APP/Y3615/W/22/3298341 AND APP/Y3615/W/22/3298390

LAND AT EFFINGHAM LODGE FARM AND HOWARD OF EFFINGHAM SCHOOL, LOWER ROAD, EFFINGHAM, LEATHERHEAD, SURREY, KT24 5JR

APPPEALS PURSUANT TO SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990

CLOSING SUBMISSIONS
ON BEHALF OF GUILDFORD BOROUGH COUNCIL

1. There are two appeals before this Inquiry.

2. The first (APP/Y3615/W/22/3298390) ("the **RMA Appeal**") concerns the refusal of reserved matters approval in relation to the site of the current Howard of Effingham ("**HoE**") School ("the **School**"). That appeal is, as the Council said it would be in opening, relatively straightforward. In light of the evidence which emerged during inquiry, it should clearly be dismissed.

3. The second (APP/Y3615/W/22/3298341) ("the **Hybrid Appeal**") concerns an application for development including full permission for "the erection of 110 dwellings, with access, parking, community assets, landscaping and associated works" on Lodge Farm Effingham. Again, as the Council said in opening would be the case, and as the Appellant's planning expert Mr Rhodes agreed in XX, the decisive issue in that appeal is, "whether the proposed development is necessary to deliver the school consented in outline in 2018, and there is no alternative way it can be provided".[1] The evidence before the Inquiry establishes that the answer to that question is in the negative. The proposed development is not necessary to deliver such a school and there is an alternative way of providing it.

The RMA Appeal

4. The Council's objection to RMA Appeal proposal arises from the design approach to and heritage impact arising from the eastern end of the proposed development.

[1] See also Rhodes PoE para. 8.14

5. When outline permission was granted on appeal in 2018, the Secretary of State (at DL20)[2] expressly endorsed the Inspector's conclusion that "with careful consideration of reserved matters" "the massing and placement of lesser residential development would effectively mitigate the small encroachment to the east" and "with the addition of appropriate planting to further soften and screen the development when viewed from the west… material harm to the setting of the Little Bookham designated heritage assets could be avoided". His conclusion was that the development could be undertaken in a manner which would "preserve the setting of the listed buildings, so according with the requirements of section 66" (IR388).[3]

6. The Appellant's heritage and design expert Mr Grover agreed with the Council's heritage and design experts, Ms Bennett-Smith and Mr Johnson that the SoS and Inspector's position was that harm to designated heritage assets could be completely avoided by taking a two stage approach.[4] As he agreed, the Inspector's position was that: (1) Giving careful consideration to the massing and placement of buildings at the eastern edge of the site through the reserved matters proposal, noting that there should be "lesser" residential development in that location (in accordance with the approved parameter plan"; and (2) Further mitigating the impact of the development through the addition of appropriate planting, would together avoid harm.[5]

7. It is common ground that that is not what has happened, rather it is agreed that there will be harm to the significance of both the Little Bookham Conservation Area ("the **CA**") and the Grade II* listed All Saints Church ("the **Church**").

8. In this case, the Church and the CA are the two key assets, the significance of both of which all parties agree the Appellant's proposed RM design will harm, even with mitigation.[6]

9. As Mr Grover agreed in XX:

[2] CD 1.1
[3] CD 1.1
[4] XX Grover
[5] XX Grover
[6] XX Grover; XX Rhodes

a. The CA boundary is shown in the CA Management Plan on p.30.[7] The graveyard of the Church is the boundary of the CA and the Church and its graveyard fall within the CA.

b. The existing Howard of Effingham school site has a discernible visual relationship with the little Bookham CA[8] and the appeal site forms part of the setting contributing to the significance of the CA.[9]

10. A comparison between Mr Gover's evidence in 2017 and to this inquiry also revealed that he had sought to downplay the nature of the intervisibility between the two, albeit in XX he ultimately refused to comment on the point saying "that's an inference you could draw".[10] Indeed, Mr Grover's attempts to dissemble in this regard did his credibility no favours. At this point, as in others during his evidence, it was readily apparent he was more concerned with supporting his client's case than with giving his true professional opinion.

11. The Church is located in the Mole Valley Local Authority Area. As Mr Grover agreed in XX:

a. As a Grade II* Listed building, it is in the top 10% of all listed buildings and, in policy terms, it is an asset of "the highest significance".

b. Necessarily, harm to a designated heritage asset of the highest significance attracts greater weight than harm to other designated heritage assets (see also NPPF 199).

c. The listed building, as defined by section 1(5) of the Listed Buildings Act 1990, includes objects and structures within the curtilage of the building. In this case, that would include at least graves pre-1948. The asset is the building and the structures in its curtilage together.

d. The setting of the asset (i.e. the surroundings in which the asset is experienced) are the surroundings of the curtilage and listed structures within it.

e. In this case, looking at JBS Appendix B, Ms Bennett-Smith has accurately identified the curtilage, which includes the historic graveyard, but not the modern extension to it.

[7] CD 5.15
[8] See also **CD 1.25** 4.37
[9] See also PoE Gover at 4.20
[10] C.f. CD 1.25 4.37 with PoE Grover 4.20

12. That is relevant because once one appreciates that the historic gravestones in the graveyard form part of the asset, it is apparent that Church Field provides part of the immediate setting of the asset. It is directly adjacent to the that graveyard.

13. As to the contribution of the setting of the Church to its significance, all parties agree that the graveyard is a "tranquil, leafy green space".[11]

14. In XX, Mr Grover changed his position from that set out in his PoE at 4.13 and accepted that the appeal site did in fact contribute to the Church's significance. That concession was inevitable. Not only is it consistent with IR387 which says the "flashes of the verdant green of playing fields beyond, seen beneath the low tree canopy, offer a sense of pastoral context beyond, enhancing the perception of a separation between settlements",[12] but it also accords with the approach of Historic England who said that the playing fields forming part of the Site "provide a verdant and attractive backdrop" to the CA.[13] Indeed, Mr Grover was ultimately forced in XX to accept that not only was his approach inconsistent with that of the previous Inspector and Historic England, but also that it was inconsistent with his own position in 2017[14] and with the approach elsewhere in his PoE (see para. 4.20 where he said the site contributes to the setting of the CA by "providing a semi-rural backdrop to the churchyard").

15. Further, Mr Grover accepted in XX that the setting of a heritage asset contributes to significance not only visually, but also in terms of landscape / townscape character, tranquillity, sense of enclosure, seclusion, intimacy and privacy and land use. As he agreed, in this case those are relevant because the sense of intimacy, privacy, and seclusion in a rural context contribute to the experiential significance of the Church and graveyard. That, he agreed, received no mention in his PoE. Indeed, despite cavilling at the use of the word "overlooking" he accepted that there would be intervisibility between the proposed buildings and the Site and that these would to a degree reduce the experience of the graveyard as a location for private mourning and contemplation.

16. These three issues: (1) a failure to appreciate the contribution the verdant backdrop of the appeal site makes to the significance of the Church through its setting; (2) the failure to assess

[11] Grover XX and CD1.10 – Vol 1-3 Vol 2 – Technical Appendices – 12.4 – Heritage Statement
[12] CD 1.1
[13] Bennett-Smith Appendix C
[14] CD 1.7 4.61 (c.f. Grover PoE 4.12)

the experiential aspects of the setting's contribution to the Church's significance; and (3) the failure to recognise the impact of overlooking on the significance of the Church and its graveyard perhaps explain the difference between Mr Grover's position (that there would be harm to the Church and the CA but at the lower end of the less than substantial spectrum) and Ms Bennett-Smith's that the harm would be in the lower half of the less than substantial spectrum, but towards the mid-point.

17. In either event, it is unarguably the case that despite the fact that the Inspector in 2018 (who Mr Rhodes agreed in XX has particular expertise in relation to the historic environment) was clear that harm to both the Church and the CA could be completely avoided, the proposed development would cause harm to the significance of two designated heritage assets, a CA and a Grade II* listed building – i.e. a building of the highest significance.

18. Mr Grover, Ms Bennett-Smith, and Mr Johnson all agreed that that harm could have been avoided by an alternative design securing the same number of units. As Mr Johnson explained in his evidence orally and at PoE 5.13-5.20 changes to the orientation or typologies of the buildings would have avoided the harm caused. Certainly, the Appellant's decision to shift higher density development towards the sensitive eastern end of the site, contrary both to the parameter plans and the requirement in the IR for "lesser" development in this location is inexplicable, even in the context of the Appellant's reliance on the indicative masterplan from 2017, which the Inspector and Secretary of State clearly and deliberately did not incorporate into the 2018 Permission. Certainly, reliance on that masterplan (which is inherently misconceived in any event) cannot explain why the height and length of the built ridges have increase (as Mr Grover accepted in XX they have), nor why 61% of the eastern boundary is composed of the rear walls of two large buildings, with the gaps between them occupied by the canopies of two mature trees, which act as a frame rather than providing relief. Certainly, it does not explain Berkeley's tenacious adherence to the position that the eastern boundary should be closed boarded fencing (as to which see plan A315-LA03) secured by Condition 15 (as appended to the SOCG) and refusal to provide further screening because of the impact on the daylight/ sunlight conditions of the residential properties (see the email from Heidi Perrin appended to Ms Bennett-Smith's PoE).

19. In this regard, and for the avoidance of doubt, the plan from which an extract appears before the inquiry (reference A315-LA04) is not (as Mr Grover confirmed in XX) before the inquiry. It is inconsistent with the Appellant's stated position, and has not been produced following any

re-assessment of daylight/ sunlight. In any event, it does not provide the heavy screening referred to by Historic England in their representations in 2017, and does not achieve the result expected by the Inspector and Secretary of State when granting planning permission in 2018, i.e. the avoidance of harm to the CA and the Grade II* Church.

