Town and Country Planning Act 1990 – Section 78
Town and Country Planning (Development Management Procedure) (England) Order 2013
Town and Country Planning (Inquiries Procedure) (England) Rules 2000

Appeal Ref: APP/P0119/W/21/3288019

Appeal by Barwood Development Securities Ltd and the North West Thornbury Landowner Consortium

concerning

Land to the west of Park Farm, Butt Lane, Thornbury

CLOSING SUBMISSIONS OF SOUTH GLOUCESTERSHIRE COUNCIL

INTRODUCTION

1. In this appeal, Barwood Development Securities Ltd and the North-West Thornbury Landowner Consortium ("the appellants") seek permission for:

   "Erection of up to 595 dwellings (Use Classes C3), land for a Primary School (Use Class D1), up to 700m2 for a Retail and Community Hub (Use Classes A1, A2, D1), a network of open spaces including parkland, footpaths, allotments, landscaping and areas for informal recreation, new roads, a sustainable travel link (including a bus link), parking areas, accesses and paths and the installation of services and drainage infrastructure (Outline) with access to be determined and all other matters reserved"

2. The application was made and validated on 21 December 2018, with two subsequent full or partial resubmissions in January 2020 and September 2020. The appellants brought an appeal for non-determination on 30 November 2021.

3. South Gloucestershire Council ("the Council") indicated that it would have refused the application, with the following four putative reasons for refusal:

> *"1. The proposed development would cause less than substantial harm at the lower end of the spectrum to the setting of the Grade I listed Thornbury Castle and St. Mary's Church and the Grade II listed Sheiling School and Thornbury Conservation Area. Great weight is required to be attached to this harm and applying PSP17 and paragraph 202 of the NPPF it is not considered that the public benefits of the proposal outweigh that harm.*
>
> *2. 14.4ha, 40% of the site is grade 2 and 10.3ha, 29% is grade 3A agricultural land. The proposed development would develop most of this land. The development of this amount of high quality agricultural land is considered to be significant. Policy CS9 seeks to avoid the development of best and most versatile land and paragraph 174 of the NPPF seeks to protect soils in a manner commensurate with their quality. Paragraph 175 seeks to allocate land for development with the least environmental value and requires that where significant development of agricultural land is necessary poorer quality land should be preferred to higher quality land. In light of the Council having a five-year supply it is not considered that the development of this land is necessary and, in any event, it is not of lower quality land. The proposal is therefore contrary to policy CS9 and paragraphs 174 and 175 of the NPPF.*
>
> *3. The proposal development is speculative in nature and would result in development beyond the defined settlement boundary of Thornbury in the open countryside, beyond the scale of development considered appropriate and provided for to revitalise the town centre and strengthen community services and facilities in Thornbury. Therefore, the proposal is contrary to policies CS5 and CS34 of the adopted South Gloucestershire Core Strategy*
>
> *4. In the absence of a Section 106 legal agreement to secure the following:*
> • *On-site public open space and a contribution towards off-site sports facilities*

- *The delivery of self-build or custom plots*
- *Affordable housing of a suitable tenure mix and unit types*
- *Highway works and Travel Plan*
- *Land for Education purposes"*

4. The fourth reason for refusal is no longer perused.

PRELIMINARY MATTERS

Housing delivery

5. The important backdrop for the determination of this appeal is that this development is sought within the area of an authority which currently has a good record of housing delivery. Thus, as against the last 3 years' requirement of 3578 units, the Council has seen delivery of 4755 units.

6. A very clear justification therefore needs to be advanced in order to allow development of an unallocated, greenfield site in the open countryside. The evidence will show that there is no such justification; indeed, there are very good reasons for refusing the appeal.

Executive Committee Briefing

7. The second preliminary matter to consider is the suggestion that the Council has in some way sought to find reasons to refuse these proposals, having initially adopted a favourable view of them. This suggestion, which was made in Matthews' proof and thereafter in questions put in Patterson xx Manley, founded primarily on the executive committee briefing note dated 13 May 2021 (CD 5.3 a). It was suggested, on the basis that that note suggested that the scheme was fully policy compliant and that it should

be recommended for approval, that the Council's current stance was somehow illegitimate.

