IN THE MATTER OF:

AN APPEAL BY ST. MODWEN HOMES UNDER S.78 OF THE TOWN AND COUNTRY PLANNING ACT 1990 AGAINST THE REFUSAL BY RUGBY BOROUGH COUNCIL TO GRANT PLANNING PERMISSION FOR REDEVELOPMENT OF THE FORMER FOOTBALL PITCH AND TENNIS COURTS ASSOCIATED WITH THE ADJACENT EMPLOYMENT USE, INCLUDING DEMOLITION OF THE EXISTING PAVILION AND ALL OTHER REMAINING STRUCTURES AND ENCLOSURES RELATING TO THE PREVIOUS USE OF THE SITE; AND THE ERECTION OF 115 DWELLINGS, ACCESSES, LANDSCAPING, PARKING, DRAINAGE FEATURES AND ASSOCIATED WORKS.

LPA Reference: R24/0111
PINS Reference: APP/E3715/W/25/3373251

CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT

Abbreviations:

LD - Lucy Davison DG – David Gower AM – Abigail Murphy NH – Neil Holly RsFR – reason/s for refusal Xx – cross-examination R ex – re-examination GI – Green Infrastructure	CB – Chantel Blair MC – Mike Carr TS – Tom Smith RTC – Report to Committee DP – Development Plan PDL – previously developed land AH – Affordable Housing

Introduction

1. It is important to define the area of dispute between the parties right at the outset. The LPA longer argues for refusal based on RsFR 1, 3 and 4 (flood risk, safe and suitable access, transport network). But that is not the only observation that operates to delimit the area of dispute. There are two further observations as regards the ambit of disagreement.

2. The first is that the LPA does not support representations submitted to the inquiry that seek refusal based on impacts related to traffic, car parking, air quality, ecology or any of the other disparate matters raised by local residents. This is important, because it shows that having consulted all of its specialist disciplines related to these matters the LPA decided that none of these concerns were based on objective evidence, and RsFR based on such concerns would not be defensible.

3. Most importantly in this regard, whilst some local residents objected to the principle of developing this site, or suggested that the former sports facilities should be reinstated on the site, this is not the position of the LPA. It accepts that reinstatement of sports facilities on this site is not practicable: this is made clear in its Playing Pitch Strategy and the RTC (CB, para. 7.31(c), 7.33, 7.42(d)), and was accepted by LD in xx. Further, it accepts that redevelopment of a centrally located site, much of which is PDL, should be supported, and LD confirmed that this was a matter to which positive weight should be attached in the planning balance.

4. The second observation that arises from this preliminary point is that the LPA's concerns regarding the failure of the scheme to make the full suite s.106 contributions cannot found a RFR, it is not a material consideration, and even if it is a material consideration it attracts no, or at best limited, weight in the planning balance. We expand on this further below as the first

substantive topic in these closing submissions.

Failure to Make S.106 Contributions

5. A refusal notice must state 'clearly and precisely' the 'full reasons for refusal, specifying all policies and proposals in the development plan which are relevant to the decision.' The RsFR make no mention of the failure to make those s.106 contributions on which the LPA now relies when conducting its planning balance. If it wanted to make the case that the failure to make such contributions was not justifiable, and would have unacceptable impacts, it could and should have done so, citing the relevant policies relating to education, libraries, PROW, health care etc (the full list is set out in the RTC CD5.2, pdf p.49). Save for 'sports provision mitigation' (which we address below) it did not do so, because it accepts that there is no breach of policies relevant to these various items of infrastructure and/or services.

6. As this matter does not form a RFR, it is difficult to see how it can be used to justify the refusal of planning permission. At the very outset of her xx, LD accepted that if the Inspector agreed with the Appellant on the matters of design (to include loss of trees) and loss of sporting facilities, permission should be granted.

7. Neither is there any disagreement as to why there is no breach of policies relating to education, libraries, health care etc. LD agreed that the reason why contributions were not sought, and why the failure to make such contributions does amount to a breach of these policies, is because the DP has specific policies relating to viability, namely policies DS4 ad DS5. These allow the LPA to waive the requirement for contributions if provided with evidence that such requirements would render the scheme unviable/undeliverable. She further confirmed that the decision to waive the contributions set out in the RTC at pdf. p49 was taken having regard to Policies DS4 and DS5. What this means is that she and the LPA agree that

failure to make these contributions does not amount to a breach of the DP.

