

<b>PINS Ref</b>	APP/B1930/W/20/3260479
<b>Site</b>	Smallford Works, Smallford Lane, Sleafshyde, St Albans, Hertfordshire, AL4 0SA
<b>Appellant</b>	Stackbourne Ltd
<b>Respondent</b>	St Albans City and District Council (" <b>the Council</b> ")

## **CLOSING SUBMISSIONS OF THE APPELLANT**

### ***The decision-making framework***

1. It is common ground between the main parties that, so far as the impact of the proposal on the Green Belt is concerned, this appeal should be determined in accordance with the Green Belt policies in the NPPF given the age of the Local Plan (the District Local Plan Review 1994). The agreed starting point is paragraph 11(d) of the NPPF which states, in relation to decision-making, that the presumption in favour of sustainable development means:

“(d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date<sup>7</sup>, 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<sup>6</sup>; 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.”

2. It is agreed that “the policies which are most important for determining the application are out-of-date” given that the Council does not have a 5-year housing land supply (see footnote 7 to para. 11(d)). This means that permission should be granted in this case

unless limb (i) or limb (ii) above apply. Logically, it makes sense to consider limb (i) first as it is narrower in scope than limb (ii). Footnote 6 to limb (i) includes the Green Belt policies in the NPPF in its list of policies that “protect areas or assets of particular importance” for the purposes of limb (i). It follows that if the appeal proposal does not comply with any of the Green Belt policies in the NPPF, this would provide a “clear reason” to dismiss the appeal in accordance with limb (i).

3. Conversely, if the proposal does comply with the Green Belt policies in the NPPF – *either* because the proposal is not considered to be for “inappropriate” development in the Green Belt, *or* because there are very special circumstances that justify granting permission for inappropriate development – those Green Belt policies would not provide a “clear reason” to dismiss the appeal under limb (i). Nevertheless, in that scenario, limb (ii) still needs to be considered as *either* limb (i) *or* limb (ii) are capable of overriding the instruction in para. 11(d) to grant planning permission. **Critically, the Council accepts in this case that limb (ii), if it needs to be considered, would not be met:** i.e. the Council accepts that the adverse impacts of granting permission would not significantly and demonstrably outweigh the benefits. This concession simplifies the decision-making framework in this case and means that the parties agree on the following:
  - (1) Should the inspector conclude that the proposal is not “inappropriate” in the Green Belt, the appeal should be allowed in accordance with the instruction in para. 11(d) of the NPPF to grant permission (i.e. as neither limb (i) or limb (ii) applies).
  - (2) Alternatively, should the inspector conclude that the proposal is for inappropriate development in the Green Belt, but that the ‘very special circumstances’ test is met, again the appeal should be allowed in accordance with the instruction in para. 11(d) to grant permission.
4. I turn first to the issue of whether the proposal is for inappropriate development in the Green Belt.

***Is the proposal for inappropriate development in the Green Belt?***

5. Paragraph 145 states that the construction of new buildings should be regarded as inappropriate in the Green Belt. One of seven stated exceptions to this proposition is at para. 145(g):

“(g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:

- not have a greater impact on the openness of the Green Belt than the existing development; or
- not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority.”

6. The main parties agree that:

- (1) The Site is “previously developed land”.
- (2) The proposal is for the “complete redevelopment of previously developed land” which is in “continuing use”.
- (3) Even though there are some temporary buildings on the Site, the entire Site is still to be treated as “previously developed land” as the temporary buildings sit on hardstanding.
- (4) The second bullet point in para. 145(g) applies in this appeal as the proposal would “re-use previously developed land and contribute to meeting an identified affordable housing need”.
- (5) The only part of the second bullet that is contentious between the main parties is whether the proposal would “cause substantial harm to the openness of the Green Belt”.

7. The Council's planning witness, Mr Phillip Hughes, accepted in cross-examination ("XX") that, as a matter of fact and degree, "substantial harm" must mean more than "significant harm". A development proposal could therefore cause significant harm to the openness of the Green Belt and still be within the scope of the exception in the second bullet point to para. 145(g). Provided that any harm to openness would be 'less than substantial', the terms of the exception are met. In the absence of any further definition of "substantial" in the NPPF, Mr Hughes agreed that it should be given its ordinary meaning, as defined in the dictionary, of something that is "considerable" in extent or degree.
8. Mr Hughes also agreed that, although the second bullet point of para. 145(g), unlike the first bullet point, does not refer explicitly to assessing the proposal by reference to "the existing development", it is necessary to have regard to the existing development, uses and activities on the Site when assessing whether the proposal would cause "substantial harm" to openness.
9. What is meant by "openness" for this purpose? The correct position is now summarized in the PPG, taking account of the judgment of the Court of Appeal in **Turner v Secretary of State for Communities and Local Government** [2016] EWCA Civ 466. The PPG states (ID 64-001-20190722):

"Assessing the impact of a proposal on the openness of the Green Belt, where it is relevant to do so, requires a judgment based on the circumstances of the case. By way of example, the courts have identified a number of matters which may need to be taken into account in making this assessment. These include, but are not limited to:

- openness is capable of having both spatial and visual aspects – in other words, the visual impact of the proposal may be relevant, as could its volume;
- the duration of the development, and its remediability – taking into account any provisions to return land to its original state or to an equivalent (or improved) state of openness; and

- the degree of activity likely to be generated, such as traffic generation.”