8. In fact, such a suggestion is wholly wrong, for the following reasons:

    a. The note was a briefing to the Council's executive committee. It was not in any way a formal document for planning purposes (such as, for example the officers report, which would normally inform any planning decision, which in this case recommends refusal). As such it carries no weight as any formal statement of the Council's position. It merely set out the views of the individual case officer at the time. The fact that it was also read over by a more senior officer in reality adds nothing to the weight to be added to that document, since the document is still primarily the work of the case officer.

    b. The formal statement of the Council's position is contained in the report to the planning committee and, thereafter, in the decision of the planning committee to issue putative reasons for refusal (in the terms set out above). Those reasons for refusal set out the final, considered, position of the planning committee which is entrusted by parliament with making decisions on applications for planning permission.

    c. Finally, and most significantly, the briefing note in any event proceeds on a false basis. It suggests at paragraph 3 that national planning policy requires the Core Strategy policies relating to settlement boundaries to be afforded only limited weight due to the passage of time since the Core Strategy was adopted. As

accepted in Matthews xx AFU, there was no such national policy in existence. Despite Matthews xx AFU attempts to brush this away, the reality is that the officer was proceeding on an entirely false basis as to the weight to be given to very significant development plan policies. As such, her suggested recommendation of approval was made on an entirely wrong basis. It is, therefore, hardly surprising that when a proper appreciation of those policies was taken as the officer's report to planning committee was prepared, a different view as to the overall outcome prevailed and has informed the Council's stance at this inquiry.

9. Accordingly, it cannot be argued that the Council has actively sought to find reasons to refuse this scheme. Instead, all that has happened is that a proper appreciation of the policy and other aspects of the scheme has been brought together in the report to committee and, on the basis of the recommendation in that report, the planning committee has exercised its undoubted entitlement to indicate it would have refused the scheme.

PARAGARPH 11 FRAMEWORK

10. Turning to the substance of the case, the various matters about which submissions will be made are most conveniently considered through the decision-making framework set out in paragraph 11 of the NPPF which provides, so far as material:

"*For **decision-taking** this means:*

c) approving development proposals that accord with an up to date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out of date, granting permission unless:

i. The application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this framework taken as a whole.

11. Although development plan policies will be considered in detail below, it is plain that the scheme is in breach of the most significant spatial polices of the Core Strategy, CS5 and CS34. This is an unallocated site located for policy purposes in the open countryside, where development is to be strictly restricted. There is no basis upon which paragraph 11(c) is engaged.

12. Thereafter, consideration must be directed at whether paragraph 11(d) is engaged. In dealing with that issue, the appellants assert that the Council's policies relating to the scale and location of development at Thornbury are out of date, on two bases.

5 years land supply

13. It is firstly asserted that the Council cannot demonstrate a 5-year supply of housing land. By virtue of footnote 8 to paragraph 11 of the NPPF, this would automatically render the Council's housing policies out of date.

14. The details of the housing land supply as derived from individual sites was considered in the inquiry's round table session and it is not proposed to make any further detailed submissions about the individual sites. Those detailed submissions as to sites are in the Scott Schedule.

15. Instead, two points of principle it will be briefly addressed here. First, whilst Mr Pycroft for the appellant produced a plethora of inspectors' decisions relating to five-year housing land supply matters, it is important to recall what the actual policy guidance is. In the NPPF the only requirement (when dealing sites with outline planning permission, or which are allocated for residential development) is that there must be "*clear evidence*" as to the ability of a site to bring forward units within the five-year period.

16. The NPPG guidance on such matters states that:

> "*Such evidence, to demonstrate deliverability, **may include**:*
>
> - *current planning status - for example, on larger scale sites without line or hybrid permission **how much progress has been made towards approving reserved matters**, or whether these link to a planning performance agreement it sets out the time scale 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 developers 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 a successful participation in bids for large scale infrastructure funding or other similar projects."*

(Guidance on 5 year housing land supply and housing delivery test. Paragraph: 007)

17. It will immediately be noted that the guidance is expressed in terms of examples and is an inclusionary list. There is no specific further guidance on exactly how such evidence is to be collected or assessed. That remains a matter for the inspector. In this case given that much of the information as to how individual sites were proceeding was based upon the direct contributions from the case officers, who were fully briefed and aware of the situations surrounding each site. That is highly credible, clear evidence as to the that progress each site was making towards delivery. The repeated complaints as to the absence of specific written evidence from developers do not, in the light of the at relatively general nature of the guidance set out above, undermine the clarity or cogency of the evidence brought by the Council's officers.