8. In the light of this, it conceptually impossible to argue that the failure to make such contributions amounts to harm that should be weighed in the planning balance. It makes no sense (in planning policy terms) to accept that the failure of a scheme to make certain s106 contributions is not a breach of the DP, but then accord negative weight to the failure to make such contributions. The test in s.38(6) is to determine matters in accordance with the DP, unless material considerations indicate otherwise. As regards this particular matter, there is accordance with the DP and (subject to other 'material considerations') that is the end of the analysis.

9. Can the alleged harm arising from the failure to mitigate impacts be brought into the planning balance through the caveat of 'material considerations'? In short, the answer is 'no' because to do so requires a coherent argument as to why a decision on this matter should be made otherwise than in accordance with the DP. No such argument has been identified by the LPA in this case; its position is a classic example of circular reasoning fallacy. If not making contributions when it is unviable to do so is harmful to good planning, there would be no justification for having development plan policies which allow contributions to be waived in circumstances where insisting on them would render the proposals unviable. There is no suggestion on the part of the LPA that policies DS4 and 5 are out of date, or inconsistent with national policy, and neither is it said that they should not get full weight for some other reason.

10. The LPA's position on this matter is also internally inconsistent. It does not argue that the failure to make provision for AH is a harm that should be weighed in the planning balance. In this, it is correct because policy H2 allows the AH requirement to be waived if supported by a viability assessment. No explanation was provided by LD in xx when asked why a distinction was being made between AH and other contributions.

11. It was suggested in Re x that the failure to make provision for AH does not have a harmful impact. This is an odd argument because if this were true applicants would not be asked to provide robust evidence of non-viability to justify non-provision of AH. It would be enough for a developer to say non-provision of AH is not harmful and thus the failure to provide it cannot be a good reason to refuse permission. In truth, there is no distinction to be drawn: all contributions are founded in policy requirements, and must be shown to be necessary for good planning. The same DP that requires contributions allows for them to be waived on grounds of viability, and that is as true for those 'missing' contributions that the LPA wants to weigh negatively in the planning balance as it is for AH which it is content not to weigh in the planning balance.

12. By way of interim conclusion on this issue, as a matter of principle, planning policy and simple logic it is not possible to attach weight to the failure to make contributions the non-payment of which is accepted by the LPA as being compliant with the DP.

13. If, contrary to this submission, weight is to be attached it cannot be anything more than limited weight. To attach significant weight to this matter, as LD does in her evidence, would be to accept the proposition that DP policies are written so as to permit significant harm. That simply cannot be right; it makes no sense to promulgate and adopt DP policies which do not discharge the basic task of preventing significant planning harm. If any weight is to be attached to the failure to provide contributions it must be limited harm for the simple reason that there is a good justification for not making the contributions, namely that if they were made it would render the development unviable. Attaching significant harm as invited to do so by the LPA would undermine those DP which are there to ensure development is not scuppered by demands which render it unviable and undeliverable.

14. A further reason why the weight to be attached (if any) should be limited is because if unmitigated harm is a material consideration, so is the fact that this

scheme will make a CIL contribution of £608, 722 (RTC at para. 21.3). Leaving aside education and sports mitigation (the latter being disputed), the other items total £510,572. What this means is that if the LPA wants to mitigate these impacts, it is being provided with the money to do so, plus a surplus of some £100,000. The Appellant accepts that education impact will go unmitigated, but when I asked LD in XX whether this gave rise to an unacceptable impact, or whether it would mean there would be no school places for children, she answered 'no'. That is why there is no RFR relating to education impacts.