20. The reason for all of Berkeley's otherwise inexplicable design decisions would appear to be found, at least in part, in the relevant Design and Access Statement ("**DAS**").[15] As Mr Grover conceded in XX:

    a. The National Design Guide ("**NDG**")[16] includes as one of the 10 key characteristics of good design "Context". As policy C1 and paras. 40-42 of the NDG make clear, "well designed places" "understand and relate well to" and should be "shaped by" an understanding of the site's local and wider context which in this case includes local heritage, such as views inwards and outwards from the CA / Church's setting. Indeed, Policy C2 of the NDG says expressly at paras. 46-48 that well designed places are "influenced positively by the significance and setting of heritage assets".

    b. A DAS should "provide a framework for applicants to explain how the proposed development is a suitable response to the site and its setting, and demonstrate that it can be adequately accessed by prospective users. Design and Access Statements can aid decision-making by enabling local planning authorities and third parties to better understand the analysis that has underpinned the design of a development proposal." (see PPG Ref ID 14-029-20140306). Its purpose is to explain why the development is a suitable response to the site and its setting. One of the ways in which it should do this is to identify constraints, including designated heritage assets, and explain how the design response to them is positive. Certainly, one would expect as DAS to identify any risk of harm to designated heritage assets and to explain how the design response has mitigated or avoided such harm.

    c. Although in this case "the DAS that accompanied the planning application sets out in detail the underpinning design intentions and evolution of the appeal proposals"[17] and the DAS itself explains on p.2 that "the purpose of this statement is to explain the

[15] CD 3.3
[16] **CD 5.3**
[17] PoE Grover 5.1

design principles and concepts…" such that where something has been used to inform the design, one can expect to find it in referred to in the DAS. Unfortunately, the Site Context section of the DAS identified listed buildings and conservation areas, but made no reference to the Little Bookham CA or to the Grade II* listed Church. Rather, in the constraints section referred to the "relationship with conservation area to the west" – i.e. the Effingham CA and ignored the little Bookham CA and the GII* listed Church (see p.28).

d. The consequence of this was that there was a shift in higher density development towards the East of the site (p.43) but nothing in the DAS to show any recognition of the Little Bookham CA and nothing to suggest any consideration was given to the setting of the Grade II* listed Church, or even the Church's status as a listed building.

e. The result is a design that harms the significance of both assets without any consideration of how that harm could be avoided, which fails to accord with Policy ENP-G3 which states "proposals that have an impact on heritage assets are required to demonstrate the assets importance and potential impact on its significance and how any harm has been avoided or minimised".[18]

21. Ultimately, Mr Grover accepted in XX that the options put forward by Mr Johnson in his PoE at 5.15-5.19 were achievable. He also agreed the following:

a. Harm to the significance of both the CA and the Grade II* Church attracts great weight (see NPPF 199)

b. Given that the church is Grade II* listed, and is therefore an asset of the highest significance, the weight to be attributed to the harm to that asset is especially great (see NPPF 199 which makes clear the more important the asset, the greater the weight)

c. The fact of such harm to the church engages section 66 of the Planning (Listed Buildings and Conservation Areas Act 1990 ("the **LB Act**") and creates "a strong presumption against the grant of planning permission" (*Barnwell Manor* paras. 23-25).

[18] See Also PoE Grover 3.13

d. That presumption was not applied by the Inspector when granting the outline part of the 2018 Hybrid consent – his approach was that harm could be avoided

e. Any harm to the significance a designated heritage asset (and especially one of the highest significance) requires clear and convincing justification

f. If development delivering the same benefits can be provided whilst reducing or avoiding harm to significance, there will not be a clear and convincing justification for the harm.

22. This should be sufficient to determine the RMA Appeal.

23. Unable to accept that conclusion, however, the Appellant's planning expert Mr Rhodes sought to suggest that the benefits of the proposed development outweigh the harm to the CA and the Grade II* Listed Building. Not only is that self-evidently wrong in circumstances where all parties agree those same benefits could be achieved through a further reserved matters application,[19] it is also seriously undermined by the fact that, as Mr Rhodes agreed in XX, his evidence was based upon the understanding (set out in his PoE at 6.3) that the appeal proposals would cause no greater harm to heritage asses in Little Bookham than the proposals considered in the 2018 Appeal decision. Mr Grover and Ms Bennett-Smith are of one mind on that issue; the harm would be greater.

24. Moreover, Mr Rhodes' XX revealed a remarkable lack of understanding in relation to the historic environment. Not only was he forced (very fairly) to accept that he had not applied the strong presumption against the grant of planning permission that flows necessarily from the conflict with section 66 of the LB Act,[20] but he also failed to recognise the distinction between NPPF 200 (which is clear that *any* harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), requires clear and convincing justification, and NPPF and NPPF 202 which states that "where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use." Harm to a

[19] Conceded XX Rhodes
[20] *Barnwell Manor* paras. 23-25

designated heritage asset of the highest significance, which all parties agree could be avoided whilst securing the same benefits, will not be justified, let alone clearly and convincingly justified. Mr Rhodes' approach falls into the error of failing to read the Chapter of the NPPF concerning the historic environment as a whole, and focusing on NPPF 202, to the exclusion of para. 200. That is the wrong approach. It is necessary to "work through those paragraphs in accordance with their terms" and properly to take into account "all those provisions" (see *Jones v Mordue* [2015] EWCA Civ 1243 at para. 28).

25. The short point in relation to the RMA Appeal is that in granting planning permission in 2018 both the Inspector and the Secretary of State were clear that the school site could be developed without causing any harm to the significance of the CA or the Grade II* listed Church. The Appellant's DAS makes it obvious that in designing the scheme, the Appellant simply overlooked both the CA and the Church. The result was an inappropriate intensification in development on the eastern edge of the site causing what all parties agree is avoidable harm to both designated heritage assets which creates a strong presumption against the grant of permission to applied by either the inspector or the Secretary of State when granting outline permission. There is no justification for that harm which (given that it is unjustified) cannot be said to be outweighed by the public benefits of the proposal. Berkeley can and should (indeed should already have) remedy that harm by submitting a further RMA application. Their failure to do so is unreasonable and their position on this appeal is untenable. The RMA appeal should be dismissed.

The Hybrid Appeal

26. The Hybrid Appeal turns on whether there are very special circumstances ("**VSC**") justifying the inappropriate development of 110 dwellings on open countryside in the Green Belt. It is for Berkeley to demonstrate VSC. Both parties agree that whether or not such VSC exist turns essentially on two issues:[21]

    a. Is the proposal necessary to enable the delivery of the school consented by the 2018 Permission? and

[21] XX Rhodes (see also Rhodes PoE 8.14)

b. Is there an alternative way in which the school consented by the 2018 Permission can be provided?

27. If either or both of those related questions is answered in the Council's favour, the Hybrid Appeal should be dismissed. As Mr Rhodes conceded in XX, if it would be possible to deliver a replacement school in accordance with the outline permission without the need to deliver 110 additional houses to enable it, this appeal should be dismissed.

28. Indeed, not only must Berkeley show that the proposals are necessary to deliver the school consented in outline in 2018, but that all of the 110 dwellings relied upon are necessary to deliver an appropriate school which accords with that outline permission. This, it has roundly failed to do. To give just three of the most obvious examples:

a. Approximately 20 of the market houses proposed are relied upon to enable the provision of end user Information Computer Technology ("**ICT**") and loose Fixtures Fittings and Equipment ("**FF&E**"), neither of which Berkeley are in fact required to provide under the Contract with the Howard Partnership Trust ("**THPT**"). THTP are in fact themselves due to fund those items, and there is no possible basis upon which it can legitimately be said that they are items the delivery of which should be 'enabled' through Green Belt development. The reality is that they should properly have nothing to do with this appeal.

b. Approximately 10 of the market houses proposed are relied upon to deliver office spaces for 56 trust staff across 580sqm. Mr Rhodes confirmed that the only evidence in support of the need to deliver those offices was from Mrs Barnfield. Mrs Barnfield conceded in XX that what is proposed will accommodate more staff and more office space than THPT currently has; it is not like for like replacement, and (as she fairly conceded) it is not an operational necessity. When it was put to her that THTP didn't need those offices, it just wanted them, she tellingly responded "Wouldn't you?", before then conceding the point.

c. One of the market houses proposed is required to deliver a caretaker's house and has been included in the School site in subsequent Reserved Matters. Mrs Barnfield accepted in XX that there was, in fact, no legal or policy requirement to provide caretaker's accommodation at the School. That is undoubtedly correct. The Appellant

never did submit the caretaker's contract of employment as evidence to the inquiry nor recall Mrs Barnfield. That is unsurprising, since the contract related expressly to the site of the existing HoE School and would be of no relevance to this inquiry since it would not apply to a replacement school.

29. All of these examples show what is obvious on a cursory inspection – as Wilmott Dixon, who unlike Scott Brownrigg are an Education and Skills Funding Agency ("**ESFA**") Framework contractor, put it in correspondence with Berkeley, the proposals relied upon in this case "exceed those we would expect to deliver for a publicly state funded school". They also go beyond what is required to accords with the outline consented in 2018, the operative part of which (including the conditions) Mr Rhodes conceded in XX makes no reference to any of the above. In short, this proposal is, to adopt Mr Olliff's expression in XX, for a Bentley not an Audi.