18. The second general point is that Mr Pycroft for the appellant adopted something of an "scorched earth" approach to the inclusion of sites within the five-year supply. His approach was that if there was any deficiency in the evidence of (as he saw it) with respect to the delivery of units, then all the units which were expected to be coming forward from a particular site should simply be excluded from the supply. He adopted this approach even in cases where the reality was that, whilst the delivery might not be at the rate which the Council had originally suggested, there would nevertheless be some units coming forward within the five year period.. We submit that the role of the

Inspector in considering a 5 year supply dispute is to arrive at the best estimate she can, on the basis of the evidence provided, as to what the delivery of sites within the five year would actually be. The approach of simply eliminating large numbers of units because they might not come forward as quickly as the Council initially contended for is wholly inappropriate in that context. The Inspector is well able to make an appropriate reasonable estimate of how many units would come forward on a given site, even in circumstances where not all the units which the Council expects would come forward.

19. Accordingly, when the evidence is considered in the sensible and pragmatic way which the guidance indicates, it is clear that the Council's approach to the disputed sites is to be preferred. On that basis, even when all reasonable concessions have been made by the Council, the Council still maintains a 5.54 years supply, with a considerable margin (780 units) for any further deductions.

20. Accordingly, the Council's housing policies should not be deemed to be out of date on the basis of the matter of five years supply.

Settlement Boundaries

21. The Council accepts that, due to the failure of the attempts at producing a joint plan to deal with the needs of the wider Bristol housing market area, the assessment of housing need which underlies the Core Strategy is not NPPF-compliant (not least because it pre-dates the NPPF). By parity of reasoning with the Yatton appeal decision (CD9.3) is it accepted that the settlement boundaries in the Core Strategy should be regarded as out of date.

22. So much was put to and accepted by Paterson xx Manley. However, a conclusion that a particular policy is out of date raises two considerations. The first is the weight which must properly still be given at to those policies despite the fact that they are out of date. This is a matter upon which we will make detailed submissions in just a moment. The second matter is whether or not the fact that a particular policy is out of date means that paragraph 11D of the NPPF is engaged. That is not a matter which was put to Patterson xx Manley.

23. The appropriate test is not whether a particular policy is out of date. Instead, as set out in *Wavendon Properties Limited v SSHCLG* [2019] EWHC 1524 (Admin) is whether the "basket" of the most important policies is out of date. As set out in paragraph 58 of *Wavendon*, paragraph 11d is not engaged merely because one of the important policies is out of date. The Inspector will need to consider whether, looking across the development plan as a whole, the basket of the most important policies for considering this appeal are out of date. When consideration is given to the issues in this case, particularly the locational issues surrounding further development at Thornbury and the important policy for the protection of heritage assets, it cannot properly be said that the "basket" of the most important policies is in fact out of date.

24. On that basis, paragraph 11d is not engaged and the Inspector ought to decide the matter on the basis of an ordinary planning balance, comparing the benefits and disbenefits of the scheme.

25. Accordingly, we turn to consider the benefits of the scheme to consider the appropriate weight to be given to them in that planning balance.

BENEFITS

26. The Council of course accepts that the scheme has benefits and that due weight ought to be given to them. It is submitted, however, that the weight which the appellant sought to place upon these benefits was overstated.

27. The scheme will provide 387 Units of market housing. The weight to be given to that benefit, is affected by the following factors:

    a. The Council, as set out above, has been performing strongly against its housing delivery targets when assessed through the standard methodology. Furthermore, it is able to demonstrate a five-year housing land supply. In those circumstances, of a generally healthy housing delivery record, less weight should be given to the provision of units of market housing which arise from a site which is not within the existing housing trajectory (being unallocated) and which on any sensible view is unlikely to deliver very many units within the five year period.

    b. It may be suggested that the market units to be provided will contribute to meeting needs within the wider Bristol HMA. For reasons which we will consider in detail below, there is no certainty at all as to what, if any, contribution this district will be expected to make to meeting the needs of that wider HMA.

    c. There is nothing to suggest any particular need in this area for additional units of market housing, given the extensive contribution being made to local supply by existing planning consents which are being built out. Accordingly, no particular weight ought to be given to the provision of these additional units of

housing in Thornbury. Accordingly, only moderate weight ought to be attributed to the provision of market housing.

