

Appeal by Wulff Asset Management

APP/N1025/W/23/3319160

Land North-West of 1 to 12 Twelve Houses, Sowbrook Lane, Stanton by Dale

CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT

INTRODUCTION

1. At the close of this Inquiry, one could be forgiven for asking – genuinely – why are we here?
2. The Appellant seeks planning permission for up to 196 new homes on land that has no designation restricting development in circumstances where the Council's housing land supply – both market and affordable – is woeful. It is now accepted that the Appeal Scheme complies with both the adopted and emerging Spatial Strategies¹. In policy terms, the Appeal Site is deemed to be in an accessible location² and the Appeal Scheme will bring forward substantial improvements to pedestrian, cycling and public transport infrastructure.
3. The Council's case has now been whittled down to the following: first, that the Appeal Scheme will be a stand alone development in an important gap which is not recognised anywhere in policy; second, that the quality of pedestrian and cycling links will act as a disincentive to future residents; third, that it would be unfair to grant planning permission in advance of the adoption of the ECSR; fourth, that permission should be refused because the Site *might* become Green Belt; and finally that most of the benefits that would be generated by the development should be given reduced weight.

¹ AR XX

² CD B1, Policy 14(1).

4. It was disappointing that the LPA refused planning permission originally. Having heard their evidence at the Inquiry it is astonishing that they continue to resist development on this eminently sustainable site.
5. It should be noted that the 10no reasons for refusal have now been reduced substantially. RfRs 2, 3, 4 and 6 have now been addressed. RfR7 (effect on the listed Twelve Houses) has also been overcome in light of the Council's concession that the public benefits of the Appeal Scheme outweigh the less than substantial harm to those designated assets. Additionally, Derbyshire County Council ("DCC") as local highway authority are satisfied that the Appeal Site is sufficiently accessible to local services and facilities by sustainable modes of transport³.

The Plan Led System

6. One of the refrains of the LPA's case was the importance of the plan-led system. We recognise that the NPPF prioritises plan-led decision taking but there are three crucially important caveats in the present case. **First**, §12 NPPF refers to conflict with an 'up-to-date development plan'. The ECS is anything but up-to-date. In the Council's own words, it has failed. The Council's case has to rely on the (Emerging) Plan led system. **Second**, a plan-led approach to the Appeal Scheme should result in an approval. As AR accepted in XX, the Appeal Scheme complies with the Spatial Strategy of the ECS (Policy 2) and, as such, 'we need not be here'. AR was absolutely correct to make this concession for a number of reasons:
 - a. Policy 2 ECS expressly supports development within or adjoining the Ilkeston Urban Area ("IUA");
 - b. Whilst neither the ECS nor the policies map expressly defines the extent of the IUA, the Key Diagram does. As a matter of fact, if *either* the Stanton Regen Site or the area encompassing the Stanton Precast Works form part of the IUA then the Appeal Site adjoins the IUA⁴;
 - c. The ECS is unequivocal: the Stanton Regen Site is an 'integral' part of Ilkeston⁵. Elsewhere in the ECS the Stanton Regen Site is referred to as a 'neighbourhood'

³ See CD L5.

⁴ AR XX

⁵ ECS §2.4.5, CD B1.

(*i.e.* part of Ilkeston). Policy 7 (Regeneration) refers to the Stanton Regen Site as being ‘in the Ilkeston urban area’⁶. Nothing could be clearer;

- d. By the same token, although the Key Diagram refers to ‘settlement area’, it is quite impossible to see how a ‘settlement area’ within the wider Ilkeston conurbation could be anything other than part of the IUA;
 - e. As such, the Appeal Site adjoins the IUA and should therefore benefit from compliance with the Spatial Strategy.
7. There are no other policies in the adopted ECS which restrict development on the Appeal Site and, as the evidence has shown, there will be no unacceptable effects on the character and appearance of the area. **Third**, the ECSR “continues to focus housing growth on sites in and adjoining the Ilkeston urban area”⁷ and the Appeal Scheme will count towards Ilkeston’s unallocated allowance of 700 dwellings⁸. It complies with the emerging Spatial Strategy.
8. Applying the principle of plan-led decision taking, permission should be granted.

Policy Context

9. There are two routes to the grant of planning permission:
- a. The Appellant’s primary position is that the Appeal Scheme complies with the development plan as a whole. As such, there is a statutory presumption in favour of planning permission⁹ and a policy presumption to grant permission ‘without delay’¹⁰; alternatively
 - b. Given that the heritage RfR is now overcome and in light of the housing land supply position (2.65 years) and the failure of the ECS, it is common ground that the tilted planning balance would apply *if* there is conflict with the development plan.