30. Faced with this obvious issue, Berkeley's approach has been to argue that this proposal has RMA, and is the subject of the contract with THTP so as to make it "the only show in town". That is an obviously bad point. As Mr Rhodes agreed in XX:

    a. The issue is whether the proposed development is necessary to enable the provision of a school which accords with the 2018 outline permission (as opposed to one of the schemes for which RMA has been granted), and whether there is any alternative way in which it can be provided.

    b. As a matter of principle it is possible to grant multiple inconsistent RMAs pursuant to a single outline consent. Indeed, in this case Berkeley has applied for (and the Council has granted) multiple RMAs.

    c. That is because it is a basic tenet of the planning regime that a landowner is entitled to make any number of applications for planning permission for the development of the same land "which his fancy dictates" even though they may be mutually inconsistent, and the planning authority must deal with any such applications made (see *Singh v SoS* [2010] EWHC 1621 (Admin) at para. 14)

    d. In the context of a RMA the Council's consideration is limited to the matters reserved, e.g. layout, scale, etc. Provided those matters are not in and of themselves

unacceptable, the Council must grant RMA. In the present case, notwithstanding that Berkeley has seemingly been aware since at least June 2019 of the need to deliver additional housing to enable the delivery of a school on the scale, and with the facilities, proposed as part of the RMA proposals, the reserved matters applications make no reference to that fact. Even if they had, the Council would have had to determine those RMA applications solely with reference to the matters reserved.

e. In any event, the effect of the section 73 application amending the parameters granted pursuant to reference 21/P/01/01283 ("the **S73 Permission**") on 15 September 2022 is to extend the time within which Berkeley can submit further RMA proposals by another three years (see Condition 3), such that Berkeley can, if it chooses to, submit further reserved matters applications for any scheme consistent with the outline granted by the Secretary of State in 2018.

f. A proposal would be consistent with that outline if:

   i. It included no THTP offices. Those offices are not referred to in the description of development, the plans referred to in the consent, or any of the conditions.

   ii. It did not include a caretaker's house, to which there is again no reference anywhere in the consent.

   iii. The school proposed were for fewer than 2000 pupils. Again neither the description of development nor the conditions specifies even an approximate number of pupils to be accommodated by the replacement school.

31. In those circumstances, the approach of arguing, as does Berkeley and THPT do that "This school has RMA" and so "this is the school we intended to build" is untenable.[22] It is not a credible approach in all the circumstances. It is inconceivable that Berkeley will simply walk away if this appeal is dismissed, not least given all of the sunk costs to date.

[22] See PoE Barnflied para. 5 and XX Barnfield

Harm to the Green Belt

32. Before examining the case for the school in detail, it is necessary to identify the nature and extent of the Green Belt harm arising directly from the Hybrid Appeal proposal, i.e. the 110 dwellings in the Green Belt.

33. Perhaps because of a failure to understand the level at which development will harm the openness of the Green Belt, whilst Mr Rhodes accepted that the proposal was inappropriate development in the Green Belt, prior to XX his position was that the harm that the development proposed would cause to the openness of the Green Belt over and above the harm resulting from the 2018 proposal would be "very limited".[23] That was an obviously untenable position to take. In the course of XX it became apparent that Mr Rhodes calibration of the harm that built development causes to the openness of the Green Belt was wildly out of kilter with national policy and accepted practice. He refused to accept, for example, that the replacement of a single dwelling with a materially larger one on the site of a building consented by the 2018 permission and falling within the Green Belt would cause any harm to its openness. He also refused to accept that the cumulative effect of such small scale developments would result in the "death of a thousand cuts" for the Green Belt. In that regard, his position was in direct conflict with NPPF 150 and with the decision in *Heath and Hampstead Society v LB Camden* [2007] EWHC 977 approved on appeal at [2008] 3 ALL ER 80 and cited subsequently with approval by the Supreme Court in *R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire* [2020] UKSC 3.

34. It is notable in this regard, that the previous Inspector took similar issue with Mr Rhodes evidence in 2018. At IR 361 he said that Mr Rhodes approach did not "actually gauge the *effect* of the proposed development on the openness of the Green Belt" which is "the critical matter at issue".[24]

35. Regardless, when faced with the escalating scale of harm to the openness of the Green Belt resulting from one dwelling on the Hybrid Appeal site, as compared with three, five, ten, fifty, of the 110 proposed, Mr Rhodes did a remarkable (but unavoidable) volte face and agreed

[23] PoE Rhodes 8.8
[24] CD 1.1

that the Hybrid Appeal proposal alone would have a "very substantial effect on the openness of this part of the Green Belt". That must be right.

36. There is thus no dispute that the development proposed:

    a. Is inappropriate in the Green Belt and that the substantial definitional harm resulting from its inappropriateness must be given substantial weight.

    b. Very substantially harms the openness of the Green Belt both visually and spatially, and that this harm too must be given substantial weight.

    c. Will conflict with at least one of the Green Belt purposes in NPPF 138, namely safeguarding the countryside from encroachment. Again a consideration attracting substantial weight.

37. In addition, notwithstanding Berkeley's refusal to recognise it, the proposed development would undoubtedly result in urban sprawl, contrary to the first purpose of the Green Belt identified in NPPF 138(a). That much is clear from the design evidence discussed in relation to any other harm below.

38. Ultimately, it became clear during Mr Rhodes evidence that the Appellant's approach was essentially to seek to redraw the boundaries of the Green Belt through the Hybrid Appeal process. That is fundamentally misconceived. As Mr Rhodes conceded in XX:

    a. The test of "defensible boundaries" which Mr Rhodes sought to apply is derived from NPPF 142-143.

    b. Those paragraphs of the NPPF derive from the test to be applied by strategic policy makers when redrawing the boundaries of the Green Belt, in the context of asking whether there are exceptional circumstances when justifying changes to Green Belt Boundaries, which is a lower test than is required to demonstrate VSC.[25]

    c. "Defensible boundaries" form no part of the policies at NPPF 147 and following which concern proposals affecting the Green Belt and VSC.

[25] See also *Luton v Central Bedfordshire Council* [2015] EWCA Civ 537

d. In this case, the Local Plan has not removed any of the Lodge Farm site from the Green Belt.

e. The Hybrid Appeal site is an area of open countryside designated as Green Belt which necessarily contributes to the openness of the Green Belt as a whole.

39. In those circumstances, it is perfectly obvious that constructing 110 dwellings on open countryside in the Green Belt will cause substantial Green Belt harm. Any harm to the Green Belt must be accorded substantial weight (NPPF 148) and given the scale of harm resulting from 110 dwellings, as compared with say, the material enlargement of just one dwelling, the weight to be afforded to that harm in this case must be very substantial indeed.

Any Other Harm

40. There is no dispute that the Hybrid Appeal proposal will cause some harm to the character and appearance of the area. The nature and extent of that harm turns essentially upon the design of the proposal.

41. Turning then to the design of the proposed development, Mr Grover, whose credibility had already suffered seriously as a result of XX in the context of the RMA Appeal on the first day of the inquiry, accepted that since 1995 the focus of his work has been on the historic environment, and that it had *never* been his job to masterplan large scale residential developments. Indeed, he said he had never produced a masterplan for development on the scale of the Hybrid Appeal proposal. Given the considerable resources available to Berkeley in this case, this raises a serious question as to why Berkeley chose to call Mr Grover to speak to the design of the Hybrid Appeal proposal, rather than the planner who had in fact designed it, or at least an independent expert with some relevant experience in master planning.

42. Again, the answer may be found in the DAS and its failure to accord with the approach set out in the NDG.

43. As Mr Grover agreed in XX:

a. Context is the first of the 10 characteristics of good design, and may be described as the attributes of a site's immediate, local, and regional surroundings.[26]

b. Well-designed places are based on a sound understanding of the features of a site and the surrounding context, using baseline studies (such as Landscape Character Area appraisals ("**LCA**")) as a starting point for design. [27] Well designed development will respond positively to existing built development including in terms of layout, scale, form and with reference to views inwards and outwards. It should be shaped by understanding and identifying opportunities and constraints.[28]

44. In that context, it was extremely surprising to discover in XX that in assessing the proposed design, Mr Grover had failed even to look at the relevant LCA. The result was that he had failed to recognise that that document identified the expansion of residential development along roads and the proliferation of suburban development as detracting features of the local area[29] and the retention of gaps in linear development, particularly where they allow rural views over fields or into woodland as benefits meriting reinforcement. [30] Similarly, he had ignored the need to avoid large-mass or bulky structures where visually intrusive.[31]

45. The failure to recognise or respond to the above was also apparent from the DAS.[32] As Mr Grover agreed in XX:

a. Although the DAS said on p.8 that Effingham has a "distinctive rural character", the section of the DAS headed "Understanding Effingham" on pp.9-16 included no consideration of settlement pattern, prevailing densities, countryside views, or the gateway role of Effingham Common Road.

b. The Constraints Plan on p.23 failed to identify views from Effingham Common Road or the footpath to the east of the site as a constraint.

[26] CD 5.3 NDG p.8 and para. 38
[27] CD 5.3 NDG p.48
[28] CD 5.3 NDG paras. 41-42
[29] CD 6.27 p.81
[30] CD 6.27 p.84
[31] Idem
[32] CD 2.4

c. The Appellant's original DAS for the Lodge Farm site had referred to residential densities of 24 dph as being "in keeping with the immediate area" in Effingham.[33] By contrast the density of the proposed development is 38.7dph, in excess of even the maximum parameters set in 2018 and significantly higher than the 24dph justified as being in keeping with the immediate area.

d. The design approach taken by the Lodge Farm proposal was to include only two houses adjacent to the run of houses on Effingham Common Road from Meadow Cottage to Terriston and, otherwise, to step back development away from Effingham Common Road so that: (1) Effingham Common Road retained the sense of being flanked by green fields, and the perception of the Lodge Farm development is reduced by the screening effect of that run of houses. That was a point the previous Inspector specifically relied upon at IR395[34]. That effect is lost as a result of the proposal, which involves development at depth north of the bell mouth on the east side of Effingham Common Road.

e. On the corner of the access road there is a change in typologies to 3 storey apartment blocks.[35] That changes what was a "soft green edge" in 2018 into a denser more suburban space. It removes views through from Effingham Common Road and encloses the open space to the south. Whilst he suggested that this was a recognised device of terminating a view, he agreed that whether or not it was an appropriate device turns on context, and is not identified as consistent with the character of Effingham in any policy document.

46. Plainly given the LCA's express position that large mass and bulky structures harm the character of the local area, the use of such largescale buildings to terminate the view is obviously inappropriate.

47. Overall, the design of the proposal is, as Mr Johnson explained, poor. It fails to take advantage of opportunities and ignores local context and the character of the area.