15. The LPA sought to argue that if this scheme was viable it would have provided the CIL and all the contributions listed at pdf.p49 of the RTC. But that is to consider a world that does not exist; it is not viable, and there is no world in which this site can be developed and the LPA receive full CIL payments plus the site specific obligations listed in the RTC. Rather than considering the situation we are in as 'glass half-empty' compared with full-glass, it is better to consider it as 'glass half-full' as compared to no beer at all. Looked at in the round, planning permission delivers much needed housing and over £600,000 into the council's coffers to spend on mitigating the impacts of this development or development generally. Presumably that is why in the planning balance LD agrees that the economic benefits of the scheme should be accorded 'significant weight' in the planning balance (RTC, para. 24.16).

Unacceptable Loss of Sports and Recreational Buildings and Land

National Policy

16. NPPF para. 104 – applies only to sports and recreational buildings which can be described as 'existing'. If the facilities on site can no longer be described as existing playing fields, tennis courts etc., the policy is not engaged and there is no justification in national policy for refusing this scheme on the basis

of unacceptable loss of sports and recreational buildings and land.

17. Whether a use is 'existing' as that concept is used in NPPF104 requires the exercise of planning judgment, but by reference to a test supplied by the Hight Court (CB's POE p.19, para. 7.30 (c) and (d)). There appears to be no disagreement between the parties on the test itself: 'is the loss of the use so permanent that the word existing can no longer apply?' In applying that test, two matters fall to be considered (CB para.7.30(e)): period of non-use and the ease with which the use could be reinstated?

Period of non-use

18. No two cases are identical, but it is instructive that in the Stoke Mandeville case (CB para. 7.34) the sports pitches were ready to use, but because the use ceased some 7 years earlier the court held that it was open to the LPA to find that the facilities were no longer existing within the meaning of NPPF104. Contrast that with the present case where the use ceased of all of the facilities (there is no warrant for making a distinction between the pitch and the other facilities) some 23 years ago. When almost two and half decades have elapsed since facilities were last used, it is very difficult to reach any conclusion other than that the loss of the use has become so permanent that the word 'existing' can no longer be applied to the facilities in question. The LPA's own audit records that these facilities do not form part of the supply figure (CB para. 7.42 (c), which further supports the conclusion that they no longer exist.

Ease of reinstating use

19. The high ct judge said (CB para. 7.30(e)(i)) that it will virtually always be the case that a sports field is relatively easy to bring back into use, and as such this was not a factor by itself which could be used to say that the use still existed. This is therefore one of the rare cases where even this factor does not support a finding that facilities exist. In support of this submission we rely

on the following submissions:

a. The Council's playing pitch strategy identifies which disused pitches are suitable for reinstatement, and this is the only one which is not mentioned as suitable.

b. LD accepted in xx that it would challenging to bring the facilities back, and in this regard she drew no distinction between the sports pitch, the tennis courts or the pavilion (and neither did the Pitch Strategy or the RTC). She was right not to – the pavilion is due for demolition (supported by both the police and the LPA), and the tennis courts are just as unusable as the pitch.

c. This is not just a case of it being difficult if not impossible to reinstate the use, but a case where as a matter of fact on the ground the facilities actually no longer exist. On a visit to the site anyone would be hard-pushed to identify the site of the football pitch, the function of which has changed to a natural attenuation pond. The former tennis courts are not visible. The pavilion has prior approval for demolition, and thus the appellant has the legal right to demolish it.

20. LD said in xx that in her view even agreeing to all of the above the facilities still 'existed'. This sounded like and was no more than a bare assertion, devoid of any reasoning by reference to the undisputable and undisputed facts. Her defence of 'existing' was faint-hearted at best. It is clear from LD's RTC and her evidence that she had not at any point asked herself whether the facilities actually existed, and neither had she had regard to the legal position as set out in the evidence of CB.

Local Policy

21. Local policy (HS4C) applies to these facilities and is engaged, because (a) it does not use the word 'existing' and (b) it expressly applies to all facilities and

land last in sporting use. There is a breach of this policy, and two questions arise: (a) what weight should be attached to this breach and (b) does the breach mean there is a breach of the DP read as a whole.

Weight

22. DP policies should be consistent with national policy (NPPF para. 36(d)). The weight to be attached to DP is dependent on their degree of consistency with the NPPF (para. 232).