10. The reference to “*both* spatial and visual aspects” is important. It reflects the conclusion of the Court of Appeal in **Turner** that “volumetric matters may be a material concern, but are *by no means* the only one” when assessing the impact of a proposal on openness, “and factors relevant to the visual impact on the aspect of openness which the Green Belt presents” may also be relevant: [14], (*emphasis added*). In other words, comparing current and proposed building footprints and/or volumes may be part of the assessment, but it is not necessarily the full picture as it may also be important to consider how the proposal might affect the *appearance* or the *perception* of openness, irrespective of any footprint/volume comparisons.
11. The reference in the PPG to “the degree of activity likely to be generated” confirms that it is not only operational development that can impact on openness; openness may also be impacted by uses, activities and other elements that are moving or temporary in presence. Mr Hughes was wrong to state in his proof of evidence (para. 5.32) that temporary buildings must be excluded from the existing ‘baseline’ position when assessing the impact of a proposal on openness. He promptly accepted in XX that this paragraph was a misstatement of policy and was contrary to the guidance in **Turner** (the relevant passages of which on this point he did – curiously – go on to cite at paras 5.33 and 5.34 of his proof). As **Turner** makes clear, temporary buildings should not be excluded from the existing ‘baseline’ position, but it is permissible to take account of their temporary nature when assessing the extent to which they impact on openness: see [27] and [31] cited at paras 5.33-5.34, Mr Hughes’ proof.
12. Unfortunately, this error by Mr Hughes had fundamental consequences for his evidence. By proceeding on the mistaken basis that temporary features should be excluded from the baseline for the openness assessment, he failed to take account of many of the major elements of the current baseline that already impact significantly on openness. They include, for example, the “containers, portacabins, lorry bodies, etc” that he states

in para. 5.32 that he has excluded from his assessment. In re-examination, an attempt was made to suggest that, despite this fundamental error in paragraph 5.32, Mr Hughes had still somehow taken these temporary elements into account as part of the baseline because, in other paragraphs of his proof, he had acknowledged their presence on the Site. This was not convincing: acknowledging the presence of a temporary building on the Site is not the same as including it within the baseline for the purposes of the openness assessment. It is not credible to suggest that this was done in the proof of evidence when Mr Hughes expressly stated in paragraph 5.32 that it should not be done.

13. It follows that, in reaching his judgment on whether the proposal would cause “substantial harm to the openness of the Green Belt”, Mr Hughes substantially under-assessed the baseline. This was a serious error in relation to a pivotal issue in this appeal. It is important to keep this in mind when considering Table 3 (‘GEA Comparison Proposed and Existing Floorarea’) in Mr Hughes’ proof, within para. 5.48. In its exclusive focus on the spatial aspect of openness, the analysis is incomplete as it includes no analysis of the visual aspect of openness. Moreover, by focussing on the extent to which the developed floor area would increase in numerical terms (an exercise more appropriate for the test in the first bullet point of para. 145(g) of the NPPF), Mr Hughes did not grapple in a meaningful way with the correct policy test in the second bullet point of para. 145(g), namely whether the proposal genuinely would cause “substantial harm” to openness. This was asserted as a conclusion by Mr Hughes, but detailed analysis in support of that conclusion was lacking.

14. When this baseline is fully identified, it is not reasonable to suggest that the proposal would cause “substantial” harm to openness when compared with that baseline.

15. When applying the test of “substantial harm”, it is essential to acknowledge the extent to which the Site is currently perceived to be ‘open’. For example, ‘Image 3’ within Mr Hughes’ proof (page 11) shows a mid-distance view: the ‘View from the junction of

Bridlepath 2 and Footpath 19 looking west'. As Mr Hughes acknowledges in his proof: "The existing complex of buildings (units 3-5) at the rear of the site are visible in this view" (para. 2.21). This "complex" of buildings is, indeed, clearly discernible in this view, significantly reducing the perceived openness of the Site from this publicly accessible vantage point. Later in his evidence, Mr Hughes fairly explained why these buildings can be seen in this view (*emphasis added*):

"5.36 [...] some of the buildings have a ridge height equivalent or similar to a two storey dwellinghouse. In particular the Inspector will note that Buildings 3 and 5 are commercial buildings used for storage of plant and materials *and have a height similar in parts to a two storey dwellinghouse*. [...]"

16. The extent to which the Site is presently occupied and used is also apparent from Mr Hughes' 'Image 4' (page 12, proof) showing the 'View Along Smallford Lane Frontage from the Northern Tip of the Site'. This image gives a sense of the dynamic view of the Site from Smallford Lane, travelling in either direction, and the extent to which the widespread activity on the Site is currently perceived by those travelling along it.
17. 'Image 5' (page 12, proof), showing the 'View from Footpath 11 looking east', is even more instructive. The very clear perception here is of a site that is extensively covered by dense development of a commercial or utilitarian character. From the vantage point shown in 'Image 6' (page 13, proof), the 'View Along Smallford Lane Frontage from the New Access Looking South', the perception is again of a site that is lacking in openness due to the extensive and intensive use of the Site for storage purposes.
18. A fuller sense of how the Site as a whole has been used, since the turn of the century, is provided in the series of historical Google Earth images at Appendix 11 to the proof of the Appellant's witness, Mr David Churchill. These images show that, since 2000, there has generally been a steady increase in the intensity of the use of the Site for storage, particularly the north-western area of the Site. The Council drew attention to an area in the eastern part of the Site being vacant (or largely vacant) between 2009 and 2016, but as Mr Churchill explained in XX (and as the Google Earth images for this period confirm),

it was necessary to vacate this eastern part of the Site to construct the new access road. Soon after these access works were completed, the use of that part of the Site for storage resumed, as the photographs from 2016 onwards confirm.