28. The scheme will provide 208 units of affordable housing. This is a matter to which considerable weight ought properly to be attached as there is admittedly a considerable shortage of affordable housing units in this district (as, it must be accepted, there is in virtually every other district). It is, however, to be noted that any development will be expected to provide policy compliant levels of affordable housing.

29. It was also suggested that there were considerable benefits arising from the transport aspects of the proposed development. However, again, the weight to be attached to these benefits was overstated by the appellant. Whilst it is accepted that the provision of a bus service to the development that might render a bus service to the Park Farm development more viable, that was in truth a speculative benefit. It was also suggested that the improvements to junction 14 which the development would fund were to be a substantial benefit, primarily on the basis that they would bring benefits not merely to the users of the development but to the wider public. It is submitted at that it is hard to see these as a substantial benefit merely because they benefit the wider public. Instead, they are better understood as a moderate benefit as part of a wider package.

30. The provision of ecological improvements, new public open space and the economic benefits which will flow from the construction of the site should properly be regarded as benefits which would flow from any modern housing scheme, and which should accordingly be attributed limited weight.

31. However, the assessment of weight must be conditioned by the fact that the Council already benefits from a 5 year housing land supply and satisfactory housing delivery.

DISBENEFITS

32. There are considerable disbenefits from the scheme, which flow primarily from the fact that this is a proposal for the development of an unallocated greenfield site.

Spatial Strategy

33. First, it is clearly in breach of basic tenets of the development plan's spatial strategy. There is nothing to suggest that the basic spatial strategy of the Core Strategy, which directs growth to the north and east fringes of Bristol, where development can benefit from coordinated infrastructure packages and more sustainable locations, is flawed. That conclusion entirely stands, notwithstanding the fact that there **may** be a need to accommodate in due course housing generated by need within the wider Bristol HMA.

34. Furthermore, even if the settlement boundaries are held to be out of date for the reasons set out above, they should still carry very considerable weight in any planning balance. This is because:

    a. As set out above, the housing delivery within the district, when considered against the standard methodology is strong, and the Council can demonstrate a 5 year supply.

    b. With respect to the lack of accommodation of wider housing needs within the Bristol HMA, the reality is that it is entirely uncertain what, if any, additional housing the district would be required to accommodate. Given that the Council

is now proceeding to prepare a new local plan solely for its own district, that process of plan preparation will be subject only (as matters currently stand at least) to the duty to cooperate. As is well understood, and as was properly accepted by Matthews xx AFU, the duty to cooperate does not extend to a duty to agree. There is simply no evidence to suggest that agreement as to the requirements for this district to take housing overspill from the wider Bristol HMA would be arrived at.

c. Furthermore, the duty to cooperate would exist within the context of the NPPF's provisions as to satisfying needs during the plan making process. By paragraph 11b, the new local plan would need to provide for its own objectively assessed housing need, as well as any needs that cannot be met with in neighbouring areas, but only to the extent that other policies in the NPPF which protect areas or assets of particular importance do not provide a strong reason for restricting the overall scale of development in the plan area. Given the very large extent of green belt within the district, it is entirely foreseeable that the policies of the Framework would provide grounds for the district not being able to plan to meet needs from other areas.

d. At this stage of the process it is simply too early to tell how much, if any, Bristol overspill housing would need to be accommodated in the district. Mr Matthews xx AFU properly accepted that the position was entirely uncertain at this stage.

e. That latter proposition it was most vividly illustrated by the fact that The Council's most recent consultation document on the new local plan, when

illustrating the possible sources of housing need, could only describe the need from the wider Bristol HMA with a series of question marks.

f. Accordingly, therefore, the central reason why the settlement boundaries are said to be out of date is entirely speculative. As such, they should continue to be given very considerable weight.

g. Finally, if the appellant's approach is to be adopted, and the settlement boundaries in the local plan are to be given limited or no weight, the logic which leads the appellant to that position would apply across the district as a whole. Accordingly, that part of the development plan which gave protection to countryside areas on the basis of the spatial strategy (and its settlement boundaries) would be rendered entirely ineffective across the whole district. Matthews xx AFU was entirely unable to demonstrate why the logic the appellants relied upon would not be effective in any other location in the district. This would plainly lead to a highly unsatisfactory situation where the spatial strategy of the entire development plan would be wrecked. To permit such a situation on the basis of an entirely speculative need from the Bristol overspill would represent very bad planning indeed and be entirely inconsistent with a plan-led system.