[33] PoE Johnson 3.23 (cross referring to p.77 of the 2014 DAS0
[34] CD 1.1
[35] See Gover RPoE Appendix 3 Figure 4 and DAS p.40

48. Whilst Mr Grover was reluctant to address the issue, at one point stating that it is obvious, and at others refusing to comment, the reality is (it is perfectly clear) that the design of the proposal has been driven by a teleological approach, seeking to cram a pre-determined number and mix of dwellings onto the site so as to deliver a target level of profit. That simply is not conducive to achieving sensitive contextual design, and it is unsurprising that in this case the design has been a failure.

The Replacement School

49. The Council does not dispute the need to replace the current school buildings, nor the educational benefit in doing so. Its case is simple; that benefit can be achieved without the need to cause the further additional and very substantial harm to the Green Belt resulting from the additional 110 dwellings proposed under the Hybrid Appeal.

Educational Need: Pupil Planning

50. The Appellant relies upon NPPF 95 (which makes clear that it is important that a sufficient choice of school places is available to meet the needs of existing and new communities and that local planning authorities should take a proactive, positive and collaborative approach to meeting this requirement, and to development that will widen choice in education) and the 2011 Joint WMS on planning for schools' development.

51. Mr Rhodes position that the two were of equal weight is directly contrary to the decision of the High Court in *Oxford Diocesan Board of Finance v Secretary of State* [2013] EWHC 802 (Admin) at para. 30 that "a mere Ministerial Statement… was low in the hierarchy compared with statutory provisions and national planning policies", and Mr Jarvis was right to note that the NPPF has revised "great importance" to simply "important" in what is now NPPF 95.

52. Little, however, turns on any of this. The Council gives great weight to the replacement of the HoE School, including to the improvement of facilities and the expansion of a good school through the addition of two forms of entry. Its position entirely accords with that of the previous Inspector. There is no dispute regarding the extent of the expansion – i.e. an expansion by two additional forms of entry.

53. Where the Council and Berkeley part ways is in relation to what "approximately 2000 pupils" means. The 2018 Inspector's decision in relation to educational need was expressly predicated upon the position of Surrey County Council ("**SCC**"). As Mr Rhodes agreed in XX:

    a. SCC's position before the previous inquiry was that two additional forms of entry would result in a school of 1500 pupils (excluding 6th form) and that sixth form uptake could be expected to be 70% resulting is a school size of "approximately 2000" pupils.[36]

    b. This was the position upon which the 2018 inspector and Secretary of State relied in granting permission.[37]

    c. The Secretary of State did not secure the provision of a specified number of places in the 2018 Permission. A number of 2000 pupils is not referred to either in the description of development contained in the formal decision at para. 21, or in any of the conditions/ plans.

54. As all parties to the inquiry ultimately agreed, statutory responsibility for securing sufficient school places for primary and secondary education falls with SCC pursuant to section 14 of the Education Act 1996.[38] This requires them to ensure a sufficient of schools in terms of "number, character and equipment to provide for all pupils the opportunity of appropriate education".[39] It is that exercise which takes into account the need to provide sufficient choice and flexibility of places.[40] Thus whilst admissions policies are determined by THPT the "need" duty falls on SCC under sections 88 and 88C of the School Standards Framework Act 1998 (as amended).[41] There is no statutory duty on a given school to plan for or provide a specific number of places generally or at 6th form level.[42]

55. In light of all of the above, it is readily apparent that, when designing the detail of a specific school consultation with the relevant local authority with responsibility for pupil place

[36] CD 1.1 IR 346
[37] CD 1.1 IR 464
[38] XX Stringer; XX Barnfield
[39] Idem
[40] Idem
[41] XX Stringer
[42] XX Stringer; XX Barnfield

planning under section 14 of the Education Act 1996 is not only essential, but entirely in accordance with the approach of the SoS and the previous Inspector. In this context, it was not just surprising but alarming to learn that Mr Olliff has not consulted with SCC (as the body with statutory responsibility for pupil place planning) in designing the detail of the RMA schemes submitted, and had not sought to design with reference to the need for pupil places they identify.

56. SCC's position, however, is consistent with their position in 2017/2018; namely that an appropriately sized 6th form would provide places for between 434 and 436 pupils.[43] That allows for a 6th form uptake in excess of 70%, in circumstances where that exceeds the 5 and 7 year average.

57. Faced with this issue the Appellant's approach was to prevaricate and obfuscate. Following repeated requests, however, the actual figures were provided. These make clear that the number of external entrants from a Planning Admissions Number ("**PAN**") of 50 has ranged from 7 – 24. Berkeley's/ THPT's approach, which was to assume that SCC's 70% figure included only those staying on from year 11 at HoE has been proved to be incorrect. It has also been shown to result in double counting. It is totally unrealistic to take a 70% figure and then to add to that a further 50 pupils per year (100 total) to account for the PAN. The reality is that HoE's 6th form is currently rated as Outstanding by Oftsead. The PAN is already 50. That attracts between 7 and 24 additional 6th form pupils to the school each year, in circumstances where on average (over 7 years) only 64.7% of pupils from year 11 stay on. The figure of between 434 - 436 pupils is a blended figure, taking account of incomers and those staying at HoE, and provides some additional flexibility above the actual number expected by SCC to addend.

58. Indeed, as Mrs Barnfield conceded in XX, the Appellant's approach to calculating pupil need is "inconsistent with SCC's approach"

59. In all the circumstances, using a refined pupil place need figure of 1935 is entirely appropriate. It is consistent with the previous Inspector's approach of relying on SCC, and simply provides a refinement of the approximation relied upon at outline stage.

[43] Fishlock Exhibit 5.16B

School Design

60. As Mr Fishlock made clear in his evidence, and as became apparent during the XX of Mrs Barnfield and Mr Olliff, the design of the replacement HoE School has involved very significant scope creep.

61. Mrs Barnfield's evidence in particular highlighted this. In XX she agreed that:

    a. Her vision for the school involves improvements and increases in capacity, as a result of which she has sought to achieve the absolute best possible facilities in the RMA scheme.

    b. Reconciling her aspirations with the criteria set by the ESFA has been a "challenge"[44] for Mr Olliff because her ambition has always been to push for "more and better".

    c. She has not sought to constrain the cost of the proposals.

    d. The result is a design which Wilmott Dixon describe as exceeding that expected for a publicly funded state school.

    e. Even after it became apparent that the school proposed in the RMA could not be delivered on the basis of the outline scheme, neither Berkeley nor THPT revisited: (a) the precise pupil place need identified by SCC; (b) the level of THPT office provision; (c) whether a caretaker's house should be provided; (d) the nature and extent of the sports facilities to be provided including the cinder sprint track, the enlarged astro-turf, and the provision of a 6 court sports hall. Rather all of those remained in the design even after it became apparent delivery on the basis of the outline permission granted in 2018 would be impossible.

62. Plainly, and as he fairly recognised in XX, this presented a challenge for Mr Olliff. He made his position very clear in XX: He designs "to a brief". The brief "determines the design and ultimately the cost of the design".

[44] See also Olliff PoE 3.4

63. A significant issue, which Mr Fishlock also identifies (see PoE 11.1-11.2.10), is the absence of robust project management.

64. As he explained himself in evidence, Mr Olliff is an architect, his particular experience and interest lies in "translating educational visions into architectural realities".[45]

65. As he made clear in XX:

    a. His experience of designing schools under various funding arrangements, including PFI, Building Schools for the Future, National Academies Framework, and the Priority Budling Schools Programme involved working with contractors on the Education Skills Funding Agency Contractor's Framework. That involves providing architectural/ design services to a Design and Build Contractor who is seeking or has won a ESFA tender to design and build schools. Those are competitive tenders awarded by ESFA in the context of a tender process in which there is a strong impetus to constrain costs. Scott Brownrigg is not a contractor on the ESFA Contractor's Framework, but (it may be noted) for the high value band (over £12m) in both North and South Wilmott Dixon is such a contractor.

    b. When working with ESFA Contractors Framework contractors, it is the contractor who project manages the design and build of the school, Mr Olliff / Scott Brownrigg's role is to provide design services to the contractor with the brief coming ultimately from the contractor.

    c. There is an important distinction between the project management function and the architectural / design function. He has not personally ever project managed a school construction project.

    d. When he has worked on other projects, and indeed generally when providing his services as an architect / designer there will be somebody else appointed as a technical advisor and / or a project manager. It is normally the Project Manager or Technical Advisor who prepare the DFE Funding Allocation Model and BB103 Schedule of Accommodation templates referred to in his PoE at 3.4, not the scheme architect.

[45] XX Olliff

e. In this case he has been appointed as an architect/ designer by Berkeley Homes (Southern) Limited who are working in partnership with THPT. His role is therefore to deliver a design to meet the ambitions of Berkeley Homes working in partnership with the THPT and in doing so, to translate THPT's "educational visions into architectural realities". In this regard, as an architect he does not like "always to say no".

Relevant Policy – The DfE Funding Model and BB103

66. Mr Olliff agreed in XX that:

    a. The budget set for the new school must "accord" and "be directly comparable with" the Funding Allocation Model provided for projects procured through the National Academies Framework and the Priority Schools Building Programme.

    b. That is the first of three "key criteria" he identifies for design in his PoE at 3.4.

    c. The best way to benchmark the costs of this design with other schools to determine whether it delivers value for money, it is important to ensure that the costs are reported on a like for like basis in a form that can be readily understood is to use the format that the DfE uses for the Contractors Framework.[46]

    d. The DfE funding model is an important tool in assessing the appropriateness of design specification proposed.

67. As will be explained below in relation to cost, Mr Britton ultimately conceded in XX that the proposal was not at all comparable with the DfE funding model, and that Berkeley's evidence to suggest that was wrong and involved double-counting. That double-counting was on an extradentary scale.