19. Allowing for these exceptional access works, these historical images show a remarkable degree of consistency in the extent to which the Site has been used, extensively and intensively, for storage purposes over the last 20 years. These Google Earth images were not taken at times chosen by anyone related to the Site to show it at its busiest; they were taken at regular intervals, without notice, and show the typical operation of the Site over the years. This authoritative photographic evidence of the Site being used consistently and intensively for storage over the years means that Mr Hughes' characterization of the storage use as "transient" does not capture the reality of how this use has been carried out over time.
20. As for Mr Hughes' 'Image 8' (proof, page 32), showing Units 5, 7A and 7B vacant in February 2021, the circumstances that led to this vacancy were explained in a letter from the Managing Director of the Appellant, Mr David Norman, dated 16 March 2021. In summary, these units were occupied by a company that supplied mobile toilet facilities to large events – events that have, of course, gone away entirely during the Covid-19 pandemic, forcing the company into administration. The pandemic is a very exceptional event and the current vacancy of units 5, 7A and 7B must be seen in that context. Any suggestion that the current vacancy of these units is evidence that large areas of the Site are commonly unoccupied for long periods is not borne out by the evidence, including the historical Google Earth photography.
21. At Appendix 10 to his proof of evidence, Mr Churchill undertook a detailed analysis of the impact of the proposal on openness, taking account of both the spatial and visual aspects. This was an exemplary document of its kind that considered, forensically, the likely effects of the proposal on openness, taking account of an illustrative masterplan provided with the application. Although this illustrative masterplan is just that – an



illustration of what *could* be done (not necessarily what *will* be done) following further appraisal at the detailed design stage – the plan is sufficient to give confidence in relation to the following matters.

22. **First**, the proposal would **create opportunities to include significant new areas of green space throughout the Site**, including the potential for a new ‘village green’ at its centre. These areas of green space would not be mere gestures; the proposed village green shows that it would be possible to create a sizeable area of respite from development at the heart of the Site, of a kind which would be impossible on the Site in its current use. The inspector asked whether the benefits, in openness terms, of a village green-type feature might be compromised by the presence of parked cars in the vicinity, but given the dedicated parking spaces for the dwellinghouses, any additional on-street parking (for example, by visitors) would be likely to be limited in extent and temporary.
23. In any event, should the Council have a particular concern about on-street parking right next to the village green, it could use its statutory parking controls to restrict it in the usual way. This is not a concern that should reduce the weight given to the village green as a welcome, green lung within the Site, opening up much deeper views into the Site from Smallford Lane, as well as to and from public rights of way to the west.
24. A village green would not only bring visual benefits in terms of openness; it would make the Site more open in a physical sense by providing the sight lines to encourage and facilitate pedestrian access through the Site from Smallford Lane to the rights of way network to the west (and vice versa). The opportunity to create an additional green space at the alternative south-eastern entrance to the Site would open up the Site even further, and provide another opportunity to open up views deep into the Site from Smallford Lane.
25. This experience of the Site as open, green and allowing much more fluid movement through the Site can be contrasted with the Site in its current form, which is covered

entirely by hardstanding and has very few areas that contain no buildings, structures or stored elements. It also has a basic internal road through the centre of the Site that (unlike the internal road network in the illustrative masterplan for the proposal) does not have tentacles into most parts of the Site (for example, there are no internal side-roads into the, built-up western part of the Site, further reducing its openness). It is correct to describe the areas of the Site currently without any development or activity as “minimal” in extent. The proposal would change that radically.

26. **Second**, the proposal would allow for **a more orderly layout of development**, enabling higher-density development to be concentrated on the less sensitive boundaries. Provision could then be made for less dense development on the sensitive western boundary, improving the perception of openness from the most prominent views from any public right of way. Presently, the Site is at its most densely developed on that sensitive western boundary, causing unnecessary harm to openness.
27. It was queried at the inquiry whether the Site is as ‘disordered’ as Mr Churchill claims. As he explained, the disorder comes not only from some units taking a less regimented approach to storage, but also from other units where stored items are packed together so tightly that there is no perception of openness at all (see, in particular, the units in the north-western part of the Site). What might appear, superficially, to be an ‘organized’ approach to dense storage is, in fact, evidence of the lack of planning constraints on the extent and intensity of the storage use. This is what Mr Churchill meant in his Appendix 10 when he referred to “disorderly” development in the north-western part of the Site.
28. The inspector asked about the parking provision in the more “orderly” illustrative layout shown for the proposal, querying whether this would have its own impact on openness, particularly along the northern and eastern boundaries of the Site. The illustrative parking bays next to these terraces are shown as perpendicular to the houses in much the same way as the parking is predominantly arranged on Sleafshyde Lane, albeit with

a more compact site footprint as would be expected for a modern development. The key point, as the illustrative masterplan shows, is that full pedestrian access would be maintained across these parking spaces (i.e. is it not intended that there would be built form physically segregating one from the other) and critically, the parking bays would be interspersed with trees, their elevated canopies softening the visual context of the space and providing a green, tree-lined aspect. The Appellant strongly resists the suggestion that someone standing in the north-eastern corner of the Site would be presented with two vistas of 'hard' development to the west and the south. To the contrary, the design vision here is that these roads should be lined with trees that draw the eye upwards and away from any parked vehicles that are interspersed between them, thereby reducing the visual significance of those vehicles in close and mid-distance views. There is nothing unusual in this approach to a residential scheme of a low density as proposed.

