainable development by directing development to locations with sustainable transport options, access to local services, where there is a minimum negative impact on the environment or opportunities for environmental enhancement*". What is more, he agrees that our scheme is doing everything it can do to **maximise** and improve the site's accessibility. That is important because of the imperative to maximise sustainable transport solutions at §105 NPPF.

44. In the end, there really is **no evidence at all** (even taking Mr Jupp's case at its highest) of **any harm** associated with this site's level of accessibility.

45. On the contrary, the evidence before you demonstrates that the scheme will meet the core test at §105 NPPF by offering its residents a "*genuine choice*" of travel modes. The Council agreed in respect of the 2020 consent that "*the proposed improvements to sustainable transport links to service the site and surrounding area are a substantial improvement which Officers consider satisfactorily address the issue of accessibility*".[11] The proposed improvements in this scheme are even *more* substantial. Even in today's closings, the Council has given you no good reason to depart from the logic which supported the 2020 consent. That is because there isn't one.

[11] CDH.3, pdf p.17.

46. In any event, the Council agrees that you should **not** dismiss the appeal on this line of its objection alone. So we turn to the final line of objection – our scheme's impact on the character and appearance of the area.

The scheme will sit acceptably in its landscape

(i) The consented baseline

47. We must begin by identifying the correct exercise:

(i) We must, sir, must have regard to any "fall-back" position when determining this appeal, i.e. what the appellant can do without any fresh planning permission.

(ii) On the question of weighing the fall-back in the planning balance, you must consider (with **emphasis** added):

> "first, whether there is a fall-back use, that is to say whether there is a lawful ability to undertake such a use; secondly, whether there is a likelihood or real prospect of such occurring. Thirdly, if the answer to the second question is "yes" **a comparison must be made between the proposed development and the fall-back use**": *R. v Secretary of State for the Environment Ex p. PF Ahern (London) Ltd* [1998] Env. L.R. 189, at p.196.

(iii) The fundamental question for the decision-maker, as Christopher Lockhart-Mummery QC put it in *Ahern* at p.196, is whether:

> "the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than, or broadly similar to, any use to which the site would or might be put if the proposed development were refused".

48. For those reasons, Mr Dudley agreed that we must consider the effects of the appeal scheme against the consented baseline – which the Council agrees is acceptable – and not only the existing position on site. So the starting point is to recognise that all built development

proposed through the appeal 1 scheme would be constrained to within the boundaries of both the HA10 allocation and the 2020 consent:

[12]

49. The HA10 allocation has since 2017 suggested an "indicative capacity" a smaller version of the Appeal 1 site of 55 homes. But we must be clear. That indicative capacity has never been endorsed e.g. by a plan inspector. And there is not a **shred** of evidence to support the site's acceptability for up to 55 homes **but no more** (indeed, even the Council's evidence supports a considerably greater capacity on the site). The appellant's team has been asking for the evidence which sits behind this indicative capacity of 55 homes for many years now. It has never been provided. It apparently does not exist. It certainly is not before this inquiry.

50. As best we can tell, this idea about a 55 unit capacity appears to have been predicated on a 20 dph density (around half of local densities e.g. of the Funtley North scheme over the road) spread out across indicative developable areas[13] designed by someone or other within

[12] Rummey proof, p.65.

[13] At CDF.1, p.231.

the Council in 2017. But that is no substitute for a proper analysis of site capacity – particularly when the parties agree that density is a very crude measure which tells us nothing on its own about the acceptability of a scheme.

51. The position becomes stranger still when we understand that the proposed red line and site area for the HA10 allocation has expanded significantly since 2017 – by over a hectare – but for some reason the indicative capacity remained the same. The first point is that expanding the red line to the south is totally inconsistent with the idea that this is a "valued landscape" – more on that below. But second, even now several years on, the Council has not carried out any proper site capacity study to consider what the site can really accommodate. Indeed, even Mr Dudley's view was that in landscape terms the capacity could exceed 55 by 50% - so over 80 homes with (in his view) **no** significant landscape or visual impacts. Of course, Mr Rummey's evidence is that the site can acceptably accommodate more homes than that.