35. Accordingly, very considerable weight should still be given to the fact that the site is located outside of the settlement boundary of Thornbury, and as such is to be regarded as being in the open countryside where, by virtue of policy CS5 [5] [e], "*new*

development will be strictly limited". As such, the development is plainly contrary to policies of the development plan which should still carry great weight.

36. Furthermore, the proposal is contrary to policy CS5 [3] which deals specifically with development at Thornbury. This indicates that new development will be of a scale appropriate to revitalise the town centre and strengthen community services and facilities. The appellants approach to this policy is to suggest that the introduction of new population by virtue of the proposed development will necessarily serve to help revitalise the town centre and strengthen community services. Indeed, that they went so far as to point to the fact [see Matthews proof paragraph 9.44] that on the basis of the fact that the High Street in Thornbury was perceived to be struggling, a bid had been made for additional government funding and support.

37. However, Matthews xx AFU also accepted that the desire to introduce new population to revitalise the town centre could not serve as a policy to trump the basic locational policies of CS5, as considered above. It is also very important to note that the perceived decline in the High Street at Thornbury took place despite the introduction of new population from other permitted housing developments. Given the obvious trends in retail and other service provision, with more and more being provided online, it is appropriate to consider whether there is a process of "diminishing returns" occurring. Whilst Patterson xx Manley properly accepted that there would no doubt be some additional footfall, it is submitted that only limited weight should be given to that and that the provisions of policy CS5 with respect to revitalization do not provide a justification for a location of new development outside the settlement boundaries.

38. It is also the case that the proposal also falls outside the housing opportunity area to the North of Thornbury (500 dwellings) and Land off Morton Way (300 dwellings) identified under Policy CS33 of the Core Strategy and Policy CS32 which directs the new development planned for Thornbury in the Core Strategy.

39. Moreover, existing consents fulfil the expectation of the development of 800 units at Thornbury which is set out in policy CS15. That policy outlines the distribution of housing over the Core Strategy plan period 2006-2027 and includes 800 dwellings at Thornbury at the Park Farm and Morton Way development sites. The proposals fall outside of these allocations, and are in excess of them. The spatial strategy of the Core Strategy directs growth to the north and east fringes of Bristol, where the allocations benefit from coordinated infrastructure packages and more sustainable locations.

Heritage

40. It is common ground between the parties that there is less than substantial harm done to the heritage assets under consideration in this appeal: the two Grade I properties Thornbury Castle and St Mary's Church, the Thornbury Conservation Area and the Grade II listed Sheiling School[1] and that such harm is done by impacts on the settings of the assets. The difference between the parties is as to the extent of that harm and the weight to be attributed to it.

41. It is not proposed in these closing submissions to rehearse in detail the various assessments, principally that the Mr Crutchley for the appellant and Mr Burns for the Council. The Inspector will form her own views as to which views most accurately consider the issue. Instead these closing submissions will focus on points of principle

[1] Mr Crutchley for the appellant does not accept there is harm to this asset.

which should inform the Inspector's decision and on certain significant differences in approach which separate the parties.

42. It is a truism that great weight should be given to the protection of heritage assets. Indeed, relevant case law which interprets the duty in section 66 (1) requires that "*considerable importance and weight*" should be afforded to the desirability of preserving a listed building and its setting (see *Barnwell Manor*). Indeed in *Forge Field* it was indeed suggested that home to the setting of a listed building "*gives rise to a strong presumption against planning permission being granted*".

43. Whilst it is obviously the case that the presumption is capable of being rebutted, it is important to understand the strength with which case law has framed the protection to be afforded to heritage assets.

44. The NPPF advises that in paragraph 199 that great weight should be given to the conservation of designated heritage assets. Furthermore, it makes plain that the more important the asset, the greater the weight should be.

45. Accordingly, it is appropriate to begin the consideration of the heritage assets in this case by recognising that two Grade I assets will be harmed. It is important to appreciate how comparatively rare Grade I assets are. The Historic England "*Guide for owners of listed buildings 2016*" (page 4) indicates that Grade I buildings are those of exceptional importance, such that only 2.5% of all listed buildings are recognised as Grade I.