29. There would be real benefits, in terms of openness, if a more orderly approach to the layout of the Site could be achieved by planning permission for a residential scheme. The use would be more uniform in character across the Site, overcoming the current problem of some areas of the unregulated Site being used more intensively or more untidily than others, with inconsistent implications then for openness.
30. The major benefit of a more orderly approach, however, would be the ability to shift the most dense development from the most sensitive western boundary to the northern and north-western boundary that are much less sensitive given the extent to which they are enclosed by trees and other vegetation. This is a significant advantage of the proposal and the opposite of causing "substantial harm" to the openness; the proposal is about creating opportunities for *more* openness on the Site where it is most important to have it.
31. **Third**, the proposal would allow for development to be **thoughtfully orientated so as to reinforce the perception of greater openness**. The indicative mews layout of housing on

the western boundary of the Site would be a prime example. At the inquiry, the Council did not challenge the clear virtues of this arrangement as a creative way of enabling a physical and visual channel to be opened way between the public rights of way to the west and the central 'village green' feature, substantially improving the openness of the Site in this area.

32. **Fourth**, the proposal would lead to **a significant reduction in the number of vehicular trips** to/from the Site in both AM and PM peak hours, and the total number of such trips throughout the day, when compared with the current use. Within this, there would be **a very significant reduction in the number of larger vehicles (of types OGV1 and OGV2)** travelling to/from the Site and using rural roads within this area of the Metropolitan Green Belt. In the transport assessment for the proposal, some 21 OGV1 vehicles and 20 OGV2 vehicles were counted accessing the Site over a typical 12-hour period in late 2019. Achieving a very substantial reduction in those numbers would be of real benefit in terms of the visual aspect of openness.
33. **Fifth**, the proposal would **allow the height of development on the Site to be the subject of detailed planning control**. The likely alternative would be an ongoing intensification of the unregulated storage and other commercial use operations on the Site, with a real risk of the heights of stored elements increasing steadily to maximize the commercial output of the Site. There would be no meaningful planning constraint on this increase in heights. A proposal that would remove this real risk of further significant harm to openness is not one that can properly be described as causing "substantial harm" to openness.
34. Assessing all these matters in the round, the proposal would not cause substantial harm to openness but, to the contrary, would provide several significant opportunities to improve the perception of openness within the Site. The proposal should therefore be considered acceptable in principle in the Green Belt pursuant to the second bullet point

of para. 145(g) of the NPPF. In accordance with the decision-making framework set out above, the appeal should therefore be allowed.

35. (For completeness, in response to the inspector's question on this point, if, separately from any harm caused to openness, the question of any harm caused to Green Belt purposes arises, the Appellant accepts that this harm to purposes could be separately weighted under the "any other harm" banner, and would not necessarily be incorporated within the assessment of "substantial harm to openness" under para. 145(g). However, as the Council does not rely on any harm to Green Belt purposes in this case, the Appellant has not addressed this point in detail in its evidence as it is academic.)

#### ***Impact on character and appearance***

36. There is a significant overlap between this issue and the assessment of impact on openness given that the visual aspect of openness has come the fore in decision-making since the **Turner** judgment. At the roundtable session, the inspector focused on three aspects: (i) the quantum and density of development; (ii) the design and layout of development; and (ii) trees and landscaping (including any effects from the loss or replacement of trees).
37. The quantum and density of development: By modern standards, the density of development (at 28dph) on a site where the Council accepts the principle of a residential redevelopment is low. Whilst the existing development in Sleapshyde is built at marginally lower densities, this is predominantly due to the size of the residential gardens and a more linear layout. It would not be realistic to seek to replicate this format in a contemporary scheme given the emphasis in paragraph 122 of the NPPF on the efficient use of land and the injunction in paragraph 123 that this is especially important when there is an existing or anticipated shortage of land for meeting identified housing needs. There clearly is such a shortage in the district of St Albans

given the acute pressure on greenfield, Green Belt sites to meet this housing need. This justifies a slightly higher density of housing development on the Site than is otherwise to be found in Sleafshyde to secure its optimal use as a housing site whilst at the same time preserving sufficient potential to increase the perception of openness within the Site.