⁶ ECS p.37.

⁷ CDL1 §7.18.

⁸ AR XX.

⁹ S.38(6) Planning and Compulsory Purchase Act 2004.

¹⁰ §11(c) NPPF.

Benefits

10. Whichever of the 'gateways' set out above is applicable, the Appeal Scheme will bring with it a package of compelling benefits. We make no apologies for highlighting these benefits at the beginning of these Closing Submissions. By their very nature, Public Inquiries tend to focus on the allegedly negative aspects of development such that the benefits (especially those which are common ground) get less attention.
11. In giving weight to the benefits SH adopted the scale: limited, moderate, significant, substantial.
12. In this case, the benefits are manifold. We do not propose to rehearse those benefits about which there is agreement: BNG and the provision of public open space¹¹. However, they must be placed on the positive side of the tilted planning balance, should it be necessary to strike that balance.

Market Housing

13. Helping to address the Council's significant five year housing land supply shortfall – substantial positive weight.
14. §60 NPPF enjoins planning authorities to boost significantly the supply of housing. EBC is doing the opposite. Its HLS position has worsened even with the publication of an Action Plan and resisting suitable sites such as the present one will only make matters worse.
15. The Appeal Scheme can help to address a massive housing land supply shortfall. The Council need 1,550 dwellings (1,008 dwelling shortfall + 462 dwelling windfall allowance) to come forward on unidentified windfall sites in order to be able to demonstrate a 5YHLS¹². This, accepts the Council, is a substantial shortfall. It will have prevented people getting on the housing ladder and reduced the availability of economically active people in the local area to support economic growth.

¹¹ See the Table under §8.1 Main SoCG CD L1.

¹² SH PoE §3.66

16. Worryingly, there is no remedy to address the five-year housing land supply shortfall in the short to medium term. The HDT Action Plan is reliant on the adoption of the ECSR and the delivery of its allocations to address the 5YHLS shortfall yet none of the draft allocations feature in the current 5YS.
17. The Action Plan advises that larger sites that will appeal to volume house builders are required in both the short and long terms to address the five year supply shortfall¹³. This site will appeal to volume house builders.
18. In XX, JG was taken through the evidence which shines a light on the appalling state of EBC's housing land supply position. It reflects poorly on his judgement that he was still not prepared to increase the weight attached to market housing delivery from moderate to substantial.
19. It is a bad point to compare the deliverability of the Appeal Scheme with the proposed allocations in the ECSR. Apart from anything else, the LPA will need both the proposed allocations and unallocated windfall sites to deliver in order to meet their minimum housing requirement and achieve a 5YS. Additionally, most of the allocations require release from the Green Belt, which cannot be approved unless and until the ECSR is found sound. Thereafter planning applications will need to be prepared and infrastructure delivered before there is any prospect of completions. Bar one allocation, the developments are significantly larger than the Appeal Scheme, which will necessarily result in longer lead-in times¹⁴. Perhaps the most telling piece of evidence on this topic is the fact that the Council do not include *any* of the draft allocations in their latest 5YS.
20. This position is to be contrasted with SH's evidence that the lion's share of the Appeal Scheme will be completed within the current 5 year assessment period. Both Harris Lamb and SH are extremely experienced in promoting sites and securing offers from house builders such that SH's assessment should be given considerable weight.
21. We agree that the NPPF does not prescribe the weight to the delivery of market housing, neither does it prescribe the weight to policies that are deemed to be out-of-date. However,

¹³ CD B13 pdf p.13.

¹⁴ SH Re-X.

applying the factors set out in *Phides*¹⁵ one is driven to the conclusion that nothing other than substantial weight should be given to housing delivery:

- a. The shortfall is significant. That much is agreed;
- b. The Council has taken steps through the adoption of an Action Plan to boost supply but that made matters worse;
- c. Unless and until a sound ECSR is adopted the shortfall is likely to persist. This is likely to take a number of years during which the position is going to worsen, especially if the Council refuses schemes such as the Appeal Scheme;
- d. The Appeal Scheme would make a meaningful contribution towards the huge shortfall in land supply.