23. Policy HS4 is clearly and fundamentally inconsistent with NPPF104. It sets up a completely different test, as amply demonstrated by the fact that when applied in the present case the application of the local policy gives a different outcome (the policy is breached) to the outcome provided if one applies NPPF104 (no breach). The inspector in the Saffron Waldon appeal observed that NPPF104 was not to be interpreted as protecting such uses in perpetuity (see CB para. 7.29 (b)), whereas this is precisely the effect of HS4. If the Secretary of State wanted such uses to be protected in perpetuity, his policy would have said so. Applying NPPF 232, there is zero degree of consistency between NPPF 104 and the local policy.

24. In response to the above, the LPA does not engage with the test of consistency at all. Instead it focuses on a different question, namely whether local policy can go 'further' than national policy. Whatever the answer to this question, it does not provide an answer as to whether HS4 is consistent, and if so how consistent, with NPPF104. We heard nothing from LD in chief or in xx has to how and why the policy was consistent.

25. In the present case the LPA invites us to infer that because policy HS4 found its way into the DP, the inspector must have found it consistent with national policy. The better inference is that the point was never argued or considered. If it was, the LPA had the ability to provide evidence to this inquiry in the form of submissions it made at the plan examination, and the inspector's

report setting out the justification for saying the policy is consistent with the NPPF. There is no such evidence available. NPPF para. 232 appears under the heading of decision-making, and it is clearly for the decision-maker to consider the matter of consistency and weight. It is for the inspector in the instant case to explain if, how and why the local policy is consistent or inconsistent before ascribing weight. We set out above why it is wholly inconsistent; by contrast the LPA has failed to explain why it is consistent.

26. In fact, the matter goes further than this. In her RTC LD accepted it was inconsistent with the NPPF and for that reason only limited weight could be attached to it (CD 5.2 – RTC para. 10.9). She was unable to explain why her proof of evidence now says the direct opposite. In her written evidence she sought to justify full weight to the local policy by reference to the emerging plan, but somewhat bizarrely accepted that the policy in the emerging plan (CD7.4 p.60, pdf 99) did not protect these facilities because the facilities do not contribute to provision in the area and have not done so for 23 years, the LPA has no power to ensure that they do, and that it is wholly unrealistic to expect the owner to reinstate them.

27. Having regard to all of the above matters, if any weight is to be attached to breach of policy HS4, it should be very limited weight.

Breach of DP read as a whole

28. Breach of one policy does not necessarily equal breach of the DP read as whole. Regard must be had to the centrality or otherwise of the policy, and the weight attached to its breach, in the context of all of the other policies of the plan that are not breached.

29. In the present case, subject to findings on the issues of design and trees, all other policies of the DP are complied with. The relative importance of policies that require adequate provision of housing, in highly sustainable locations, and the re-use of the PDL, far exceed the importance of a policy

which is inconsistent with national policy. Further, the DP read as a whole allows for contributions to infrastructure to be waived where it would be unviable for such contributions to be made. Accordingly, the failure to make the contributions sought by the LPA is justified by reference to policies DS4 and DS5, and thus there is compliance with the DP read as a whole.

30. LD was unable to explain why the viability report justified waiving all the other contributions, but not the contribution relating to sports provision. The only response she made was that during the processing of the application there were negotiations with the applicant where the applicant suggested that it may be willing to make a partial contribution. The problem with this explanation is three-fold (a) no weight can be attached to without prejudice negotiations which were never concluded (b) the viability report shows even without any contributions whatsoever the scheme would be unviable and thus DS4 and DS5 apply and (c) the sums discussed were not acceptable to the LPA which still insisted there would be a breach of policy HS4 without any explanation as to why this contribution was different in principle to all of the others that were being waived.

31. I asked LD the following question twice:

'If this were the only RFR – assume Insp agrees with us on design and loss of trees, which are the only other RFR you rely on – would you be saying it is sensible planning to refuse permission and end up with a derelict site, and no housing, because no equivalent provision being made for loss of private pitches which have not been used for almost 25 years, which are incapable of being brought back and where the scheme cannot viably make alternative provision?'