38. **The density of the proposed development was not challenged in officers' report on the scheme.** To the contrary, officers recorded the proposed density and then observed: "Although low density development could potentially preserve the openness of the Green Belt, low residential density would create an inefficient use of the Green Belt land" (para. 8.6.3). In accordance with this assessment, there was no reason for refusal taking specific issue with the density of the proposed scheme. In particular, the word 'overdevelopment' does not feature anywhere in the Council's decision notice.
39. The illustrative masterplan shows one way of achieving the maximum number of dwellings sought in the permission (100) on the Site, but it is not the only conceivable solution. The question in law at this outline stage is not whether the illustrative masterplan itself shows an acceptable detailed layout and design (those matters being reserved), but whether it is sufficient to show that an acceptable scheme at the low density of 28 dwellings per hectare is likely to be *achievable* on the Site at the detailed stage (allowing for the possibility of amendments and refinements to this illustrative masterplan at that detailed stage).
40. The illustrative masterplan meets this low threshold: the Council takes no issue with the separation distances between dwellings and makes no point about residential amenity. Rather, the concern has been primarily about the allegedly 'hard' appearance of the housing and car parking illustrated along the northern and eastern boundaries of the Site. As explained above, this concern appears to have been advanced without taking due account of the extent to which it is intended that the loop road around the Site will be tree-lined, particularly in its northern and eastern stretches. At no point is it intended

that a visitor to the Site will experience a parade of parked cars without interruption; as explained above, the intention is to provide intervening trees and vegetation to break up the northern and eastern vistas and use tree canopy to soften the visual context. It need hardly be stated that the softening effects of such internal landscaping would be in stark contrast to the current presentation of the Site, which is a genuinely 'hard' environment. It would be peculiar to criticize the Appellant's illustrative scheme for its alleged 'hard' appearance when what it seeks to replace lacks any potential for visual softness.

41. Design and layout: The justification for the illustrative layout of the proposal along the northern and eastern boundaries has already been provided. The development is illustrated to be denser here because the northern and eastern boundaries are less sensitive than the western boundary which is closest to the most prominent views from any public right of way. The northern and eastern parts of the Site therefore provide the best opportunities to make efficient use of this site in the Green Belt.
42. At the inquiry, the inspector queried the indicative approach of having dwellings with rear elevations facing onto Smallford Lane. Whilst this, of course, could be the subject of further discussion at the detailed design stage, there is a clear design rationale for this indicative approach, namely that there should be a 'green edge' at the interface between the road and the Site in keeping with much of this section of Smallford Lane. Whilst some of the former landscaping along the eastern site boundary has been removed to provide the new access into the Site, the Appellant's vision is that landscaping should be restored along the eastern site boundary to soften the appearance of this developed site in the Green Belt and improve its assimilation with the generally rural character of its surroundings. This can be achieved without having rear elevations of dwellings close up against the eastern boundary because it is intended that the rear gardens to those properties would enable those dwellings to have a generous set-back from the road frontage (see the illustrative masterplan).

43. The Appellant does not consider the alternative of having housing fronting onto Smallford Lane to be practicable or sound in design terms on this particular site, for these reasons:

- (1) Having the rear gardens up to the boundary fence allows the site boundary to be generously landscaped with trees and vegetation to filter views of the housing in this Green Belt location. If, alternatively, there were houses directly fronting onto Smallford Lane, they would be more prominent in this Green Belt and rural context as it would then only be possible to place a few trees sporadically along the boundary.
- (2) In any event, the land owned by the Appellant does not extend up to the highway boundary, so it has no legal right along the full length of Smallford Lane to provide access directly from the highway to houses on the Site. There is no prospect of the Appellant or any successor in title ever becoming the owner of this land.
- (3) As is clear from the drainage evidence before the inquiry, there is a ditch running the full length between the eastern boundary of the Site and Smallford Lane. This provides a physical obstacle preventing level access from Smallford Lane to the houses on the Site.
- (4) At no point during their consideration of the scheme did the County Council's highways department suggest that there should be an alternative or additional access created to housing on the Site from Smallford Lane. The Appellant approached its illustrative layout and access on the basis that they should be looking to achieve access to the houses from the least busy road for highway safety reasons, which in this case would be from an internal road on the Site, rather than from the busier Smallford Lane. This is in the context of the policy in paragraph 117 of the NPPF that planning decisions "should promote an effective use of land in meeting the need for homes and other uses, *while safeguarding and improving the environment and ensuring safe and healthy living conditions*". Neither the County Council nor the District Council has suggested to the Appellant that it was wrong to



approach its illustrative layout and access on the basis of achieving access from the least busy road in the interests of highway safety.

44. For all these reasons, the Appellant would maintain that the illustrated orientation of the dwellings along the eastern boundary would be acceptable on this particular Green Belt site given its unusual constraints. This is in the context of the Council accepting the principle of residential development on this previously developed site, on which it is seeking to achieve major environmental enhancements.

45. Trees and landscaping: The Arboricultural Implications Report submitted with the application explains both where and why individual or groups of trees would be removed or pruned on the indicative masterplan for 100 dwellings. In summary, the trees/features to be removed are discussed in Chapter 4 of the report and set out in Table 2. Their spatial extent is indicated on the Tree Protection Plan.

46. As Mr Churchill explained in his proof of evidence (para. 5.40), a number of the trees identified in this Report have already been removed as part of delivering the new access road (11, 12, 13, 14 and G2a). These will be replaced by new planting in accordance with a section 278 agreement, as illustrated in the plan at Appendix A12. The net effect of these changes alongside the changes now proposed would be that:

- 1 individual tree (10) would be removed to make way for building works;
- 2 groups of trees (G2b, G3) would be partially removed to make way for residential development and to facilitate pedestrian access to the countryside on the western boundary, respectively; and
- 1 small group of trees would be entirely removed at the point of the new pedestrian link (G1).