46. In this case the collection of listed assets which make up the Thornbury castle complex are of exceptional interest and value. The list description, for example, of Thornbury

Castle Inner Court (Burns appendix 3) notes that "*Thornbury castle is recognised as being one of the finest examples of Tudor domestic architecture in the country, taking inspiration from royal buildings both lost and extant*" and "*the castle represents the height of architectural taste and craftsmanship*".

47. The Church of St. Mary the Virgin is also identified as a Grade I listed building on the basis of its outstanding architectural qualities. Moreover, notwithstanding the particular importance to be attached to the Grade I listed buildings, both the Grade 2 listed school, and the conservation area itself, are heritage assets of significance which attract the full measure of protection in both law and policy referred to above.

48. It is accepted that the harm done to these heritage assets is done solely by way of the harm to their significance caused by development within their setting. The appellants, when faced with such a situation sought to place considerable weight upon the recent decision concerning Edith Summerskill house (CD 3.4). This set out an approach to the appraisal of harm when the only harm is to the setting of a listed building. It suggests that appropriate recognition should be given to the extent to which the form and fabric of a listed building will remain following development within the setting and also suggests that it is necessary to identify the extent of the contribution made by the setting to the overall heritage significance of the asset.

49. Whilst this approach is obviously correct, it is of extreme importance to understand the factual context of the decision and to correctly apply the fundamental principle that harm should be assessed on the basis of understanding the contribution made by the setting to the significance of the asset.

50. In coming to a view as to the importance of setting to the significance of an asset and the harm caused by development within that setting, it's appropriate to have regard to the relevant guidance from Historic England, primarily in their good practice advice in planning Note 3 (CD 6.1). this builds upon guidance in the NPPG, which begins with the proposition that:

"*The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors such as noise, dust and vibration from other land uses in the vicinity, and by understanding of the historic relationship between places....*

The contribution that setting makes to the significance of the heritage asset does not depend on there being public rights or inability to access or experience that setting...."

51. Building upon that national policy guidance, Historic England thereafter advise (page 4) that:

"Change over time

Settings of heritage assets change overtime understanding this history of change will help to determine how further development within the assets setting is likely to affect the contribution made by setting to the significance of the heritage assets …

…

Cumulative change

Where the significance of a heritage asset has been compromised in the past by unsympathetic development affecting its setting... consideration still needs to be given to whether additional change will further detract from... the significance of the asset.

Negative change could include severing the last link between an asset and its original setting...

...

Access and setting

Because the contribution of setting to significance does not depend on public rights or ability to access it, significance is not dependant on numbers of people visiting it; This would downplay such qualitative issues as the importance of quiet and tranquilly as an attribute of setting… the potential for appreciation of the assets significance may increase once it is interpreted or mediated in some way, or if access to currently inaccessible land becomes possible."

52. Taking account of the wide-ranging nature of a concept of setting which extends far beyond purely the impacts on views, Historic England set out what it describes as an assessment "Checklist" which sets out a wide range of factors which need to be considered when assessing the extent of setting and, thereafter, the impact of development within that setting.

53. When the full range of factors which ought properly to be brought into the consideration of setting is properly appreciated, it is clear that the harm to the heritage assets, particularly the castle and the church, is greater than the appellants suggest. The assessment of Mr Burns, who clearly had a wider-ranging appreciation of the component parts of the setting and the effects upon those components, is much to be preferred. In particular, in Burns IC, when he took the inquiry through the Historic England checklist and demonstrated his consideration of each of those elements, Mr Burns demonstrated a proper approach to assessing the settings and the impacts. He

also demonstrated a proper appreciation of the need to understand the cumulative impacts of the scheme on a collective group of heritage assets, which the church and the castle, and to a lesser extent to school clearly represent.

54. His approach was in marked contrast to that of Mr Crutchley for the appellants. It is to be remembered that he did not even include in his proof the Historic England checklist or any systematic appraisal against it (see Crutchley xx AFU). Rather surprisingly, Crutchley xx AFU was unwilling to concede the obvious point that if a wider range of factors were included in the basic understanding of the setting of a heritage asset, the impact of development within that setting was likely to be seen as having a greater impact. He grudgingly conceded that the effect "*might be larger*", an answer which is clearly something of an understatement

55. This difference of approach manifested itself in the consideration of the individual assets. With respect to the castle, Mr Crutchley was not prepared to accept that there was a functional relationship between the area of the appeal site, as part of the setting, and the castle. Given the undoubted existence of the Deer Park, and the fact that on any view (see Crutchley proof paragraph 3.95) the appeal site lay within it, this was a somewhat startling position which goes a good way to explaining his under estimation of the impact of the appeal scheme on the setting of the castle.