Affordable Housing

22. This is a critically important benefit of the Scheme to which substantial weight should be attached, especially given the cost of living crisis, the housing crisis and the terrible record of this local authority.
23. The record of the Council makes for sorry reading. The AMR¹⁶ identifies a 227 dwelling affordable housing shortfall against the annualised target by 2021/22 (800 – 603) in the Core Strategy. The shortfall against the affordable housing need figure identified in paragraph 3.9.6 of the ECS is 4,039 dwellings (4,842 - 603).
24. Worse still, the ECSR does not intend to replace Policy 8 – Housing Size, Mix and Choice; it will remain saved. It requires 30% affordable provision. The five strategic allocations in the plan requires 10% on site affordable housing delivery, subject to viability testing, with two sites potentially making a contribution for offsite provision¹⁷.
25. Under XX JG recognised that the delivery of affordable housing of whatever number should still be seen as a benefit because it meets a pre-existing need that is independent of the impact of the development in question. Faced with some extremely worrying statistics JG was still not prepared to offer a sensible view on weight.

¹⁵ CD P1 §60.

¹⁶ CD B14

¹⁷ SH PoE §3.79.

26. The Appeal Scheme will provide up to 59 households with a new home. These are real people in real housing need who, if the Council maintains its current attitude, will have to wait for even longer for a suitable home.

Improvements to Public Transport

27. It is accepted by the Council that the increased frequency of the No:14 bus will be a benefit. The difference is one of weight with the Appellant rightly attaching significant weight. The financial contribution of over £500,000 in the s.106 agreement is substantial and will go some way to meeting a deficiency that was identified some time ago¹⁸. It is therefore difficult to see why only limited weight is given to this benefit by the Council.

Improving footpath connections in the locality

28. The benefits of the improved footpath provision go beyond just serving the appeal site. The Committee Report for the Stanton Regeneration Site advises in the Sustainable Transport and Highways section that:

“Due to its sustainable location, the site is accessible by walking. It is generally accepted that a 2km distance is an acceptable distance to walk to work. This would encompass residential areas of south Ilkeston, Hallam Fields, Stanton by Dale, southern Kirk Hallam and northern areas of Sandiacre and Stapleford”¹⁹

29. Policy 1.2 – South Stanton, of the CSR advises that children in the development could attend secondary schools in Kirk Hallam, Ilkeston or Sandiacre. The footway improvements will improve access to the schools.
30. Moderate positive weight should attach to this benefit.

¹⁸ Stanton Regen Site Committee Report, CD H4 pdf p.47 and Appendix D to the ECS (CD B1), which characterised an improved bus service as ‘critical infrastructure’.

¹⁹ CD H4 pdf p.47.

Economic Benefits

31. Appendix 2 of the Appellant's SoC (which is unchallenged) confirms that the Appeal Scheme would have a number of economic benefits. These include:
- a. 111 constructions jobs over the 4 year build period
 - b. 132 supply chain jobs
 - c. £1.1m of first occupation expenditure as residents move in
 - d. £1.2m of residents expenditure within local shops and services per annum
 - e. 17 supported jobs from increased expenditure in the local area
 - f. c£347,000 in Council Tax revenue per annum
 - g. c£456,000 in planning contributions
32. Significant weight should attach to these benefits, as §81 NPPF tells us: "Significant weight should be placed on the need to support economic growth". In an authority where the HLS position is likely to operate as a brake on economic growth, these benefits are especially important. Finally, it would be wrong to downgrade the weight of the economic benefits on the basis that they could be delivered with any housing development. That is not the correct approach – there is no requirement to show that this Scheme is special or unique but rather one should recognise that the benefits of this Scheme will not come forward without planning permission and there is no evidence that they will flow from any other site in the short to medium term given the HLS position.
33. The Council already accepts – quite rightly - that these benefits overcome harm to designated heritage assets, which should be given 'great weight'. Consequently, in the event that the Inspector needs to apply a planning balance the key question is whether the Council's claims of adverse effects are justified and, if so, whether they significantly and demonstrably outweigh these benefits.

Sustainability of Location (Issue 1)