52. But given Mr Dudley's change of position, the real issue for you, sir, is whether the increase from 80 homes (which Mr Dudley accepts can give rise to no significant effects at all) to 125 turns an acceptable position into one which is unacceptably harmful.

53. And on that issue, the Council's position does not stand up to scrutiny:

(ii) "Valued" landscape

54. The starting point is the odd proposition that the Appeal site is a "valued landscape" within the meaning of national policy. This matters. Since the 2012 NPPF, the Government has taken a more nuanced approach to development within the countryside. We no longer protect all countryside "*for its own sake*". Now, there is a distinction made – see §174(a)-(b) NPPF. We protect valued landscapes. Landscapes which are not valued must be recognised in the planning balance.

55. There is no definition of a "valued landscape" in the NPPF. The courts have endorsed the decisions of other planning inspectors who found that a landscape is only "valued" within the meaning of §174(a) NPPF if it has physical attributes which take it **out of the ordinary**.[14]

56. And again, the value of the landscape is an important question. Because Mr Dudley agreed that the accuracy of his conclusions **depends** on an accurate assessment of the landscape's value. If his findings on value are over-egged, the rest of his assessment cannot be relied on.

57. So what, if anything, takes our site "*out of the ordinary*" in landscape character terms?

58. Mr Dudley agrees that our part of the Meon Valley is disturbed by a range of urban influences including the M27 and the settlements of Funtley and Fareham, along with fencing, modern agricultural barns, stables, hardstandings and other clutter associated with the horse uses. This area is, as a consequence, agreed to be less sensitive in landscape terms than other parts of the valley. The landscape character assessment describes a suburban character.[15] The Appeal 1 site is not subject to any existing or proposed national, regional or local landscape designations.

59. As Mr Rummey explained, the site and its surroundings have seen many changes in the last 200 years, from agricultural land with coppice woodland, to brickmaking, to railway infrastructure, to the construction of the M27, to suburban housing north of the Funtley Road, to the cessation of brickmaking and clay extraction, the appearance and later the disappearance of a football pitch, and eventually the introduction of horse grazing. In the process the western part of Funtley including this site have become the "Funtley triangle", separated from the Meon Valley to the west by the Deviation Line, and from the east by the

[14] *Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 2429 (Admin), Hickinbottom J At §14.

[15] CDG.2, p.58, 5th bullet.

railway line in cutting, and from the south the M27, also in cutting. The Appeal 1 site and development on Funtley Road sits within a 'bowl' of land which will also contain the new town of Welborne.

60. The Appeal 1 site was proposed for allocation for housing in 2017. It was never suggested then that it formed part of a valued landscape. It was assessed in 2018 for the 55 scheme. Again – no suggestion then that it formed part of a valued landscape. The September 2020 technical review[16] expressly **excluded** this site from the proposed ASLQ designation. The September 2021 SHELAA[17] confirms that our site is an enclosed pocket of land surrounding by strong vegetation. Again – no suggestion that it's part of a valued landscape. In the Council's latest draft plan,[18] the site is excluded from any ASLQ designation, and there is no suggestion that the HA10 site forms part of a valued landscape. The Council's May 2021 SA[19] describes the site's "*scruffy, fringe character*" which is less sensitive that the areas of the Meon Valley to the south of the motorway. We know the Council supports and has already approved the community park on the Appeal 2 site which will formalise the use of that site – again inconsistent with (and not based on) any suggestion that this is a "valued landscape".

61. Given all of that, where has this allegation of a valued landscape come from?

62. Now we know. It came from Mr Dudley's March 2021 consultation response.[20] Remarkably, Mr Dudley tells us nowhere in this long response that he hasn't actually visited the site. But the important point is that Mr Dudley's analysis in this response was premised on a basic

[16] G4.

[17] ID06.

[18] CDF.5, p.23

[19] ID.04, pdf p.7.