56. It is correct to describe this position as startling ,because of the extensively documented history of the Deer Park, the obvious relationship between it and the castle and the fact that Historic England (in a consultation response to the to these proposals which was

done after, not before, they had concluded that there was an insufficient basis to list the Deer Park itself as an RPG) nevertheless concluded that:

"*We previously emphasised that despite no formal designation for this new park,* ***it is relatively easy to read within the landscape*** *- in our view it is not only an important non designated asset in its own right but as a unique example from the Tudor period of a deliberately designed piece of landscape to be seen in conjunction with the castle* ***providing a significant and comprehensive setting to this structure****. These comments remain equally as relevant to this current application,* ***perhaps even more pertinent given the loss of a portion of this landscape*** *through the construction of the Park Farm development." (emphasis added)*

57. This assessment comes from the government's advisor on the historic environment, whose views, in the words of the Edith Summerskill Inspector, "*should not be lightly set aside*". It illustrates both that the setting of the castle is properly to be regarded as making a considerable contribution to the overall heritage significance of the asset and that concern about development within that setting, particularly where it is within the old area of the Deer Park, will have a considerable impact on that setting. The concerns as to continued degrading of the setting fall precisely within the guidance set out above as to the dangers of ongoing degradation of already impacted settings. The existing degradation of the setting since the mid 1950s is indeed directly referred to by Mr Crutchley at his paragraph 3.80 (6), although bizarrely Mr Crutchley appears to regard those factors as a reason to downplay the significance of the impacts identified by historic England.
58. Indeed, the somewhat breezy dismissal bye Mr Crutchley of the views of the government's advisor on heritage matters provides a good general illustration of his tendency to understate the impact of this development.

59. A similar tendency is detectable in Mr Crutchley's consideration of the church. At his paragraph 3.126, he properly accepts that the setting of the church "is nonetheless considered to make a substantial (but minority) contribution to the totality of its significance." However, when considering the **impacts** upon this substantial contributor to the overall significance of this grade one asset, Mr Crutchley again, by confining his assessment purely to the visual impacts on the setting, understates the impacts.

60. Likewise, with his dismissal of any meaningful relationship with between either the church and the conservation area with its surrounding countryside, despite the clear historical relationship between both the church (with its obviously prominent role in the life of both the town and the surrounding countryside) and the southern end of the conservation area with that surrounding countryside, Mr Crutchley again fails to take account of meaningful effects and understates the level of impacts.

61. Finally, when considering these extent of harm produced by these impacts, it is pertinent to "crosscheck" with the Edith Summerskill decision. It is notable that notwithstanding the fact that the heritage assets in question in that case were surrounded by built form throughout their setting (see paragraphs 12.30 and 12.31), the introduction of further built form through the proposed development was nevertheless still sufficient to produce less than substantial harm at the lower end of the scale.

62. It will immediately be recognised that this is the same level of impact for which the appellants now argue in this case, where assets which are in part surrounded by open countryside which has an historical functional link with the heritage assets. Whilst of course each case must be assessed on its merits, a comparison with the actual facts of

the Edith Summerskill case gives a significant pointer that the appellants have, indeed, underestimated the level of harm caused to these assets. In all the circumstances, Mr Burns's assessment of a medium level of less than substantial harm is entirely appropriate.

63. However, the level of harm is only one component of the overall assessment. The other, of course, is the weight which should be attributed to that Tom. Only then can a proper assessment be made of the role which the heritage harm causes for the overall planning balance.

64. In this case the crucial element is the fact that two Grade I listed buildings are harmed. as set out in paragraph 199 of the NPPF, the greater the value of the asset, the greater the weight which must be attributed to any harm. It is submitted therefore that very considerable weight ought to be attached to the harm to these very important heritage assets. Surprisingly, neither the appellant's planning witness (to whom the job of attributing weight would ordinarily fall) nor, on examination of his proof Mr Crutchley, appear to have dealt with this matter. It therefore appears, that as well as underestimating the level of harm, the appellants have significantly under estimated the weight which therefore ought to be placed upon that harm.