34. The agreed position between the LHA and the Appellant is that the Appeal Site “is in a relatively accessible location for trips by active travel modes and public transport”²⁰. Under XX, JG said that he would disregard the County’s opinion on this issue. Given that the LHA engaged extensively on measures to improve accessibility, employ expert highway planners and offered a considered view on the sustainability of the Site’s location, this was frankly a bizarre comment. MA had it right when he said that substantial weight should be given to DCC’s judgement.
35. The position adopted by the Appellant and the LHA is not only correct but is supported by the ECS Policy 14:
- “The need to travel, especially by private car, will be reduced by securing new developments of appropriate scale in the most accessible locations following the Spatial Strategy in Policy 2, in combination with the delivery of sustainable transport networks to serve these developments”.²¹
36. The Appeal Scheme complies with Policy 2 and – through improvements to pedestrian and public transport infrastructure – will deliver ‘sustainable transport networks’. There is consequently a policy presumption that the Appeal Site is sustainably located.
37. By way of further introduction, we should not be distracted by considering walking (and to a lesser extent on cycling) alone. A key national policy test is whether “opportunities to promote walking, cycling and public transport use are identified and pursued”²². The Appeal Scheme will secure a demonstrable improvement to the No:14 bus into Ilkeston, which even the Council admits is a benefit: *i.e.* that it goes beyond ‘mere mitigation’. The Appeal Scheme will further encourage a range of sustainable modes of travel by producing and monitoring a Travel Plan, by providing bus stops and by providing electric vehicle charging points²³, noting that “Sustainable Transport Modes” includes “ultra low and zero emission vehicles, car sharing and public transport”²⁴. We invite the Inspector to render a

²⁰ §2.6 CD L5.

²¹ CD B1, p.51

²² §104(b) NPPF

²³ Whether they are secured by condition or under the Building Regulations.

²⁴ See NPPF Glossary.

holistic judgement, taking account of the opportunities that residents will have to use sustainable transport.

38. The starting point for considering accessibility by bike and on foot is the Highway SoCG with the LPA²⁵:

“The above amenities [set out in the table at p.6] are accessible on foot within 30minutes and typically less than 20mins at a walking pace of 1.4m/s or 5kph. Facilities can be accessed much quicker via bicycle. Also, use of public transport is an option for Ilkeston’s facilities”.

39. Section 5 of MA’s proof sets out the different guidelines as to reasonable walking distances. It now appears to be common ground walking offers the greatest potential to replace short car trips, particularly those under 2 km, that the average walking distance is 1.2km²⁶ and that 82% of journeys under 1.6km are on foot²⁷. JG was content to agree this in XX. However, he adopted the rather bold position that these distances are two-way: *i.e.* a person is only prepared to walk 1km in one direction and then 1km back. MA, a very experienced transport consultant, had never heard this argument before. That is because it is wrong. As the extract from the NTS glossary confirms, the distances to which the survey refers are one way trips. Equally importantly, if the guidance in Manual for Streets²⁸ and Providing for Journeys on Foot²⁹ had meant to refer to two-way trips, it would have been explicit.

40. Once the guidance is properly understood, it becomes clear that a wide range of services and facilities in Kirk Hallam are within 1.2km, 1.6km or 2km from the Appeal Site, even allowing for the extra distance that residents from the east of the Site will need to walk. More particularly, as JG accepted, a cluster of services and facilities is likely to act as a draw for residents given that they are able to undertake a series of linked trips as part of the same journey. Kirk Hallam local centre (1.2km away) provides such an opportunity³⁰. Closer still is the local primary school at 740m, as well as the Community Centre and day nursery. The conclusion is unavoidable: in quantitative terms Kirk Hallam is eminently

²⁵ CD L2

²⁶ See NTS extracts at CD O3 and O4.

²⁷ *Ibid.*

²⁸ CD O1

²⁹ CD O2

³⁰ See Table on p.6 of the LPA Highways SoCG CD L2

accessible on foot. As for cycling, all of Kirk Hallam's amenities are well within the reasonable cycling distance of 5km.

41. JG's principal, if not only, focus was on the quality of the pedestrian links to Kirk Hallam. Indeed, that focus had a very narrow scope indeed; namely the alleged lack of surveillance between the edge of Kirk Hallam and the Appeal Site pedestrian access. It was agreed that the route along Sowbrook Lane is lit, is off-road and will be provided with a suitable width of pavement for the entirety of the journey to Kirk Hallam local centre. The essence of JG's argument was encapsulated by his reliance of Providing for Journeys on Foot which refers to 'personal safety' as a potential barrier to walking³¹. As MA explained, the relatively short length of Sowbrook Lane which is not overlooked by houses or businesses is unlikely to act as a barrier to walking:
 - a. It is lit;
 - b. It will safe in terms of any interaction with vehicular traffic; and importantly
 - c. The level of traffic flows, which continue in the hours of darkness, will allow drivers to provide surveillance as they pass along the Lane. JG did not appear to have considered this point.