[20] CD.B12

error: he concluded that the "valued landscape" provisions in §174(a) NPPF were – in his words – "*triggered*" **because** (so he thought) the site falls "*in an area of local landscape designation*" in the emerging plan.

63. But it doesn't. Our site is expressly **excluded** from the proposed ASLQ. There are no grey areas about this. The basis of Mr Dudley's original consultation response was flat wrong.

64. It was telling, then, that his 2nd report in May 2021[21] struck such a different tone. Of course, he'd now walked around the site (he still has not walked the site itself). Having visited, he made no allegations that the site was part of a valued landscape. Indeed, he confirmed its acceptability for **more homes**.

65. There was no reference to the site forming part of a valued landscape in the officer's report for this scheme,[22] or in the reasons for refusal.

66. So until the Council reformulated its case for this appeal, after years of assessment work, the only person to assert that the HA10 area should be treated as a valued landscape in the language of the NPPF is Mr Dudley. And that was on the basis of not having visited and making a simple error about the site area's interaction with the proposed ASLQ.

67. The in the Council's closings that Mr Rummey adopted an artificially narrow approach to defining the correct landscape unit is – with respect – nonsense. He was clear on what the correct landscape unit is and why. The Appeal 1 site is, even on the Council's evidence (ID6, final page) an enclosed pocket of land screening by strong vegetation with a suburban character subject to a range of human detracting influences. That is why it has been consistently excluded from proposals to designate other areas as ASLQs, and why the

[21] CD.B13.

[22] CD.C1.

Council has consistently recognised its differing (and more degraded) character from the wider Meon Valley.

(iii) The errors in Mr Dudley's evidence

68. Turning to Mr Dudley's evidence to this inquiry, he says that there are two things which define the site's setting: human influences and topography.[23]

69. The human influences include the M27 and the suburban development at Funtley North. Those influences, Mr Dudley agreed, **detract** from the value of the appeal site. Not a promising start for his evidence that the site is part of a valued landscape.

70. His other point is the site's gradient. As you will see, sir, this is a site of 3 sections. There is a gradual rise from 20m-30m, then a steeper rise up to 55m, then a top section at 55m. The south of the site in those higher reaches is more sensitive and has more visual connections with the wider landscape. But the position for the northern area is very different. Mr Dudley describes its suburban character as §3.26 of his proof. And it is that area – the lower, less sensitive, more enclosed area with a suburban character – which will contain the built development. Mr Rummey described Appeal site 1's urban fringe feeling through access ways, sheds, fences, degrading vegetation. Again, Mr Dudley agreed that these influences **detract** from the appeal site's value.

71. Mr Dudley now agrees that the Appeal 1 site **itself** is not out of the ordinary, so is not a valued landscape in terms of the NPPF.

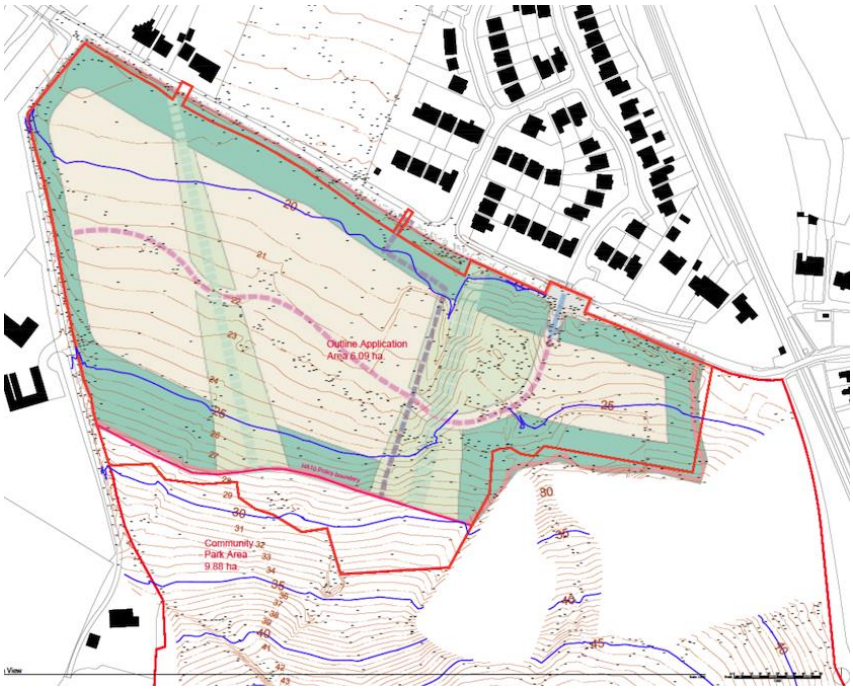
72. Nonetheless, he suggests the wider "landscape unit" is "valued" within the meaning of the NPPF even though the Council has agreed that a significant amount of housing is