32. The fact that she was unwilling to answer speaks volumes.

Impact on Character and Appearance

33. This is a derelict site, and currently detracts from the character and appearance of the area. It has lain vacant for almost a quarter of a century. The LPA accepts that it should be redeveloped, it accepts it should be redeveloped for housing, and it agrees that we should be seeking to make the most efficient use of PDL. Its redevelopment poses serious commercial challenges, and the scheme that the applicant brings forward is unviable. It is to the applicant's credit that it is prepared to redevelop the site for a much lower developer's return than Govt. guidance agrees as being a reasonable return.

34. LD rightly accepted that the relevant local and national policies on trees and GI design (SDC2, NE2, NPPF 136) do not mandate that all trees and GI must be retained intact. She agreed it was a matter of planning judgment as to whether the right balance had been struck between delivering housing and safeguarding important natural features on site.

35. But this reasonableness is then not reflected in the evidence of AM and DG in their criticisms of the design and the consequent loss of trees.

36. DG's evidence amounted to no more than saying that the loss of TPO trees was a bad thing, and more trees should be saved by sacrificing more plots. This leaves out of account that the applicant has already through negotiation and compromise reduced the scheme from 134 dwellings to 115 dwellings, thereby retaining more trees and making space for its 2:1 tree planting. No answer was forthcoming as to how a scheme which is already unviable will ever come forward if more units are lost. The criticism that new tree planting cannot replicate the size and age of existing trees fails to appreciate that is the precise reason why 2 trees are being planted for each tree lost, and why heavy standard trees are being provided. There is simply nothing more that can be done if the site is to be developed in a commercially viable manner. There was also a failure to recognise the scheme allows local

residents to come onto the site and enjoy the mature trees that will be saved (and taken into positive management) and make use of the proposed POS, clear benefits of the scheme as opposed to the do nothing scenario.

37. AM's evidence was an academic critique of design narrative (or alleged lack thereof) rather than telling the audience what was bad about the design that was put forward. When her evidence condescended to detail, it amounted to little more than detailed disagreements about the design choices that had been made, but without any consideration of the constraints of delivering the required quantum of development consistent with modern parking standards, private and public amenity space and highways requirements. There was an unexplained conflict with wanting a more urban scheme, but at the same time wanting more trees and more GI. On matters of detail (pedestrian accessibility, public surveillance of existing play area etc) AM accepted that the design was an improvement on what existed at present but focused on minor drawbacks without any positive contribution as to how these could be fixed without losing something in return.

38. As MC explained, this area of Rugby has seen housing in different stages in history, it is a patchwork of development blocks, but commonly dwellings are predominantly 2 storey dwellings with occasional 2.5 storey terraces and detached and semi-detached dwellings (ie not just terraces) with pitched roofs, developed in one period rather than incremental growth in small more haphazard small clusters developed plot by plot like older village housing. The layout typology in the area is typified by housing overlooking often rectilinear mostly straight streets, as opposed to curving or winding streets.

39. The new development proposed would be read as complimentary part of that townscape development reflecting predominately 2 storey terraces, detached and semi-detached dwellings (ie not just terraces) with pitched roofs, with housing overlooking rectilinear mostly straight streets.

40. Criticisms of individual plots, parking and linkages:

a. Plots 69,70 and 71- adjoining the footpath link to Essex Street, MC explained the new link would usefully improve pedestrian connectively in the area, providing surveillance for all but a short part of the link, with dwellings set back behind a low hedge and front garden. Plot 71 has the added benefit of being a visual end stop to Princes Street.

b. Plot 64 on the north-eastern edge - MC explained this would be attractive to residents being in a quiet area, detached and with less overlooking, whilst at the same time providing useful natural surveillance of the parking court to the east. A view of parked cars with tree planting between does not make it unattractive (many dwellings overlook parking in streets and spaces without undue concern).

c. The benefits of new dwellings overlooking the existing play area could be seen (V3 and V6) , and the views to the rounds gardens and the footpath alongside the southern boundary at the same time give a sense of natural surveillance currently missing from that route (as accepted by AM).

d. Approach to parking provision - a range parking solutions seek to disperse the parking requirements, including on street, on plot and (unlike current suburban housing) there is use of rear parking courts, that being a logical design solution to remove cars from the street scene in places.

e. MC explained how the new footpath links through the site did not need to be exactly straight lines as sought by the Council. Some minor alignment variation is logical to allow footpaths to go around retained trees and features. Avoiding a vehicle route through the site

dissipates traffic movement in and around the site and encourages residents to prioritise walking when going east to west.