42. JG's concerns about the cycling route into Kirk Hallam were similarly overstated. First, it should be borne in mind that cycling makes up only one part of the sustainable transport opportunities and is likely only to be taken up by *some* residents. That is not unusual. Second, there is not a shred of evidence that Sowbrook Lane is unsafe for cyclist, as the personal injury data showed³². Third, the notion that drivers will need to overtake cyclists is hardly a novel one. As MA explained, the ability of drivers to give cyclists a passing distance of c.2m and still be able to pass each other would only be possible on a dual carriageway. There is nothing unusual or problematic about the cycling route into Kirk Hallam.

43. As for journeys to Ilkeston, the Appellant has always been clear that the most likely non-car mode of travel will be the improved bus service. Residents and local people alike will be able to travel to and from work and the shops in the peak hours and undertake one leg of a journey in the evening.

³¹ CD O2, p.41.

³² See MA XC.

44. We do not deny that there will be opportunities to cycle or walk to Ilkeston albeit that the distances are longer, the infrastructure less attractive than the route to Kirk Hallam and given that Ilkeston does not offer the range of facilities that Kirk Hallam does. It is in this context that one should consider the request by DCC to provide and fund a link from the north-east of the Site across Ilkeston Road through the Stanton Regeneration Site biodiversity area. The Appeal Site's sustainability credentials are more than acceptable without these measures, which is why the Appellant does not rely upon them³³. We would therefore invite the Inspector to wield his blue pencil and remove these particular obligations from the s.106 agreement. We spent a disproportionate amount of time on the deliverability and utility of this link in evidence and during the s.106 session when the Appellant does not consider it necessary and the LPA's position is that the Site is unsustainable even with the link in place. Matters would have been different if the Council's case was that the link is essential but undeliverable.
45. It would be an unreasonable counsel of perfection to expect that *everyone* will walk or cycle to school or to the shops. That is not the policy test. The relevant policy test is met in that both the location of the Appeal Site and the quality of the pedestrian and cycling infrastructure provide both a genuine choice of travel modes and will act to promote cycling and walking. When one considers the other opportunities to use sustainable modes of transport there are simply no grounds on which to conclude that the Appeal Site is an unsustainable location for development.

³³ MA XC

Effect on Character and Appearance of the Area (Inspector Issue 2)

46. The Council's case on this issue was something of a moveable feast. In Opening and in XX of JG it appeared that the Council was raising a concern only in relation to visual amenity and not landscape character. That position was consistent with JG's written evidence that the Derbyshire Landscape Character Assessment ("DLCA") was irrelevant and with the character and appearance SoCG which confirmed that any landscape effects would be localised³⁴. Under Re-X JG attempted to introduce a landscape case, or so it appeared. We would say that the reason for this confusion is obvious: the only professionally robust assessment of the effects on landscape character and visual amenity of was that produced by RH. Unlike JG his work followed the GLVIA and did not elicit any methodological criticism from JG himself. Seen in this context, the Council's evidence came across as a series of assertions that were not underpinned by a transparent or legible methodology. As such, where JG's and RH's evidence differs we unhesitatingly invite the Inspector to prefer RH's.
47. Before considering what remains of the Council's case we should set the backdrop for this issue. The Appeal Site has no landscape designation; it is white land unprotected by any specific policy. In any event, it is common ground that any landscape or visual effects will be localised given the site's level of self-containment.
48. As with *any* greenfield site, its development for housing will result in adverse effects. However, in a local authority unable to meet their needs through brownfield sites and heavily constrained by Green Belt, it is a most obvious candidate for development. Additionally, the Appeal Scheme's compliance with the Spatial Strategy denotes an implicit acceptance, in policy terms, that there will be a change to the character and appearance of those sites which adjoin the IUA.
49. The Appeal Site is already heavily influenced by residential, industrial and commercial development. These influences will soon be magnified tenfold by the completion of a warehouse as part of the Stanton Regeneration Site to the east. These urbanising influences will increase if – as the Council wishes – the South Stanton site comes forward with up to

³⁴ CD L3, §2.3(8)

1,000 homes³⁵. It is truly an urban edge location and it is quite extraordinary in those circumstances that JG described the Site as having ‘rural surroundings’.

50. Now to the nub of the Council’s case, which can be boiled down to two assertions: first, that the Appeal Site forms part of an important gap between Ilkeston and Kirk Hallam; and second, that the Appeal Scheme will be seen as a ‘stand alone’ development. Neither point bears scrutiny.