[23] Dudley PoE, §3.26.

appropriate on the HA10 site, that site is expressly excluded from the proposed ASLQ and in all the years of work, nobody other than Mr Dudley has concluded that the Appeal 1 site falls into a valued landscape. And, of course, his definition of the "landscape unit" manages to exclude the Welborne site – which is part of the consented baseline and will, we all agree, fundamentally change the character of this landscape. More on that below.

73. Mr Dudley accepted that building can occur with no significant effects on landscape character up to the 25m contour. And in fact, as you will see on site, it is around the 30m contour that the land starts to rise more steeply. In any event, the vast majority of the appeal scheme falls below the 25m contour, and almost all below the 28m contour, and of course some of the consented baseline scheme falls *over* the 25m contour – see the plans at Mr Rummey's rebuttal appendix 4:

(i) The consented baseline



(ii) The appeal scheme

74. As above, all of the built development proposed in this scheme falls into the HA10 allocation area. And there is no suggestion in that policy that building must e.g. fall below the 25m contour.

75. And this is where Mr Dudley's method starts to disintegrate. Because he assesses harm arising from "contours" at "*major/moderate*".[24] But in fact, his view of the consented scheme was that it caused moderate harm. So even on Mr Dudley's case, there is only half a step difference between the two.

76. Again, when it came to impacts on the appeal 1 site itself – which Mr Dudley agrees only has a **medium value** – Mr Dudley said in cross-examination that there was only half a step of difference between the appeal scheme and the consented baseline.

[24] Proof at 4.20.

77. This is a point which recurs. Mr Dudley over-states the degree of harm he has found by failing to present a proper comparison against the consented baseline. When challenged in cross-examination to make comparisons to that baseline, there was either no difference or barely any difference even on his case

78. And that is the apex of the Council's evidence at this appeal. If you accept it in full, and reject Mr Rummey's evidence in its totality: a step or half a step of difference from the consented baseline which all parties agree causes no material harm. Hardly an impact which significantly or demonstrably outweighs substantial planning benefits.

79. Mr Dudley's evidence was flawed in other important ways. He agreed that the Welborne scheme would fundamentally alter the character of this landscape,[25] and that it formed part of the consented baseline so had to be taken into account. But he totally failed to incorporate the part of the consented baseline into **any** of his analysis either of landscape or visual impacts. He agreed that, in hindsight, he should have assessed it. But the omission was particularly bizarre when Mr Dudley chose viewpoints from within the Welborne scheme but didn't understand until we told him that they would soon be in the midst of a major strategic development. As a consequence, he was forced to downgrade many of his findings on the stand during his oral evidence.

80. For example, I asked Mr Dudley about his viewpoint 4 looking over the Appeal 1 site. His proof described panoramic views of the valley. But he failed to undertake the task which he agrees you should do sir: he failed to judge its acceptability against the consented baseline. He said nothing about the fundamental change to the character of the view which is already consented through that baseline. At p.38 of his evidence, he attributed **major** effects for this

[25] His proof at §3.32.

receptor. But again, when pressed to consider the baseline properly, he agreed there would be no material change **at all** between the consented baseline and the appeal scheme.