47. In addition to the above, one individual Category U tree (G2b) is recommended to be removed irrespective of this development, and two small groups (H1b and H1c) of hedgerows will be fully removed to make way for built form and the pedestrian access.

48. The removal of these arboricultural features is considered necessary to enable the development to be built as illustrated. This removal is not only limited in scale, it also only involves those trees of low quality and of low value. All features listed above are Category C or lower.
49. The trees to be pruned (not removed) are discussed in Chapter 5 of the report and set out in Table 3. Their spatial extent is indicated on the Tree Protection Plan. In summary:
- 2 individual trees (1, 3) would require minor pruning to facilitate the proposal. A further tree (2) would need to have a failed stem removed to prevent further damage.
  - 3 groups of trees (G3, G4 and G6) on the western, southern and eastern boundaries would require pruning back to the extent of the boundary to give clearance for a proposed fence line.
50. The proposed pruning is minor and would largely be screened in view by either the remaining tree canopies within those groups, or by other trees growing within or adjacent to the Site. This would have a negligible effect on the appearance of the trees when viewed from outside the Site itself. As shown in green on the Tree Protection Plan, a considerable extent of the existing canopies of these groups would remain.
51. This minor pruning is necessary to ensure that none of the proposed dwellings would lie within 2m of the retained canopies of the trees. This will provide adequate working space for construction, and a reasonable margin of clearance for future growth.
52. Taken together, it is clear that the indicative development would not have an adverse impact on the arboricultural character and appearance of the landscape. The planned mitigation on the eastern boundary secured via the section 278 agreement, as well as an appropriate landscape strategy to deliver new planting around the site boundary and

throughout the site (as is secured by condition), would assist screening and improve the arboricultural quality of the area.

53. The information submitted is more than adequate to show that it would be possible for up to 100 dwellings to be accommodated on this site without having an adverse arboricultural impact.

54. For all these reasons, taking account of the proposed landscaping of the Site, the proposal would have, in the final analysis, minor negative effects on the wider countryside such that there is either no breach of Policy 74 of the Local Plan or any technical breach of this aged policy should be given (at most) moderate weight in the planning balance.

#### ***Very special circumstances***

55. “‘Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations”: para. 144, NPPF.

56. As Mr Hughes put it succinctly at para. 6.6 of his proof of evidence, “[v]ery special circumstances are the outcome of the Green Belt balancing exercise and only exist at a point when that balance has been undertaken and the other considerations clearly outweigh the harm”.

57. On the “harm” side of the scales are three remaining harms alleged by the Council:

- (1) the harm by reason of inappropriateness (the VSC test only being engaged if the inspector concludes that the proposal is for inappropriate development);
- (2) the alleged locational unsustainability of the Site;
- (3) the harm caused to character and appearance.

58. Harm 1: Harm by reason of inappropriateness: Mr Hughes suggested that the harm by reason of inappropriateness, and the harm caused to openness, should be treated as distinct harms and given separate weightings in the planning balance. That would be illogical in this case. If the reason why the proposal is inappropriate is because it would cause substantial harm to openness, it would be irrational double-counting to give separate weightings to the inappropriateness, on the one hand, and the substantial harm to openness on the other, because in the present case they are one and the same. This approach is supported by the judgment of the High Court in ***R (River Club) v Secretary of State for Communities and Local Government*** [2009] EWHC 2674 (Admin). Asked to rule on the meaning of the words “any other harm” in the virtually identical formulation of the VSC test in the former PPG2, the court held (*emphasis added*):

“27. It is of note that there are not qualifying words within paragraph 3.2 in relation to the phrase “and any other harm”. Inappropriate development, by definition, causes harm to the purposes of the green belt and may cause harm to the objectives of the green belt also. “Any other harm” must therefore refer to some other harm than that which is caused through the development being inappropriate. It can refer to harm in the green belt context, therefore, but need not necessarily do so. Accordingly, I hold that “any other harm” in paragraph 3.2 is to be given its plain and ordinary meaning *and refers to harm which is identified and which is additional to harm caused through the development being inappropriate*. It follows that I reject the argument that the phrase is constrained and applied to harm to the green belt only.”

59. In a case such as the present, involving the application of the second limb of para. 145(g) of the NPPF, there is no harm to openness that is “additional” to the harm caused through inappropriateness: the development is only inappropriate *because* of the substantial harm it would cause to openness (if this stage of the test is reached). Whereas in other cases not involving the application of para. 145(g), it might be rational

to disaggregate the 'definitional' harm and the harm to openness if the 'definitional' harm exists irrespective of the openness harm, that is not the case when para. 145(g) is in play: the 'definitional' harm only exists if there is substantial harm to openness. In that scenario, the rational approach would be to assess them globally under the same heading of "Green Belt harm" and ascribe this harm a single weighting.