The Gap

51. Nowhere in policy or in any professionally produced assessment is the Appeal Site described as being within a gap, still less a gap that needs to be protected from development. The LPA had their chance to persuade the Inspector examining the ECS to designate the Site as Green Belt but he was unpersuaded; hence its formal status as ‘white land’.
52. Similarly, as JG accepted in XX, Kirk Hallam and Ilkeston are treated as the same settlement in the ECS and the ECSR. On that basis it is difficult to see how it could possibly be objectionable to allow development within the same settlement.
53. In any event, as RH explained cogently in XC, the Appeal Site does not function as any sort of gap:
- a. Its relationship in landscape terms is with the built-up area of Ilkeston to the east given the urban influences and the mature landscaping along the western boundary;
 - b. There is absolutely no intervisibility between the Appeal Site and the ‘edge’ of Kirk Hallam that could be eroded if planning permission were granted.
54. Further, if the Council wished to protect a gap it has been inconsistent. The Elka’s Rise development plainly falls within ‘the gap’ yet it did not act as a constraint to development³⁶.

³⁵ See ECSR CD B3, policy 1.2

³⁶ See RH §2.22 and XC.

55. Even if we were to conclude – without any evidential or policy basis – that the Appeal Site falls within a gap that must be protected, there will remain a robust and defensible gap between the IUA and Kirk Hallam with development in place. The existing landscaping belt on the western boundary together with new planting will ensure that separation between different parts of the same settlement exists.

Stand Alone Development

56. This part of the Council’s case is based on a false premise and a misunderstanding of how the Appeal Scheme will be perceived.
57. First, the false premise is that residential development can only be acceptable if it adjoins another residential area, or ‘residential settlement’ as SC put it in XX of RH. JG had to make this argument in order to support his case but it is unutterably wrong. As JG was forced to accept, a settlement is comprised of different elements: residential, commercial, industrial, retail, civic. The idea that residential development must be seen as an isolated enclave merely because it is located next to an employment site is fallacious for a number of reasons:
- a. There is nothing in local or national policy which supports JG’s opinion;
 - b. The Key Diagram in the ECS does not make that distinction. To the contrary, §2.4.5 of the ECS³⁷ describes the Stanton Regeneration Site as an ‘integral part of Ilkeston’. *I.e.* it is part of the settlement;
 - c. As AR accepted, it is a sensible planning objective to co-locate employment opportunities with housing. That is an eminently sustainable approach;
 - d. One only needs to consider RH’s context plan³⁸ to appreciate that the southern part of Ilkeston is characterised by residential and employment development being in close proximity, if not cheek by jowl. *E.g.* the Elka’s Rise development is across the road from the Quarry Hill Industrial Estate and the LPA are actively promoting the Stanton South allocation which will lie directly to the south of the consented employment area;

³⁷ CD B1

³⁸ RH Vol 2, p.45.

- e. Reliance upon the description of the Stanton Regeneration Site as a ‘neighbourhood’ makes this very point: a neighbourhood is part of an existing settlement, not a new settlement.
58. Second, the Appeal Scheme will not be perceived as a stand alone or isolated development. We invite the Inspector to travel along Sowbrook Lane with the illustrative masterplan firmly in mind. Travelling from east to west, one will be very aware of the substantial development at Stanton and the cottages at Twelve Houses. Views of the Appeal Scheme will be filtered by buffer planting with the houses being set back from Sowbrook Lane. As such, one will not get the impression that 196 houses have been dumped on a pristine green field but rather that one is moving from one part of Ilkeston to another. It will be seen as a continuation of an existing settlement, not a stand alone proposal.
59. Before leaving this topic we must comment on the approach taken in XX of RH. The premise underpinning SC’s questions was that an ‘open landscape’ was undeveloped land rather than any characterisation of its landscape qualities. There is no local policy which protects the Appeal Site from built development. The Appeal Site will change from an undeveloped field in agricultural use to a landscaped housing development but that is not a reason in itself for holding back planning permission unless there is unacceptable landscape or visual harm (which there will not be). Introducing the concept of spatial openness was an attempt to elevate the status of the Appeal Site to a green wedge or Green Belt. It is neither and the mere fact that the Site will become developed cannot be a reason for rejecting the Appeal.
60. In terms of the effect on visual amenity, we do not propose to tell the Inspector what he can and cannot see from various viewpoints but we do emphasise the following points:
- a. The Appeal Site, both now and when it is developed, is visually contained;
 - b. As with landscape character, the experience of the viewing public will be heavily influenced by the urban context within which the Site is located. *E.g.* users of the canal towpath will be under no illusion whatsoever that they are moving about within an urban area. Indeed, within a relatively short distance travelling from east to west users of the towpath or the Nutbrook Trail will have passed the substantial

employment development at Stanton before reaching the Elka's Rise development. This is shown extremely well by RH's photo viewpoints 10a, 10b and 11.