81. **No change at all**.

82. And we know, of course, that he considers the 2020 scheme to give rise **to no significant landscape or visual harms**.

83. Mr Helme's point in cross-examination about "staging posts" and a "developer's charter", with respect, takes us nowhere. All of the witnesses agree that the proper approach is to compare the consented baseline to the appeal scheme. All the witnesses agree that the significant residential development consented as part of that baseline has no material adverse effects on the landscape. That casts a shadow over Mr Dudley's assessment. If the consented baseline scheme – and indeed a scheme of up to around 80 homes – would have **no material adverse effects** in landscape character terms, then why on earth would the appeal scheme change that baseline to such an extent that the outcome is unacceptable?

84. We're told even now that, apparently, that Mr Dudley "maintains" his position that there would be substantial and unacceptable levels of harm. But, with respect, he cannot be right. Because his evidence was not predicated on the correct consented baseline, and drastically overstated the value of the site which – as above – pulls the rug out from the rest of his conclusions.

85. In the end, Mr Dudley agreed for the Council that our proposed built form sits within an area the Council support for significant residential development, outside any existing or proposed designation, in the lower, less sensitive part of the site which is subject to suburban influences that detract from its value, and where it is agreed that a significant number of homes can come forward without any unacceptable landscape or visual impacts.

(iii) The design objection

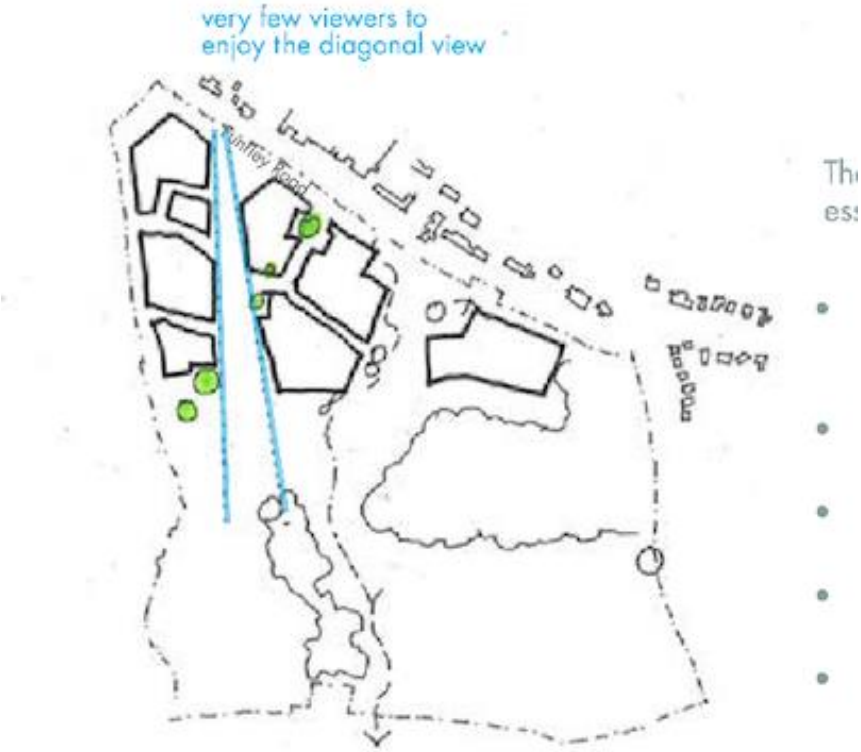
86. Mr Russell-Vick has no architectural, urban design or highways qualifications. He is a landscape architect. Nonetheless, most of his points on detailed design and layout are not for this inquiry. They are (as he agrees) issues for the reserved matters stage. It is very curious indeed to spend so long on detailed design matters at an inquiry for an outline planning application. The only basis for refusal on this point would be if there were **no way at all** that an acceptable scheme could possibly come forward later within the scope parameter plans. But the evidence suggests just the opposite:

(i) Mr Russell-Vick agreed that the work to date was along the right lines and has already responded to majority of the concerns raised. He said the masterplan went some way to satisfying him, but he wasn't satisfied completely. Again, with respect, it isn't the Appellant's task to satisfy him completely. This is an outline application. Mr Rummey presented his masterplan with verve, brio and sensitivity. This plainly has the potential to be a wonderful scheme. But at this stage, it is only an illustrative scheme. Detailed issues on e.g. gardens or parking are not for this inquiry to decide. They will be in the control of the Council.