68. Similar arise under Building Bulletin 103 ("**BB103**"). The Appellant confuses the range with the target. As Mr Fishlock explained, the DfE criterion is the target, not the range. Indeed, Mr Olliff agreed in XX that:

[46] See also PoE 6.34-6.37

a. BB103 is also one of the "key criteria" for the design of a school proposal.

b. BB103 contains schedules of accommodation ("**SoA**") regularly published on the gov.uk website, with the current version being v8.2. This is the agreed standard tool for designing the teaching and non-teaching area of a school based on pupil based planning numbers.

69. Turning to the application of the BB103 SoA Mr Olliff agreed in XX as follows:

a. He did not present any evidence to suggest that Mr Fishlock's Appendix 3.3.6 is erroneous in its own terms. Adopting a pupil planning figure of 1935 it is accurate.

b. Unlike Mr Fishlock, Mr Olliff had not completed a BB103 SoA previously. His version in CD 11.8 left the box "additionally resourced places" for SEN blank. On the assumption that Mr Stringer had conceded that the SEN need for 20 places fell within the 2000 figure (which he had) the effect of doing so (and also excluding the Cullum Centre from the overall area calculation) was to double count those pupils; providing for them as part of the 2000 need *and* separately through the Cullum Centre.

c. Even excluding the Cullum Centre, the capacity Mr Olliff had worked to is in fact for a range of 1890 up to 2100 pupils. It is that which gives a floor area range of 14,350-16,275sqm.

d. That is distinct from the figure at the bottom which is the target area under the SoA and which even for 2000 places is 14,350sqm. That is the maximum "area that ESFA would fund, if it were being procured through the contractors framework".[47]

e. As a matter of fact the current design involves: (a) 14,956sqm for 11-16 and 6th form which is 606sqm over the area that ESFA would fund; as well as (b) 474sqm for the Cullum Centre; and (c) 594sqm for the THPT Offices. Those give a total area figure of 16,024sqm which is 1,674sqm (11.7%) over the area that ESFA would fund. Even if one excludes the Cullum Centre (but not the offices), the proposal is still 1,208sqm (8.4%) over area that ESFA would fund.

[47] See also Olliff RPoE 2.4.2

f. Taking Mr Fishlock's approach in his Appendix 3.3.6, the number of places input into the table is 1935 i.e. the figure provided by the body with statutory responsibility for pupil place planning. That provides capacity for up to 2007 pupils and so, as a matter of fact, is capable of accommodating more than 2000 pupils. Using that figure produces a target area of 14,055 which is the figure that ESFA would fund.

g. Even Without the Cullum Centre and offices the RMA proposal exceeds that figure by 909sqm. If you add in the offices (but not the Cullum Centre) that increases to 1,504sqm over fundable area (10.7%) and if the Cullum Centre is also included then the proposal is 1,977 (14.1%) over the area that ESFA would fund.

70. In light of all of the above Mr Olliff was forced to accept clearly and unequivocally that what has been put forward is not a fundable proposal.

71. This alone is fatal to the Appellant's case. It is absolutely clear from both or either of the above exercises alone that what the Appellant has proposed is not in accordance with mandatory criteria. Mr Rhodes 11th hour attempt to rely in XX on NPPF 188 (a paragraph which had had never been referred to previously) is totally unconvincing. Not only is it entirely contrary to the clear evidence from Mr Olliff, the relevant expert in the area, but it is also ignores the fact that NPPF 188 relates to emissions, not to all other statutory permitting regimes, and that even in that context the presumption is rebuttable. In this case, the Appellant has admitted it is seeking to enable development far exceeding the DfE benchmark, which fails the test the Appellant itself has itself adopted and relied upon as being "key". Indeed, that accords also with the position of Mr Saint of MEA referred to in Mr Olliff's RPoE at 4.5.2, which is clear that HoE has to "comply with EsFA/DfE area and cost criteria".

Specific items

72. The above issue arises on the basis of the area of the proposed replacement school alone.

73. Once the specific items included in the Appellant's proposal are examined, the nature and extent of the problem becomes even more apparent:

a. As regards the THPT trust offices, Mr Olliff agreed in XX that:

i. These represent 580sqm of built space and parking which Artelia have costed at £2,190,998 pounds

ii. They significantly exceed the level of office provision for THPT offices on the current site and this is not (as Mrs Barnfield also conceded) a case of like for like replacement.

iii. Certainly, there is no requirement in policy or guidance to provide those offices. They do not form part of any recognised design standard and the level of provision for non-school staff office space is generous and far in excess of that on any other state school project he's ever worked on.

iv. No consideration was ever given to an option involving any reduction in the 580sqm of office space to be provided to THPT staff unconnected with the running of the School. THPT's position was that it would rather "sacrifice teaching space than its own generous offices" and was willing to make "major compromises" like merging the 6th form block with the sports hall "rather than reduce its own office provision".

v. It would have been "an easy and obvious alternative" to remove or reduce the level of office provision, but that was not an option ever given to the design team.

b. As regards the Caretaker's House, Mr Olliff conceded in XX that:

i. The DfE would not fund a Caretaker's House.[48]

ii. In accordance with the evidence of Mrs Barnfield there is no legal reason why it has to be included in the proposal.

iii. A caretaker's house has not been included in any state school project design he has worked on in recent years (although prior to that he could think of one historic example).

[48] See also RPoE 2.7.1

iv. He originally omitted it from his design but Mrs Barnfield required a further design be produced to include it.

c. In terms of sports provision Mr Olliff's position following XX was that:

i. There is no requirement in any policy or guidance (including that produced by Sport England) for a cinder sprint track. The sprint track was not included in the indicative outline designs or required by any of the conditions imposed on the outline planning permission granted by the Secretary of State and there is no document before the inquiry suggestion Sports England required it to be provided.[49]

ii. *The Sports Hall* proposed exceeds the BB103 area guidance. BB103 p.22 – requires only a four badminton court size sports hall Mrs Barnfield did not seek to justify a level of provision exceeding four badminton courts but rather at PoE 4.63 accepts that the current facilities with four badminton courts are adequate. PoE 6.4.8 specifically refers to four badminton court sports hall and she did not amend that position in her oral evidence. Applying the new Sport England guidance, a four badminton court sports hall should measure 690sqm in area and the proposed sports hall exceeds that by 195.5sqm.

d. Finally, the quantum of AstroTurf (in addition) to the MUGA proposed is excessive. It is significantly larger than was shown at outline stage and, again, is not justified by any relevant policy or guidance. Nor is there any evidence that Sport England required it to be this size, rather than applauding that it was on the scale proposed (which is unsurprising given their remit).

74. An unfortunate feature of the inquiry was the Appellant's distraction, disinformation and dissemblance. One of the most obvious examples of this was in relation to the THPT offices which Berkeley excluded from the area of the school in any calculation where it suited their case i.e. when a comparison was to be drawn with an objective standard such as BB103 or the DfE Funding Model Template, but included as part of the school when seeking to justify its

[49] The Sport England correspondence provided on the last day of the inquiry served only to underline this, making no reference to the cinder running track, and indicating no objection to the proposals, but not justifying any particular provision.

delivery. It is harder to think of a more obvious example of trying to have it both ways. Such dissemblance cannot, however, change the facts. The offices have a cost of almost £2.5m. Their provision would therefore have to be enabled. They are part of what is proposed and result in an unjustifiable extra cost resulting from an immovable design parameter forming no part of the 2018 permission but presented to Mr Olliff as a necessity.

75. Mr Olliff's overall comment in relation to the design specification of the school was very telling. He agreed in XX that a highly relevant consideration is whether an alternative design could meet the educational need for a replacement school at a lower cost. He also agreed in XX that just removing the caretaker's cottage and THTP offices would have no impact on meeting the educational need for a replacement school, but would significantly reduce the cost of replacement school buildings. To produce and submit a design to that effect for the purposes of a further RMA application would be easy and could be quickly achieved. Indeed, he accepted in XX that amendments could be "readily achieved" that would "significantly reduce the funding requirement" but that those options had not been explored. His response, however, was that "if you are spec'ing a Bentley, you don't want to come away with an Audi". That demonstrates acutely the issue in this case. The approach has been to seek to provide top grade facilities with the highest possible specification, resulting in a design going way beyond that which DfE would fund. It is for that reason that the 2018 development cannot be enabled as originally proposed.

School Cost

76. Mr Britton's evidence got off to an inauspicious start. He had not provided a PoE and although he agreed his evidence was contained in the Artelia Statement (issued as rebuttal) and Mr Olliff's PoE at 6.32-6.53, he subsequently sought to resile from that when faced with the obvious inaccuracy of what was said about cost in Mr Olliff's PoE.

77. The litany of breaches of the RICS Practice Statement on giving expert evidence that he accepted were substantive as well as procedural significantly reducing the weight (if any) that can be given to what he says, in any event he was clear he had never previously been instructed to prepare a DfE funding template, and although he had done so he in fact said he did not know how properly to do so.

78. Indeed, when it came to consider the detail of the DfE Cost Plan/ Funding Model Mr Britton's evidence confirmed in XX (consistent with Mr Olliff) that his understanding was that the budget set for the new school must be directly comparable to the DfE Funding Allocation Model and that that is the "best way" to benchmark whether a design is good value for money.

79. On that basis he (like Mr Olliff) agreed that the statement (on his and Mr Olliff's part) contained in in the Scott Schedule (identifying areas of agreement and disagreement with Mr Fishlock) to the effect that whether or not the DfE would fund the cost of the scheme was "irrelevant", was wrong.

80. Looking at the template Mr Britton had produced, he was forced to accept that the conclusion drawn at para. 6.40 of Mr Olliff's PoE that the costs of the RMA proposal are £830k less than DfE would be budgeting was completely wrong.