60. It is accepted that as the VSC stage in this case is only reached if it has been concluded that the proposal would cause substantial harm to openness, substantial negative weight should be given to that Green Belt harm in the planning balance (on that hypothesis) in accordance with the first sentence of para. 144 of the NPPF.
61. Harm 2: Alleged locational unsustainability: Mr Hughes alleges that the Site is in an unsustainable location for housing and gives this factor substantial negative weight. This is untenable.
62. There was no stand-alone reason for refusal alleging that the Site is in an unsustainable location. Rather, the allegation was incorporated into the first sentence of the first reason for refusal concerned with the different issue of Green Belt openness. The officers' report on the application does not support, still less substantiate, the allegation. Rather, as officers confirmed (para. 8.3.8), the Council gave the Site a largely favourable assessment for residential development in the SHLAA in 2009 and did not identify any concern in a detailed pro forma about the site being an unsustainable location for housing. Indeed, officers confirmed in their report that the Council had "no in-principle objection to residential development" on the Site (para. 8.3.9). Mr Hughes' allegation of an unsustainable location rang hollow against this background.
63. In his proof (para. 5.76 onwards), Mr Hughes expressed concerns about distances from the Site to certain facilities for day-to-day living, citing "typical" and "preferred" walking distances in the Manual for Streets and two publications by the Chartered Institution of Highways and Transportation and the Institution of Highways and Transportation

respectively. Whilst the latter two publications are from respected bodies, they are not policy or guidance adopted or endorsed by central government. In any event, the references to “typical” and “preferred” distances in these three documents do not set hard-and-fast rules. Neither the NPPF nor PPG sets hard-and-fast rules for walking distances because the UK Government acknowledges (rightly) that this will vary depending on context, circumstances and the individual. As the NPPF states at the end of para. 103:

“103. [...] However, opportunities to maximise sustainable transport solutions will vary between urban and rural areas, and this should be taken into account in both plan-making and decision-making.”

64. In other words, there needs to be a degree of pragmatism and realism about what is achievable, in terms of sustainable transport solutions, depending on the particular local context. That would include, here, taking account of the rural context of the area.
65. When that rural context is duly taken into account, the distances that Mr Hughes cites in his Table 2 (‘Distances to facilities from the Appeal Site’) (page 14) are not unusual for a site in a rural setting, and certainly not so problematic that they would justify a refusal. Mr Hughes expressed a particular concern about the road between the Site and the nearest primary school being unsuitable for those walking with young children, such that parents would be likely to drive instead. However, even if that were correct, it would not be unusual for a primary school in a rural context. Certainly, there is no policy to the effect that new housing can only be located within safe walking distance of a primary school.
66. The Site is located close to regular bus services (see Mr Hughes’ proof, paras 2.27-2.28). Moreover, directly opposite the site to the south-east is the large area of residential housing that comprises Sleafshyde. It is not credible to suggest that the Site is an unsustainable location for housing when there is already a large area of housing diagonally across the road.

67. Assessing all these considerations together, for Mr Hughes to give “substantial” negative weight to his allegation of locational unsustainability is so untenable as to be irrational. It is not an allegation supported by his own client. The only proper conclusion is that no negative weight at all should be given to this point because there would be no harm caused on account of the Site’s location.
68. Some context is provided for this aspect of Mr Hughes’ evidence by the fact that the Council does not consider the point to be strong enough to enable it to argue that it would significantly and demonstrably outweigh the benefits of the proposal in the titled balance. Mr Hughes’ insistence on giving “substantial” negative weight to this factor, despite this concession in related to the titled balance, was difficult to understand.
69. Harm 3: Impact on character and appearance: Mr Hughes gives moderate negative weight to this factor (para. 7.6), again confirming that the Council does not consider this harm to be such that it should defeat the proposal on the tilted balance. For the purposes of testing the planning balance, the Appellant is content to agree to this moderate negative weighting.
70. Harm 4: Drainage: This concern, previously given significant negative weight by Mr Hughes, has now fallen away.
71. Summary of harms: To recap, therefore, on Mr Hughes’ very best case in relation to the alleged harms of the proposal, there would be **two substantial** negative weightings (Green Belt harm; locational sustainability) and **one moderate** negative weighting (character and appearance). However, one of Mr Hughes’ substantial negative weightings (locational sustainability) is so obviously wrong and unrealistic that it should be stripped out, leaving him with his own best, *realistic* case of **one substantial** negative weighting and **one moderate** negative weighting.
72. I now turn to the positive side of the scales.

73. Positive consideration 1: Substantial contribution towards housing in the context of an abysmally low housing supply: Mr Hughes gave this consideration “significant” positive weight, stopping short of “substantial” positive weight. This was an unrealistically low weighting in the context of the Council having a housing land supply as low as 2.4 years. It is established that the greater the shortfall, the greater the negative weight that may be given to it in the planning balance: see, for example, *Langton Homes Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 487 (Admin) at [61]. The housing land supply in this District is so appallingly low that the weight given to the provision of housing must rationally be at the highest end of the scale.
74. A “significant” positive weighting was also unrealistic given the chronic and very serious issues with plan-making in the District. The full, unfortunate history of these failures is appended to Mr Churchill’s proof of evidence, but in summary:
- (1) The Council has one of the oldest extant Local Plans in the country, dated 1994. The extant plan is – astonishingly – 27 years old. This is a total failure of land use planning.
  - (2) The extant Local Plan predates even the first version of the NPPF by 18 years.
  - (3) In recent years, the Council has twice failed to progress a new local plan because of two separate failures to comply with the duty to co-operate.
  - (4) The situation is so serious that the Council is in the small minority of local planning authorities in England where central government has threatened to intervene and effectively take over planning functions, so serious are the Council’s failures (see the correspondence at Appendix 4 to Mr Churchill’s proof).
75. When these matters are treated with due seriousness, it is not tenable only to give “significant” weight to the provision of 100 homes when they are higher weightings on the spectrum. The Council’s housing land supply, and its plan-making generally, is in such a parlous state that the provision of 100 homes in this appeal should be given **very substantial** positive weight.