(ii) Albeit the criticism in the RfR is a failure to "reflect" Funtley's character, it is agreed that it is not a settlement with any particularly distinguished townscape attributes worthy of being reflected. Mr Russell-Vick agreed that we should **not** simply mimic the characteristics of Funtley, albeit our main internal access appropriately follows the village's East-West alignment and our perimeter block approach is – in his view – correct.

(iii) One of the issues which is fixed by the parameters plan is this point about view corridors. We've heard much about this from the Council, but there is no evidence **at**

all to support its position. The issue comes down to a comparison between the figures on p.22 of Mr Rummey's proof:



Different designers may have different individual preferences. But the purpose of this inquiry is to test **evidence**. And there is no evidence to support the idea that the blue western corridor is the only acceptable way of arranging development on this site. Mr Russell-Vick raises no issue on our proposed eastern view corridor. On the western view corridor, he says the view suggested by the Council's urban designer is critical to achieving a satisfactory development on this site. That is assertion. Not evidence. And it is very difficult to understand when:

(a) the corridor on which the Council is so keen is totally **arbitrary**;

(b) it is not based on the existing or historic pattern of the landscape; and

(c) it starts at a totally arbitrary point on the Funtley Road where there is no footway, and cuts across the historic landscape pattern without any sympathy or sensitivity to that history. Again, it begins in an area with no footpath – so would not benefit any obvious receptors and is only visible through a hedge.

The Council's justification appears to be that it would give views of the higher parts of the site. But, of course, we already achieve those views through our eastern corridor. But Mr Rummey's approach has the benefit of achieving the view in a way which will be appreciated by more people, and which respects the historic form of the landscape. The draft HA10 allocation could have but did not set any requirement for the dimensions or orientation of the view corridor. We meet its requirements for view corridors. So the Council's idea (at this appeal, not in its plan) that the blue western corridor is the only way of designing this scheme acceptably is very strange, totally unevidenced and suggests an intransigence on the part of its urban design officer which may explain why – after so many years of work – the appellant was forced to appeal for non-determination.

(iv) Mr Russell-Vick's other point is about density. But he agrees that density is a very crude metric which is not a strong guide to character, or a reason to dismiss a scheme on its own. He agrees that the low densities to the north of Funtley Road of 28-32dph are that low because those are large detached houses in generous plots without open space provision which is a form Mr Russell-Vick agrees we should **not** replicate on our site. He accepted that it cannot fairly be compared to a scheme like ours which proposes a wide mix of accommodation including flats. He agreed with the principle that Mr Rummey explained in more detail of reducing density toward the south of the site. But in any event, in the end, he agreed the density parameters are all "*up to*" which means the detail can be resolved at the reserved matters stage.

(v) Mr Russell-Vick had concerns about internal road layouts and parking but, of course, there is no highways safety objection and he did not rely on any particular highways or parking SPD to substantiate any of his views. In any event, he agreed that these are **not** matters for approval at this stage. If that is so, one may wonder why the Council has spent so long arguing about them?

87. The Inspector has the detailed account from Mr Rummey of the proposed indicative masterplan. It is a meticulously constructed and brilliantly conceived piece of work. His enthusiasm for place-making of the highest quality shone through in the detailed and holistic approach he has taken to every corner of this site. But in the end, as above, his scheme is only illustrative. The purpose of his work is to give you confidence that a scheme which is not only acceptable but **exceptional** can come forward later at the RM stage. Making that scheme a reality is within the gift of the Council by its control over the reserved matters process.