- c. The illustrative layout demonstrates how the Appeal Scheme will be landscape-led, with planted buffers to filter views, Green Infrastructure to provide connectivity within and without the Site, new tree planting and the retention and enhancement of hedgerows.

61. RH's considered and transparent judgement - following recognised guidelines - that there will be mainly minor adverse visual effects is therefore entirely correct. These minor effects, or even minor to moderate adverse effects, come nowhere near justifying the refusal of planning permission.
62. Overall, to the extent that it is necessary the Appeal Scheme recognises the intrinsic character and beauty of the countryside³⁹ and conserves landscape character and visual amenity in a way that is consistent with ECS Policy 10.

Prematurity (Issues 4, 5 and 6)

63. By way of introduction, it is instructive to understand why EBC have proposed the ECSR:

“The primary justification for carrying out a review of the Local Plan has therefore been the failure of housing related policies (specifically Policy 2: Spatial Strategy) and resultant failure in the supply of new homes coming forward within the Borough to meet LHN.”⁴⁰

64. This is candid but startling admission and one that places added emphasis on the need to grant planning permission for new homes now, not when (or if) the ECSR is adopted.

³⁹ §174(b) NPPF.

⁴⁰ CD B9, p.1.

Prematurity (§49 NPPF)

65. §49 NPPF posits two tests, neither of which are satisfied here.
66. Before addressing the tests a point of interpretation has arisen. §49(a) speaks to decisions about “the scale, location or phasing of new development that are central to an emerging plan” (emphasis added). In other words, it is only where there is likely to be a substantial impact on decisions about allocating land for new development that §49(a) can be satisfied. In the present case, there is absolutely no reason why the Council’s draft allocations will need to be jettisoned. More particularly it is difficult to see – using this interpretation – how the proposed designation (as opposed to allocation for development) of the Site as Green Belt and a GI Corridor falls within the definition of ‘new development’. If the Inspector agrees, that is the end of the prematurity argument.
67. In any event, there is no tenable basis on which to conclude that the plan-making process will be unacceptably prejudiced by granting planning permission:
 - a. Emerging Policy 1 – Housing, requires the development of a minimum of 5,800 dwellings. The five Strategic Allocations are expected to provide 3,350 dwellings. The residual requirement of 2,450 dwellings is expected to come forward on unallocated sites. At 196 dwellings the appeal site would provide 8% of the unmet housing need;
 - b. The housing requirement is a minimum anyway;
 - c. The ECSR continues the approach of directing development towards the IUA;
 - d. The Council needs to continue to grant planning permissions given the 5YHLS position. Indeed, if the LPA’s case at this Inquiry is upheld then *any* proposed housing site which falls outside the ECSR or which falls potentially within an area proposed to be designated for a non-housing purpose should be refused on prematurity grounds. That is a recipe for planning paralysis and a worsening of the Council’s already depressing HLS position;
 - e. The Council has indicated that they need larger sites to meet the housing target and PDL opportunities have been exhausted so development will have to go to locations such as this⁴¹;

⁴¹ SH XC

- f. If this site does result in the need to take less land out the Green Belt that is a positive;
 - g. If permission is granted the Council can simply advise the Examining Inspector that the Site has planning permission and is a commitment. If it is considered necessary the Policies Map can be updated accordingly.
68. There is absolutely no reason why the ECSR should be derailed by granting permission for the Appeal Scheme. Indeed, SH's considered view was that it would be unreasonable to 'pause and rewind' the Plan merely because planning permission is granted for the Appeal Scheme. In particular, it would not form a substantial part of the Council's housing land supply overall nor would it undermine the Spatial Strategy. On the contrary, the Appeal Scheme would comply with the Spatial Strategy⁴². In any event, the ECSR relies on delivering some 2,450 dwellings on unallocated (*i.e.* unidentified) sites. It is entirely a matter for the Council if it wishes to rip up the ECSR should this appeal be successful but it would be exceptionally short sighted.
69. We have no doubt that AR's views about the effect on the ECSR were sincerely held but they were misguided. Under XX he confirmed that his principal concern was that of 'unfairness'. *E.g.* it would be unfair for promoters of sites in the emerging Plan if those sites were downgraded or removed from the ECSR; the harmonious relationship that the Council has enjoyed with some developers might be affected; and local people whose views the Council want to reflect could be disappointed. With respect, a generalised concern about fairness is not, and probably never could be, a reason for refusing planning permission and is certainly not supported by NPPF §49(a) or (b).
70. Neither is the ECSR at an advanced stage (NPPF §49(b)). Although the ECSR has been submitted for Examination, there are currently no hearings scheduled. More importantly, representatives including the Appellant have identified some fundamental flaws in the draft plan and the Examining Inspector has raised concerns – including in relation to the Duty to Cooperate ("DtC")⁴³. If the Council is unable to satisfy the Inspector that the DtC is met, that will be fatal to the ECSR. If the Council is unable to convince the Inspector that the Strategic Allocations can viably be delivered then it will need to withdraw the Plan or