81. As Mr Britton agreed in XX:

    a. The funding template is correctly explained in Mr Fishlock's PoE at 3.5.1-3.5.6 and 6.4.1-6.4.6.

    b. The template calculates a cost based on the area of the proposed school. That costing includes a base funding specification which is included in that area based cost. To that may be added abnormals, but DfE requires any abnormals to be justified and there is a DfE rate for funding abnormals exhibited to Mr Fishlock's RPoE at Exhibit 3.3.4.

    c. What the base specification includes is exhibited to Mr Fishhook's evidence as Exhibit 7.5.4. That explains in the various columns the element of works, what the base funding for that element includes, that which can be added as an abnormal to the baseline, what is required to justify the addition of that abnormal to the baseline, and finally any relevant comments.

    d. The sum of £7,873,004.74 Mr Britton added for external works came from his Cost Plan 3.[50] It represented the entire sum under Item 8 for external works. The effect of that was to double count for an enormous number of items of external work already included in the baseline specification. Mr Fishlock's RPoE Appendix 5.2.19 was

[50] CD 11.5

undisputed and accurately identified the extent of this double counting. On that basis alone £6,833,994 should be removed from Mr Britton's figure.

e. In addition, Mr Britton had ignored the DfE rates (found at Fishlock RPoE Exhibit 3.3.4). Using those rates Mr Fishlock had correctly identified that £7,043,169 of the figure attributed to external works should be removed.

f. In addition the sums for ICT (£1,850,000) and loose FF&E (£2,144,900) relied upon in Mr Britton's Cost Plan 3 included the provision of all new loose and end user equipment (including computer suites, interactive whiteboards, desks, tables, chairs, sports equipment etc) despite that fact that none of those items are to be provided under the relevant clauses of the Contract between Berkeley and THTP. Rather, THPT are to fund those items, rendering them unjustified as costs for the purposes of this case. For that reason both sums (£1,850,000 + £2,144,900) should be removed.

g. The inclusion of Main Contractors fees in preliminaries at £122,377.50 was also double counting and unjustified.

h. In total, his version of the DfE Cost Plan/ Funding Template had inflated the bottom line by £11,160,466.

i. The correct fundable figure should have been £43,065,293.

j. Rewriting para. 6.40 of Mr Olliff's proof accurately, it should read "the costs of the RMA scheme (excluding offices, nursery, and Cullum Centre) are £11,160,446 in excess of what DfE would be funding.

k. In light of that, the budget set in his Cost Plan 3 was <u>not</u> comparable to the DfE Funding Allocation Model.

82. Indeed, even when looked at in its own terms, Mr Britton's Cost Plan 3 is clearly inflated.

83. At the outset, Mr Britton accepted both in XX that the increases in cost, between Cost Plan 1 and 2 and even between Cost Plan 2 and 3 cannot be explained by inflation alone.[51] Increases in quantum and specification were, he agreed, a significant driver in the cost increases.

[51] See also and Artelia Statement at para. 4.4

84. Indeed, as he conceded in XX, if Mr Britton's Cost Plan 1 were inflated to Q3 2022 the figure he arrived at would be £41,929,430 i.e. more than £20 million below the figure of £64,369,000 referred to in Cost Plan 3. That notwithstanding, Mr Britton did not agree that Cost Plan 1 had been a gross underestimate. Rather, he returned again to the fact that there had been significant increases in terms of quantum and specification resulting in increased costs.

85. Upon interrogation, Mr Britton's Cost Plan 3 did not withstand scrutiny. He accepted in XX that:

    a. Mr Fishlock had done a random sample and had compared Mr Britton's cost rates to those contained in SPONS Builder's and Architects Price Book which he accepted is "respected practitioner text containing detailed construction cost price information regularly used by Quantity Surveyors".

    b. The sample showed that (for example) the price per tonne used for universal columns was £940.28/m2 (39%) in excess of SPONS.

    c. The sample also showed that the price used for Fire Protection Paint was £391.64m2 (60%) in excess of SPONS.

    d. The sample showed that the price used for timber cladding was £153.21/m2 (65%) in excess of SPONS.

86. Mr Britton had also inflated main contractors profit from 3.1% in his Cost Plan 1 to 5% in Cost Plan 3, with no explanation or justification given.

87. In the context of BCIS [52]benchmarking, he relied upon a generalised BCIS figure (item 713) for High Schools rather than the specific rates used by Mr Fishlock (713.1 for secondary school specialised teaching blocks; 713.8 for secondary school mixed facilities and 714.8 for sixth form mixed facilities). Mr Fishlock addressed this clearly both in his PoE at 6.6.1-6.6.5 and in oral evidence (when it was made clear that the point should be put if it was taken). He was not, however, challenged on it. Nor was there any evidence before the inquiry to contradict it, save the assertion in the Scott Schedule, to suggest that it was wrong. In those

[52] Building Cost Information Service

circumstances, Mr Fishlock's approach is undoubtedly to be preferred. As Mr Britton agreed in XX nowhere in the BCIS description of the rate does it suggest that the rates Mr Fishlock used are for extensions only. They simply are not.

88. Finally, and perhaps most remarkably, it became apparent from Mr Britton's evidence that his Cost Plan 3 attributed enormous sums of money to items which simply are not being funded by the Hybrid Appeal development. In particular:

    a. Clause 9 of the specification agreed as part of the contract for the land swap between THPT and Berkeley expressly excludes all loose FF&E from what Berkeley are due to provide. That equates to a sum of £2,144,900 for the "all new" provision Mr Britton had costed.

    b. Clause 12 of that specification excludes end user ICT including teaching wall appliances such as interactive whiteboards, hardware in computer labs etc. from what Berkeley are due to provide. That equates to the sum of £1,850,000 Mr Britton had included in his cost plan.

89. Mr Britton accepted in XX that those items should not have appeared in Cost Plan 3 if they are not to be provided by Berkeley (which they certainly are not as Mrs Barnfield confirmed in XX). When asked why they were included he had no good answer, but confirmed that he had not discussed the position with Berkeley, nor had Berkeley suggested they should be excluded. It is astounding that such large sums of money were included in the Appellant's viability calculations as a cost to be funded by enabling development when Berkeley must surely have known that they would never have been required to pay for the relevant items. The effect of the approach taken results in a clear understatement of the profit the proposal will generate for Berkeley. That is a matter of which they cannot have been unaware.

<u>The Decisive Issue: Are the Proposals Necessary to Deliver a Replacement School? Are there Alternatives?</u>

90. Ultimately, as Mr Rhodes agreed in XX, the decisive issue in this case is whether the proposals are necessary to deliver the school consented by the inspector in 2018, and/or whether there is an alternative way in which that school can be provided.

91. The Appellant's position is that "the level of profit to enable the delivery of a replacement school in this case is 11%." That was clearly and explicitly conceded by Mr Turner in XX. It was a concession that was inevitable given that:

    a. In his PoE he made clear that at level of developer return the development is "deliverable".[53]

    b. That profit level is consistent with the position taken by the Appellant in relation to the outline proposal consented by the Secretary of State in 2018,when an 11.75% return was accepted by Berkeley.[54]

92. In circumstances where the decisive issue in this case is whether development is necessary to deliver the school consented, 11% is the critical figure. It is the figure that the developer is willing to accept, as opposed to the figure the developer would like.

93. On that basis, as Mr Jones explained in his RPoE at para. 3.4, a school at a cost comparable to that which the Mr Britton conceded in XX the DfE would fund could be delivered without the need to deliver any housing on the Hybrid Appeal Site. Indeed, even taking Mr Fishlock's more conservative figure of £47,785,397, which is based on BCIS costings, no development would be required to deliver the proposal in accordance with the 2018 outline permission.

94. The Appellant's attempt to argue that enabling development is required because an 11% profit margin is insufficient is utterly untenable. As noted above, it promoted the scheme in 2018 on the basis of an 11.75% profit margin. It did that on the express basis that it would deliver the school consented in outline. Berkeley cannot simply bank that consent, and seek additional development to improve the profitability of the scheme beyond that which was ever intended. If the proposal consented in outline can be delivered within the profit margin on the basis of which the Appellant put forward the proposal granted permission in 2018, which it can, permission for additional enabling development is unnecessary.

95. That should be the beginning and end of the Hybrid Appeal. As became readily apparent during the evidence of Mrs Barnfield, Mr Oliffe, and Mr Britton, the costs of the school have not been constrained, but rather have been allowed to spiral. Mr Oliffe fairly conceded that

[53] PoE Turner para. 9.2
[54] PoE Jones para. 3.2 conceded by Turner in XX

this project is significantly higher in terms of cost than any other school development proposal he has ever been involved in. The point has been reached where Berkeley must now accept (as Mr Oliffe did in XX) that the scheme area fails to meet the 'key' criterion he identifies of being comparable to that fundable by DfE and (as Mr Britton did in XX) that is the budget for the proposal is more than £11m in excess of that which DfE would budget for the project.

96. Berkeley's only answer to this point is to argue that the school they are seeking to fund has reserved matters approval, and that the proposal should therefore be "considered on its own merits".[55] That approach is misconceived for the following reasons:

    a. First, the development the merits of which are before this inquiry is not the reserved matters approval for the school, but the delivery of development including 110 residential dwellings on the Hybrid Appeal site. Enabling the delivery of a replacement school is at best a linked benefit of granting permission for those 110 dwellings, because of the contract in place between Berkeley and THPT.

    b. Second, as Mr Rhodes agreed in XX, the viability position is irrelevant to grant of reserved matters approval. It is, in any event, perfectly possible to secure multiple inconsistent reserved matters approvals, and there is no reason why the approval alighted upon by the Appellant for the purposes of this appeal is the approval that should be built out. On the contrary, as Mr Rhodes agreed in XX, Berkeley can submit further reserved matters applications which exclude elements from the scheme (such as the THPT offices).

    c. Third, the Appellant's approach is entirely inconsistent with the decision of the Court of Appeal in *The Governing Body of Langley Park School for Girls v The London Borough of Bromley* [2009] EWCA Civ 734. In that case, the Court of Appeal quashed the decision to grant planning permission for a school on Metropolitan Open Land precisely because "Recitation of the mantra – that each planning application should be considered on its merits" was "of little assistance" and had lead to a failure to have regard to obviously material considerations (see para.25ff). As the Court of Appeal also explained in that case at para. 52 "if a local planning authority considered that a proposed development would do really serious harm [in that case the really serious

[55] XX Rhodes

harm being to Metropolitan Open Land] it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm." In other words, the effect of the policy protection given to Metropolitan Open Land (which is materially identical to that given to the Green Belt) then the burden is on the developer to demonstrate that that harm cannot be avoided or reduced by an alternative scheme or otherwise.