88. But to be clear: by working up a masterplan in such detail at this stage, this appellant has gone considerably above and beyond the requirements of a normal outline permission. It

has done that to try to alleviate the Council's concerns and to avoid the need for this appeal. Many of the concerns have indeed been met. What Mr Rummey's puts beyond any doubt is that this site is capable of accommodating up to 125 homes along with all the other elements of this scheme in a way which would not only be acceptable, but would raise the bar for built development in the area.

The planning balance

(i) Section 38(6) PCPA 2004

89. The starting point under s.38(6) of the Planning and Compulsory Purchase Act 2004 is the statutory development plan. i.e. that your "*determination must be made in accordance with the plan unless material considerations indicate otherwise*".

90. That section requires applications to be determined in accordance with the plan **unless** other material considerations indicate taking a different decision.

91. How that balance is struck is a matter **for you** sir. Whatever the right answer is, that answer is certainly **not** dictated by the development plan. A good thing too in this borough because, as above, this plan has failed and is still failing to deliver the homes that the people of Fareham need.

92. A couple of references to the law on this topic show us that the development plan is the statutory starting point for your decision. But it is **not** the end point:

    (i) In *Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, the House of Lords considered the effect of the Scottish equivalent to section 38(6). Lord Hope explained that:

(a) the development plan does **not** have "*absolute authority*" and may be departed from: p.1450B-C.

(b) In particular, the development plan's "*provisions may become outdated as national policies change*" and in that case:

> "the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority."
>
> p.1450D-E

(c) So it is unhelpful to regard the presumption in favour of the development plan as either "governing" or "paramount": p.1450F.

(d) Further, Lord Clyde held from pp.1458B – 1459A that the presumption leaves the assessment of facts and the weighing of considerations in the hand of the decision-maker, including the development plan. Lord Clyde said:

> "the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given."

(e) The House of Lords endorsed the proposition that what section 38(6) does **not** do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations.

(ii) Further, Laws LJ said at §20 of *Secretary of State for Communities and Local Government v. West Berkshire District Council* [2016] 1 W.L.R. 3923 that:

> "First, while the development plan is under section 38(6) is the starting-point for the

> decision-maker (and in that sense there is a "presumption" that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations: see in particular Glidewell LJ's dictum in *Loup v Secretary of State for the Environment* (1995) 71 P & CR 175, 186 cited by Lord Clyde. Secondly, policy may overtake a development plan ("outdated and superseded by more recent guidance"). Both considerations tend to show that no systematic primacy is to be accorded to the development plan."

(iii) Finally, note that what is required is a view on whether granting permission accords with the plan read **as a whole**. Conflict with one, or even several, policies in the plan does not determine that question. Some policies matter more than others. Weighing them and reaching an overall view on accordance with the plan is a matter for your evaluative judgment.: *Dignity Funerals Ltd v Breckland DC* [2017] EWHC 1492 (Admin) at §65-§68.

(ii) Striking the balance in this case

93. The most important policy in the development plan is DSP40 in the 2015 Local Plan Part 2. The parties agree that all relevant issues flow into and are covered by this policy. However, as above: that policy is both deemed out of date and is also substantively out of date based as it is on settlement boundaries which have failed to come close to meeting Fareham's requirements for new development. As Mr Burden explained, the policy has failed. It has never achieved the purpose the Local Plan Inspector envisaged for it. Throughout the life of the policy, the Council has never been able to demonstrate an adequate supply of housing land. Mr Burden was right to attribute only limited weight in the balance.

94. In any event, as Mr Burden explained, the appeals accord with every limb of DSP40. The Council only raises issue with parts (ii) and (iii). On those, for the reasons above, the site would be sustainably located, the scheme has been well designed and effects on countryside character have been minimised.