⁴² SH XC and AR XX

⁴³ See CD B8 §5 – 7 in particular.

make fundamental changes to it. In fact, the letter written by the Examining Inspector mirrors entirely the extract from the PPG produced by SH in evidence. She obviously has ‘serious concerns’ about legal compliance and soundness. One simply cannot conclude that – in substantive terms – the ECSR is at an ‘advanced stage’.

Alleged Conflict with Emerging Policies

71. This area of dispute has narrowed considerably. The Council originally claimed conflict with ESCR Policy 5 (GI Corridors) but, as AR accepted in XX, this policy does not prevent built development within a GI corridor. The explanatory text to the policy (or at least it appears to be explanatory text) makes this very point by stating that “Green Infrastructure includes established green spaces and new sites and should thread through and surround the built environment and connect the urban area to its wider rural hinterland”⁴⁴. AR also accepted that the objectives of Policy 5 could all be met by the Appeal Scheme. RH confirmed that none of the objectives could be secured if planning permission is refused. As such, even if Policy 5 were given full weight there is no breach.
72. This leaves the Site’s proposed designation as Green Belt. Applying the factors in §48 NPPF SH was being generous in giving this proposal very limited weight.
- a. The ECSR is not at an advanced stage of preparation for all of the reasons given above;
 - b. As AR accepted and SH emphasised, whether there are unresolved objections is not a question of numbers but of substance. The Appellant has submitted substantive objections to the proposed designation which remain entirely unresolved. Irrespective of the number or nature of unresolved objections it should be remembered that the creation of new areas of Green Belt requires the LPA to demonstrate that there are exceptional circumstances justifying the designation. This test must be met whether or not there are objections;
 - c. The emerging designation of the Site as Green Belt is not consistent with the NPPF. As SH said in Re-X, given that §48 NPPF applies to decision taking it is incumbent on a s.78 Inspector to reach a judgement on NPPF consistency. Such a judgement need not be anything than high level and cannot bind an Examining

⁴⁴ CB B3, pdf p.14.

Inspector but it needs to be made nonetheless. The suggestion in XX of SH that this question must be left to the EiP simply underlines the fact that it is too early to give anything other than very limited weight to this emerging policy. In any event, the designation of the Appeal Site as Green Belt is not – on the evidence before this Inquiry – consistent with the NPPF. The LPA have not conducted a Green Belt Review which would assess the role that different parcels of land play in meeting the Green Belt purposes; there is no site specific assessment of how the Appeal Site fits with these purposes; and there is not a shred of evidence that exceptional circumstances exist to extend the Green Belt.

73. Only very limited weight can be attached to the emerging policies. Consequently, even if it is concluded that the Appeal Scheme runs contrary to the emerging policies named in the RfRs, this will not be sufficient to justify the refusal of planning permission.
74. RfRs 8, 9 and 10 are makeweights and should be rejected.

CONCLUSION

75. As we said in Opening, there are two routes to the grant of planning permission. First, the evidence has shown that the Appeal Scheme complies with the adopted Spatial Strategy and does not conflict with Policies 10 or 14 of the ECS or H12 of the saved policies of the Local Plan. As such, planning permission should be granted ‘without delay’ *per* §11(c) NPPF and s.38(6) Planning and Compulsory Purchase Act 2004.
76. Second, if the Inspector finds that there is conflict with the development plan, the inevitably limited adverse effects do not significantly and demonstrably outweigh the compelling package of benefits.
77. For all of the above reasons, and those presented in the evidence, we anticipate in due course being able to invite the Inspector to allow the appeal and grant planning permission subject to necessary conditions and planning obligations.

16th August 2023

JONATHAN EASTON KC

KINGS CHAMBERS
MANCHESTER-LEEDS-BIRMINGHAM
COUNSEL FOR THE APPELLANT