76. Positive consideration 2: Provision of affordable housing: Mr Churchill and Mr Hughes agreed that this should be a positive factor in the balance, not least because the 40% affordable housing offered would exceed the policy requirement. Mr Hughes accepts that this consideration should be given substantial weight, but the affordability crisis in this District is so acute, and the land supply issues so problematic, that Mr Churchill's view that this consideration be given **very substantial** positive weight should be preferred.

77. Positive consideration 3: Environmental benefits: Mr Hughes gives this factor "moderate" positive weight, but this is unrealistically low. It is important to be clear that the main "environmental benefits" are two-fold: (1) an opportunity to remediate the Site; and (2) the replacement of a 'bad' neighbour with a residential use.

78. First, the Site has been for industrial-type storage for decades. The Site is also next to land in relation to which there are significant and justified concerns about contamination given the historic use. The conditions proposed as part of this scheme would allow the Site to be thoroughly investigated and any necessary remediation to take place in the public interest.

79. Second, it is clear that the Council has a long-standing ambition to relocate the activities carried out on the Site to a more suitable location. As the Council recorded in its assessment of the Site for the SHLAA in 2009 (cited at para. 8.3.4 of the officers' report on this application):

"The site is previously developed land and the Council has long had aspirations to remove the poorly located industrial uses on the site, in order to secure some major environmental enhancement of the area as part of the Watling Chase Community Forest. It is recognised that this is unlikely to happen without some 'enabling development'."

80. Mr Hughes said that there was limited evidence of complaints being made by members of the public in recent years about the activities carried out on the Site. However, a

“poorly located” use does not have to amount to a permanent nuisance in law for its relocation to be justified in planning terms. The Council’s publicly stated position is that the activities carried out on the Site would be better located elsewhere, and that the Site is in need of “major environmental enhancement” which it accepts will be unlikely unless the Site is redeveloped.

81. In these circumstances, either each of the two main environmental benefits should be given significant positive weightings, or more neatly, the two significant positive weights can be combined together under the heading of “environmental benefits” and given a single, global **substantial** positive weighting.
82. Positive consideration 4: Substantial reduction in vehicular trips, in particular large vehicles: Mr Hughes gave this consideration “little” positive weight (proof, para. 7.8). This was to treat this positive consideration, wrongly, as a trivial benefit when it will be of real, tangible benefit to those living in the vicinity of the Site. From a quality-of-life perspective, local people would certainly notice the virtually complete disappearance of some 40 large vehicles travelling through their area to the Site over a typical 12-hour period (i.e. based on the 21 OGV1 vehicles and 20 OGV2 vehicles counted accessing the Site over a 12-hour period in late 2019). There would be clear benefits in terms of visual and auditory amenity and of avoiding the emissions from these large vehicles in this residential area of the Green Belt. It would not be plausible to suggest that a more suitable site, further away from residential uses, could not be found for the activities carried out on the Site and the traffic movements associated with them.
83. The Appellant maintains that the consideration should be given **significant** positive weight.
84. Positive consideration 5: Opportunity to bring the Site within planning control: In the light of the discussions at the inquiry, there is a fifth positive factor that the Appellant relies upon, namely that a planning permission granted for this proposal would provide

an opportunity to bring an entirely unregulated site within planning control. This is especially valuable when, as the inquiry heard this week, there is a reasonable likelihood that if the current scheme is not granted permission, the use of the Site will continue to intensify with no planning controls on, for example, the heights of structures and pallets.

85. The Council suggested in XX of Mr Churchill that this is not a distinct benefit of the proposal, but another facet of the second “environmental benefit” identified above, namely the removal of a ‘bad’ neighbour. This is incorrect. The environmental benefit of removing the current “poorly located” activities from the Site is a benefit primarily to those living in the area. There is separate, distinct benefit to the Council in creating the opportunity (through the consequential relocation of the activities) to bring these activities within planning control *on another more suitable site*. In other words, the opportunity would be created for the Council to go from having a single, unregulated site, to two sites (one residential; one elsewhere for commercial storage), both subject to planning control. This is a regulatory benefit in the general public interest which is distinct from, and should be weighed separately, from the localized benefit to the residents of Sleafshyde and its surroundings in having the unneighbourly uses on the Site removed. This consideration should be given **significant** positive weight.

86. Summary of positive considerations: To recap, it is the Appellant’s case that there would be **two very substantial** positive weightings (provision of housing in the context of chronic plan-making failures; provision of affordable housing), **one substantial** positive weighting (environmental benefits) and **two significant** positive weightings (reduction of vehicle movements; bringing within planning control).

87. Final balance: In the final analysis, the scales, based on the Council’s best realistic case in relation to harms, stack up as follows:

<b>Negative weightings</b>	<b>Positive weightings</b>
Substantial	Very substantial
Moderate	Very substantial
	Substantial
	Significant
	Significant

88. It is clear that the positive side of the scale does “clearly outweigh” the combined harms. Very special circumstances are therefore present. In accordance with the framework for decision-making agreed between the parties, the inspector is invited to allow the appeal.

**GWION LEWIS Q.C.**  
**Landmark Chambers**  
**London**  
**19 March 2021**