95. The parties agree that the contributions offered in the s.106 enable you to make a finding that the scheme would not affect the integrity of the New Forest or Solent Habitats Sites in relation either to nutrient nitrogen or recreational pressure. There has been detailed work on the range of other technical matters including e.g. flooding and highways safety. Those issues have been scrutinised by statutory consultees. **There are no objections**. That means that there is no conflict with limb (v) of DSP40. And the Council agrees that the scheme is relative in scale to its housing shortfall (DSP40(i)) and is deliverable in the short term (DSP40(iv)).

96. On that basis, allowing the appeal and granting planning permission would accord with DSP40 and, by extension, would accord with the statutory development plan read as a whole (recalling that even Mr Jupp attributes only limited weight to alleged conflict with the settlement boundary policies like CS14 and DSP6 because – he accepts – this is a plan which can, read as a whole, support development outside those settlement boundaries when the Council cannot demonstrate a 5 year housing land supply, which it has not been able to do for many years).

97. In those circumstances, the appeal should be allowed.

98. However, even if you find conflict with DSP40, for reasons above, that policy is out of date. It is not allowing the Council to meet its core obligations under national policy. That reduces the weight any conflict can be afforded in the planning balance. And we must then consider whether there are material considerations – including the policies in the NPPF – which indicate taking a decision other than that which accords with the plan.

99. In this case, the most important material consideration is the tilted balance at §11(d)(ii) NPPF.

100. In particular, as we have explained:

(i) This Council has failed the housing delivery test and has a significant and serious deficit in its housing land supply. This is a district with a desperate need for small-medium sized residential schemes to start delivering **now**.

(ii) When it comes to affordable homes, the agreed numbers are desperate. The picture they paint is acute and chronic. As we have explained, the planning system is failing in its most basic task to meet the needs of its most vulnerable residents.

(iii) Meanwhile, the Council's Core Strategy predates the first version of the NPPF, and is premised on 2005 housing numbers from the South East Plan's South Hampshire Sub-regional Strategy. The plan, and the settlement boundaries its policies enshrined, were drawn up to meet the needs of another era. They are both technically and substantively out of date and they have not for many years come close to meeting the needs of the residents of Fareham.

(iv) All of that means that, in the language of §11(d)(ii) NPPF, you should allow the appeal unless any adverse impacts both **significantly** and **demonstrably** outweigh its benefits. And remember, even the Council accepts that some of those benefits are substantial.[26] Which means, to dislodge the balance at §11(d)(ii) which tilts in favour of permission, the Council must identify some very weighty harms indeed. Even if – against our case – you were to find some harm, and significant harm, that is not nearly enough to support refusing this scheme. The harm would have to be at the highest levels.

(v) And as we have explained, the analysis of the alleged harms e.g. landscape and sustainability is not between the appeal scheme and the existing undeveloped site. It's

[26] Jupp proof, §10.9.

between the appeal scheme and the 2020 consented scheme.[27] The Council accepts that the 2020 scheme is acceptable e.g. in terms of locational sustainability and landscape impacts. It has, in the end, provided **no evidence** on why the appeal scheme is so very unacceptable measured against the 2020 scheme that it fails the tilted balance at §11(d) NPPF.

101. You have, sir, extensive evidence on the scheme's benefits. In the end though, for all the Council's concerns, you have no evidence to substantiate the idea that this scheme would cause any significant harm. Particularly when measured against the appropriate baseline.

102. Which is why, the end, it is very difficult to see even on the Council's view of this case how the harms they identify – when considered against the correct baseline – could ever be thought to significantly or demonstrably outweigh the scheme's benefits. On the Appellant's case, there is no material harm measured against the baseline position. The scheme's benefits are very substantial. Its effects are similar – and in several ways preferable – to the 2020 consent. Which means that the scheme's harms do not outweigh – still less **significantly or demonstrably** outweigh – those substantial benefits.

103. For those reasons, we ask you to allow both appeals.

ZACK SIMONS

Landmark Chambers
180 Fleet Street
London EC4A 2HG

17th FEBRUARY 2022

[27] *R. v Secretary of State for the Environment Ex p. PF Ahern (London) Ltd* [1998] Env. L.R. 189 at p.196.