Agricultural Land

65. The proposal results in a significant loss of best and most versatile agricultural land, which is not necessary as the site is not required to contribute to the five year housing land supply. This deals with the suggestion that any development in the area would use

up BMV land. That may be so, but this development is not needed and so cannot be regarded as a suitable use of BMV.

66. Accordingly, the loss of this BMV is contrary to policies CS9 and CS34 of the development plan and contrary to the advice in paragraph 174 and footnote 58 of the NPPF. It should continue to be regarded as a disbenefit of the scheme.

Contributions

67. Contributions are now agreed, so that the development now makes the contributions necessary to mitigate in full adverse planning effects.

Conclusion on planning balance

68. Accordingly, when the correct, normal, planning balance is applied, the disbenefits of a scheme which is so clearly contrary to the development plan patently outweigh the benefits, such that permission should be refused.

Paragraph 11(d) engaged

69. In the event that, contrary to the Council's case, it is concluded that there is no 5-year supply or that the basket of relevant policies are out of date, such that paragraph 11 (d) is engaged, it remains the case the planning permission ought to be refused.

70. The appropriate framework for considering the operation of paragraph 11d, and the interaction between the tilted balance and applications involving heritage assets has received recent judicial consideration in *Monkhill v SSHCLG* [2019] EWHC 1993 (Admin). In the subsequent Court of Appeal hearing, the Court endorsed the extensive 15 point logical sequence of steps set out by Holgate J in the first instance decision.

71. From those authorities the following propositions appear clearly established:

a. Because paragraph 11(d) states that planning permission should be granted unless the requirements of either alternative are met, it follows that if either limb (i) or limb (ii) is satisfied, the presumption in favour of sustainable development ceases to apply. The application of each limb is essentially a matter of planning judgement for the decision-maker. (Holgate step 6, CA para 18)

b. In the event that the application of heritage asset policy within the NPPF provides a clear reason for refusing planning permission, the tilted balance within paragraph 11 limb (ii) has no further role in decision-making, since the presumption in favour of granting planning permission has already been disapplied by the outcome of applying limb (i). (Holgate step 13, CA para 18).

c. Coming back to the test under limb (i), the determinant is whether the application of the heritage asset policies in the NPPF provides a clear reason for refusing planning permission. The mere fact that such a policy is engaged is insufficient to satisfy limb (i) (Holgate step 10, CA para 18).

d. The assessment of whether the harm caused to the heritage asset (to which great weight must be afforded) outweighs the benefits of the scheme is not to be carried out on the basis of any tilted balance, but instead is a simple planning balance exercise (see Holgate para 52, CA para 19).

e. The consideration of whether the harm to the heritage asset outweighs the benefits of the scheme only determines whether the presumption in favour of sustainable development is disapplied (pursuant to limb (i)). Even if the presumption is disapplied, the decision maker must then go on to have regard to the development plan and all other material considerations in order to finally determine the application. However, in undertaking that final balancing exercise, the "tilted balance" is of no application because it has already been disapplied by the operation of limb (i). (Holgate step 13, CA para 18).

f. When undertaking that final balancing exercise, the decision maker must have regard to the harm to the heritage asset and must afford it great weight. She must also consider all elements of NPPF heritage asset policy

72. The heritage disbenefits noted above, and the weight which ios atrtibiuted to them, is such that the relatively modest level of public benefits open brackets (which in truth are no different from those which would flow from any modern market housing scheme) cannot outweigh them.

73. Furthermore, the significance of the heritage assets, and the harm caused to them, is such that the harm to heritage assets provides a clear reason for refusing planning permission. In accordance with the framework for decision-making provided by the *Monkland* decision, that clear reason suffices to disapply the tilted balance. Once the tilted balance is disapplied, the overall balancing exercise thereafter required still points in the direction of a refusal,.

74. Finally, in the event that the harm to heritage assets alone does not provide a clear reason for refusal, and the tilted balance is engaged, it is submitted that that the harm (particularly the breach of development plan policies by way of development in the open countryside the heritage harm) that is sufficient that the harm significantly and demonstrably outweigh xde the relatively modest benefits which come from this scheme.

75. On any basis, therefore, the Council contends that planning permission should be refused.

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