97. In this case, the Council's primary submission is that the Appellant simply has not demonstrated that any development is necessary to deliver a replacement school in accordance with the outline proposal. On the contrary, Mr Fishlock and Mr Jones' evidence together that a replacement school could be delivered without the need for any development on the Hybrid Appeal site.

98. Certainly, the Appellant has not demonstrated that *all* of the development relied upon is necessary to deliver a suitable replacement school. In particular:

    a. First, no evidence whatsoever was ever put forward to explain why a scheme which justifies the delivery of approximately 20 market houses to enable the delivery of end user IT and loose FF&E which is not in fact being funded by the development should be granted consent. Obviously it should not. The end user IT and loose FF&E are being delivered separately by THPT and not by Berkeley homes. In those circumstances, the entire rationale for 20 of the 110 dwellings proposed falls away.

    b. Second, more than 10 market dwellings are (Mr Turner conceded in XX) relied upon to fund the delivery of the THTP offices. Those are not, the Appellant says, part of the School. Certainly, they are not required to meet any educational need. They are not supported by policy. They are not even, Mrs Barnfield admitted in XX, an operational necessity for THPT. There is simply no good reason why they should be 'enabled' by the delivery of 10 market houses on Green Belt land. No doubt because he well understood this, Mr Rhodes position was simply that it was inappropriate to seek so to disaggregate. Given that Mr Oliffe agreed in XX that the removal of those offices is an obvious and readily achievable alternative, that position, too, is untenable.

c. Third, the absurdity of consenting a market dwelling on open Green Belt land to enable the delivery of a caretaker's house, which formed no part of the Inspector's consideration at the outline stage, and which Mrs Barnfield agreed there is no legal or policy requirement to provide, cannot be lost even on Berkeley. To suggest otherwise is a nonsense.

d. Fourth, the provision of an oversized astroturf and cinder sprint track plainly do not justify the delivery of 5 market houses in the Green Belt to enable them.

e. Finally, the provision of an additional 65 places in the sixth form over and above what SCC has determined to be a suitable level of expanded 6th form provision simply does not justify the delivery of approximately 18 market dwellings in the Green Belt. SCC has statutory responsibility for pupil place planning and the previous Inspector's approach was to rely upon SCC's position. That was obviously the correct approach.

99. In those circumstances, the Appellant has simply failed to demonstrate very special circumstances capable of justifying inappropriate development in the Green Belt. Applying Mr Rhodes' own test, the proposals are not necessary to deliver the school consented by the Secretary of State in 2018 and there are a number of alternatives, including providing only sufficient houses to enable the delivery that which Berkeley will be delivering rather than items for which they will never be expected to pay, removing or reducing the THTP office provision, removing the caretaker's house, reducing the size of the astroturf and removing the cinder sprint track, and/or reducing the size of the school to that which accords with the target area for a school for 1935 pupils (or even 2000 pupils) under BB103. Any of those options alone would materially reduce the harm from to the openness of the Green Belt. All of them in combination would very significantly avoid it, if not entirely avoid it.

Other Benefits

100. There are of course other benefits of the proposed development, which Mr Jarvis very fairly recognised in his clear and measured evidence. Foremost amongst those benefits is the delivery of affordable housing, which attracts substantial weight. In addition the delivery of market housing attracts moderate weight (assuming the Council can demonstrate a 5 year supply of housing land). None of these matters are determinative, however. The delivery of the school is *the* decisive issue, as Mr Rhodes agreed in XX.

101. In light of that, it is not strictly necessary to rule on the Appellant's challenge to the Council's 5 year housing land supply ("**HLS**") to determine this appeal. Given the importance of the issue to the Council, an addendum to these closing submissions addresses 5 year HLS, but the point is moot, just as the Council said it would be in opening.

102. In the absence of VSC Mr Rhodes agreed in XX that the proposal will not accord with the development plan read as a whole, or with the NPPF, such that it should not be granted planning permission.

Conclusions

103. Overall, the Appellant simply has not demonstrated that VSC exist so as to justify the grant of planning permission for significant inappropriate development in the Green Belt. The benefits the Appellant purports to rely upon do not clearly outweigh the harm to the Green Belt by reason of inappropriateness and other harm resulting from the development, with the consequence that the proposal does not accord with the development plan read as a whole, and the presumption against the grant of planning permission arising from section 38(6) of the Planning and Compulsory Purchase Act 2004 is engaged. The proposal is not supported by the policies in the NPPF such that other material considerations re-enforce, rather than outweigh, that conflict.

Conclusion

104. For these reasons, the Council respectfully submits that both Appeals should be dismissed.

Charles Streeten
FTB

13 October 2022

APPENDIX – 5 YEAR HLS

1. The Appellant agrees that whether or not the Council can demonstrate a five year HLS is not determinative of the outcome of this appeal.[56] For that reason, the Council's submissions on that issue are included in this appendix, rather than in the main body of its Closing Submissions.

2. In XX, Mr Pycroft admitted he was not aware of any appeal decision since adoption of the Local Plan suggesting the Council does not have a 5 year supply of housing land. There are none. Other inspectors have, however, as recently as May 2022, found that Guildford has a deliverable 5 year housing land supply (eg Ash Manor APP/Y3615/W/21/3273305 – CD 13.1).

Matters of Agreement

3. As Mr Pycroft accepted in XX:

    a. The approach to be taken in calculating housing land supply is that set out in Chapter 68 of the PPG

    b. In this case the base dated is 1 April 2021 and the relevant 5 year period is therefore from 1 April 2021 – 31 March 2026. The Council has not sought to introduce any new sites into the supply since the 2021 LAA was published.

    c. The Council's housing requirement should be measured against the adopted housing requirement set out in Policy S2 of the Guildford Local Plan – that requirement being 562 dwellings per annum. It should not bee calculated using the standard method, which may be relevant to determining the requirement figure as part of the preparation of the next local plan, but it is not the correct approach in relation to this adopted plan.

    d. The number of completions in Guildford over the period 2015-2021 revealed more completions in 2015/16 and 2019 and 2020, with slightly fewer in 2016/2017. The

[56] XX Rhodes

reason for this is as explained in Mr Miller's PoE on p.17 in footnote 1; it occurs because the completion certificates are sometimes sent after the completions figure for a particular year has been finalised. In fact, there were 19 more completions across the 6 year period than reported in the AMR.

e. Over the last three years the Council has delivered 2,087 new homes against a requirement over the same period of 1,452 dwellings resulting in a HDT measurement of 144% such that the HDT has been passed.

f. The appropriate buffer is 5%

g. Nowhere in his PoE does Mr Pycroft advocate for a lapse rate. There is no policy requirement for a lapse rate, and the Council's approach in applying a lapse rate of 6% reducing its supply by 83 units is "robust and realistic". Such an approach is not strictly necessary and in that regard is a more conservative approach than the approach Mr Pycroft himself advocated for in his PoE.

The Shortfall against the Housing Requirement Figure

4. Council's position is that the shortfall is 828. The Appellant's position is that it is 1,011. The difference is 183 units.[57] That difference arises from the number of dwellings released from the completion of student accommodation.

5. In XX Mr Pycroft agreed as a matter of principle that off-campus student accommodation should be included in the past completions and five year housing land supply calculation.

6. PPG reference ID 68-034-20190722 is entitled "Counting other forms of accommodation: How can authorities count student housing in the housing land supply". It says:

"All student accommodation, whether it consists of communal halls of residence or self-contained dwellings, and whether or not it is on campus, can in principle count towards contributing to an authority's housing land supply based on:

[57] HLS SoCG paras. 2.1-2.3

the amount of accommodation that new student housing releases in the wider housing market (by allowing existing properties to return to general residential use); and / or the extent to which it allows general market housing to remain in such use, rather than being converted for use as student accommodation.
This will need to be applied to both communal establishments and to multi bedroom self-contained student flats. Several units of purpose-built student accommodation may be needed to replace a house which may have accommodated several students

Authorities will need to base their calculations on the average number of students living in student only accommodation, using the published census data, and take steps to avoid double-counting. The exception to this approach is studio flats designed for students, graduates or young professionals, which can be counted on a one for one basis. A studio flat is a one-room apartment with kitchen facilities and a separate bathroom that fully functions as an independent dwelling.

7. As Mr Pycroft agreed in XX:

    a. That is the approach advocated by the Government in the PPG for taking student housing into account in the housing land supply calculation.

    b. It makes clear that all student accommodation whether or not it is on campus can in principle count

    c. The Council has not counted student accommodation units delivered on the University of Surrey campus (479 and 674 bedspaces delivered in 2018 and 2019)

8. As set out in LAA Appx 5 para. 4.7-4.9 and explained by Miller at PoE 6.10 – 6.12 if on campus delivery of student accommodation counted in accordance with PPG, the supply of housing released from students is actually greater than reported in the LAA. In that regard the Council's approach is a conservative one.

9. In XX Mr Pycroft accepted that:

    a. The PPG is clear that in considering what figure to include for student housing "Authorities will need to base their calculations on the average number of students

living in student only accommodation, using the published census data, and take steps to avoid double-counting"

b. The national census figure is 2.5 students per dwelling (See also Figure 5 PoE Miller)

c. The Guildford census figure is 3.1 students per dwelling

d. He had not used either of those figures. Rather, his approach was to use the ratio of 1:4 derived from the West Surrey SHMA published in 2017 rather than the census data (see also PoE pycroft 17.10).

e. In that regard, his approach was "not consistent" with the PPG.

f. The PPG was changed in 2018 for the first time to explain how student accommodation should be included in the housing land supply calculation. The Council's SHMA pre-dated that change.

g. If the inspector were to follow his approach, that would result in taking an approach that is "not in accordance" with the approach now set out in the PPG

h. If one adopts the local census figure of 3.1, in accordance with the PPG, the shortfall against the requirement is that set out by Mr Miller at PoE 7.1 – i.e. 828. That is without taking any account whatsoever of the on campus completions.

10. These concessions are enough definitively to dispose of this issue. Mr Pycroft conceded at the start that the approach that should be taken to determining whether or not the Council had a 5 year housing land supply had to be determined with reference to the PPG. Adopting the PPG approach, the Council's position is the correct one. There is justification for departing from that approach.

Addressing the Shortfall: Liverpool vs Sedgefield

11. PPG Ref ID 68-031-20190722 says:

"If a strategic policy-making authority wishes to deal with past under delivery over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal."

12. As Mr Pycroft agreed in XX, that is a clear statement in the Government's current Practice Guidance that whether or not the Liverpool or Sedgefield approach should be used is a matter for determination through the plan making and examination process rather than on a case by case basis on appeal. It accords with the policy in NPPF para. 15 that the planning system "should be genuinely plan lead" and that succinct and up-to-date plans should provide… a framework for addressing housing needs"

13. My Pycroft was also right to concede that there is nothing in the PPG which suggests that that Guidance does not apply to recently adopted and otherwise up to date development plans examined under the transitional arrangements in NPPF 220.

14. Appendix 1 to Mr Millers PoE demonstrates that the Council justified to the examining inspector examining the Local Plan the use of the Liverpool method. The Examining inspector's report accepted that approach "in recognition of the contribution made by the strategic allocations which typically have a longer lead in time".[58]

15. As Mr Pycroft agreed in XX, in the language of the PPG "a case was made as part of the plan making and examination process" and accepted by the examining inspector.

16. His approach is by definition to seek to re-visit that "on a case-by-case basis on appeal". That, Mr Pycroft accepted, involves a departure from the PPG and is not consistent with NPPF para. 15 and a "genuinely plan-lead" approach.

17. In terms of his justification for using the Sedgefield method, Mr Pycroft gave 4 reasons at PoE 9.4-9.15. He agreed in XX that:

    a. The first reason he gives is that para 60 of the NPPF "reaffirms" the Government's objective significantly to boost the supply of homes", but that objective was clearly

[58]CD 6.1 para. 45

stated in the 2012 NPPF against which the Guildford Plan was examined. The Inspector examining the plan accepted the Liverpool method and on that basis and still found it to be sound – i.e. to be consistent with national policy which included that objective.[59] It could never also be a reason for departing from the approach of the examining inspector.

b. The second reason given relies on the effect on the need figure using the standard method. The local plan was adopted on 25th April 2019. The effect of NPPF 220 was to put in place transitional provisions. On the basis of those transitional provisions the plan was examined in accordance with national policy. In the course of the examination consideration was given to the effect of the standard method when examining the requirement figure in this plan, along with other OAN figures of 594, 654, 700dpa.[60] The plan was found sound – that finding accorded with the policy in current NPPF which deliberately includes the transitional provisions at para. 220.

c. The third reason given is that in April 2024 the 5 year HLS may be measured using the standard method. That, however, is more than 18 months in the future. The standard method does not apply now and the Council is not obliged to review its plan at this stage. In any event, the Prime Minister has recently made statements indicating that the standard method may be abolished.

d. The final reason relied upon derives from a passage in the PPG which is addressed to strategic policy makers. It is clearly directed at the plan making process

18. The fact is that it is wholly inappropriate (and unlawful) to attempt to look behind the transitional provisions in the NPPF and re-examine the Local Plan through a section 78 appeal inquiry. That approach would be wrong in principle and contrary to NPPF para. 15. For the same reason it would be wrong to apply guidance directed to the plan making process in circumstances where the PPG states clearly the issue should not be dealt with on a case by case basis on appeal.

[59] See also CD 6.1, IR para. 30 "*the figure of 562 dpa (including students) amounts to a 79% uplift over the demographic starting point of 313 dpa and is a significant increase above historic housing delivery rates; it can be expected to improve affordability and will boost the supply of housing in accordance with Government policy.'*

[60] See Miller Appendix 1 para. 3(b))

19. This issue, again, is one which must be decided in the Council's favour.

Windfalls

20. NPPF 71 is clear that an allowance can be made for windfall sites provided there is compelling evidence they will form a reliable source of supply.

21. LAA Appx 1 para. 5.6 (Table 1) shows the number of approvals and those figures are not disputed. Nor was Mr Miller's Figure 6 (PoE para. 11.5) showing that 68% of developments under construction in the borough comprised less than 5 units.

22. Whilst Mr Pycroft referred to historic delivery rates, he did not consider expected future trends. In XX he accepted, with reference to LAA Appendix 1, para. 5.12, that changes were introduced through the local plan resulting in villages being inset from the Green belt and that Appendix 2 to Mr Miller's PoE (referred to in his PoE at 11.7), being a newsletter from West Horsley, supports an increase in windfall development in future. Moreover, changes to permitted development rights in recent years have facilitates greater delivery of housing – that was the reason, for example, for the introduction of Class AA in Part 1 and Class 20.

23. In light of all of the above, the windfall allowance adopted by the Council is realistic and robust.

Specific Sites

24. The test for deliverability under the NPPF should by now be well understood. Sites not involving major development with planning permission, and all sites with detailed permission should be considered deliverable unless there is clear evidence homes will not be delivered within 5 years. Sites with outline consent or allocated or with permission in principle aer only considered deliverable where there is clear evidence that housing completions will begin on site within 5 years. The former places the burden on the party seeking to demonstrate a site is not deliverable, latter places the burden on the party seeking to demonstrate a site *is* deliverable.

25. The PPG expands on this at Ref ID 68-007-20190722. The former group of sites are sites "which are considered to be deliverable in principle". For the remaining sites "further evidence" is required. There follows a list of three bullet points that such evidence "may include". The words "may include" indicate that the list is not exhaustive.

26. As Mr Pycroft agreed in XX, in progressing a planning application there are a number of steps leading up to submission and approval: the applicant must draw up a draft of the scheme, seek the advice of planning consultant on the issues to address, appoint a team of consultants to bring forward the planning application, commission baseline surveys to support the application, seek pre-appliation advice, refine the scheme in light of any advice from consultants/ LPA pre-app advice, seek an EIA screening opinion if appropriate, and submit the scheme.

27. The PPG gives examples, noting that on larger scale sites with outline or hybrid permission clear evidence may turn on, for example, on how much progress has been made towards approving reserved matters, or whether these link to a planning performance agreement that sets out the timescale for approval of reserved matters applications and discharge of conditions. Otherwise, clear evidence of firm progress being made towards the submission of an application or firm progress with site assessment work may be sufficient.

28. As Mr Pycroft accepted in XX:

    a. What the first bullet in the PPG seeks is "progress towards approving". Where there is clear evidence of progress towards such an approval facilitating development within 5 years that will meet the test in bullet 1.

    b. The second example is "firm progress towards the submission of an application" – again it is progress towards submission. An application need not have been submitted for the test to be satisfied. It follows that if the test can be met even where an application has not been submitted, it can certainly be met by an application which has been submitted not approved.

    c. The wording in the PPG is 'firm progress' not (for e.g.) "submission is imminent".

d. In this regard, as he recognised at para. 11.37 of his own PoE, it is "of note" that when considering this issue on appeal "the SoS did not remove any of the sites with outline planning permission for major development where a reserved matters application had been made".

e. Firm progress on assessment work is at a further remove again – assessment work comes before submission, which comes before approval. Even where there has only been firm progress with assessment work, that may be enough to meet the test of deliverability.

f. Ultimately, what matters is the evidential value of the content of the written information before the inquiry the– question is whether there is a realistic prospect that housing will be delivered on the site within five years. Ultimately that will be a judgment for the inspector.

29. In terms of the specific sites challenged by the Appellant, the Inspector will have a careful note of the site specific evidence canvassed before him. Rehearsing it in writing will serve no useful purpose. Rather, the Council makes the overarching observations:

a. Mr Pycroft's approach plainly set the bar for meeting the test of 'deliverability' far too high. That much was evidence from the fact that, between the time he wrote his PoE and the inquiry, a number of the sites he was disputing received detailed consent, such that he was forced to amend his position and agree that they form part of the Council's supply. That indicates thee obstinacy of his position, his approach means he will only accept a site is deliverable when it has detailed consent, and not even at shortly before the grant of permission (even say where the Council's officers have published a report recommending that permission be granted).

b. In relation to a considerable number of sites, including Guildford Cathedral, Weyside Urban Village, West Horsley, Winds Ridge, Land at May and Juniper Cottages Ash Green, Land to the rear of 2 Ash Street and 4a Ash Street Aldershot, and Land North of Keens Lane, Mr Pycroft accepted that "progress" had been made, but refused to accept that that progress was firm. He accepted that that was a judgment, but generally fell back on the position that the reports that had been produced had not been provided to him, or if they had that he could not be sure objectors would not

persuade a committee to refuse. With respect, that approach is wholly unrealistic and disproportionate to the exercise. It is plainly not the role of a section 78 appeal on one site to conduct a mini-planning inquiry into the merits of development on innumerable other sites. Providing the level of information Mr Pycroft demands would not be feasible. It would result in inordinate time and money being expended at every inquiry. Indeed, the in this appeal, it was only at the CMC (after the Appellant had produced its Statement of Case) that the issue was even raised.

30. Overall, the Council appointed an independent expert robustly to review its 5 year HLS position and to present those findings as evidence to this inquiry. Mr Miller took a very fair approach to the deliverability of sites. His conclusion is that the Council has a 5.8 year supply of housing. That is a conservative figure, but one the Council is willing to accept for the purposes of this inquiry. Certainly, the Appellant's challenge to the Council's 5 year HLS should not prevail. On any view, thee Council has a supply in excess of 5 years.