41. Criticism of tree loss and level of replacement:

a. The design embraces existing trees where they can be a positive part of the new townscape, the trees of particular note being the central arc of trees that will be a striking attractive focal point the east and west streets. This green space has the potential to become a new destination for residents and the wider existing community. A further large tree group to the east adjoining the back of properties on Princess Street is also retained and set alongside a new street.

b. Some trees of high value are proposed for removal as they would be incongruous and compromise the new layout being created. The Council was unable to evidence how a design retaining them could be viably achieved.

c. More specifically as regards the tree group on the west (T149-164, TPO group G1), it is not possible to retain this as it sterilises a large area, and the depths to the boundary do not allow new development to be accommodated. Similarly, there are a few other places where trees are removed, but the removal of some existing tree trees is accepted in policy, custom and practice, especially where the site needs regeneration and subject to viability concerns, a pragmatic approach is needed.

d. The new development will allow the substantial areas of existing trees that are retained to benefit from optimal management as part of the new public realm, with the submitted planting plans show the commitment to 2 to 1 replacement tree planting, a number of those being large 'extra heavy' size from day one which will mitigate the

losses.

42. Detailed architectural criticisms:

    a. Architectural design is often a matter of judgment, and whilst not to the satisfaction of the Council, the approach was explained in evidence and a design narrative provided, with balanced well-proportioned elevation treatments, with features such as larger windows, Juliette balconies and double height rectangular chalk render window framing (reflecting double height bays locally) used regularly to an animate the frontage. This in combination with the use of materials provides recognisable contemporary quality commensurate with the regeneration of the site whilst being reflective of the locality.

    b. MC explained that a more eccentric solution such a monoculture of a single house type or exactly match building height along a street would be monotonous and lack visual richness. With regularity and design impact provided as seen in a common building line and a common architectural theme, the design approach would be bland if a further step led to all dwellings being the same. The proposals do not need to be photocopy of a terrace (the Council appeared to agree) and some variety in built form in that context is a positive of the scheme.

43. In summary, the proposed development will be a polite high-quality addition the existing townscape layout character and a recognisable sense of place with a logical movement pattern and new streets and spaces focused on the retained trees. It will provide a new place residents and locals can enjoy. It represents good design by reference to local and national design policies.

5 Year Housing Land Supply

44. The parties agree that the LPA cannot demonstrate a 5YHLS land supply and that the tilted balance is engaged. The difference relates to the degree of shortfall, with (on the revised figures following the roundtable) the Council claiming a supply of 4.16 whereas the Appellant finds a supply of only 2.06 years. The divergence between the parties on the level of supply is certainly significant, but there is far less disagreement over what it means. This is because LD agreed that regardless of whether the supply was at the level claimed by the LPA, or at the level claimed by the Appellant, significant weight should be attached the supply of housing. 'Significant' was at the top of her scale.

45. In the light of this, and also in light of the Appellant's case that this proposal accords with the DP read as a whole, it may be that the Inspector decides that he does not need to determine the precise shortfall. Nonetheless, to provide assistance should it be needed, we briefly cover some of the main points.

The Supply and Coventry's unmet Need

46. The first point to make is that even if no deduction is made to account for that part of the supply which relates to meeting Coventry's unmet need, the supply stands at 2.68 if the Inspector accepts TS's evidence that 987 dwellings should be deducted from the supply on the basis of the 5 disputed sites. So this is not the area of dispute that accounts for majority of the divergence between the parties.

47. NH sought to dismiss previous relevant decisions, on the basis that (a) they were not binding precedent and (b) matters of distinction in terms of policy and facts.

48. As regards (a), whilst is it is true that the inspectors are not bound by the decisions of other inspectors, the law is also clear that such decisions are a material consideration, that consistency in decision-making is important, and if a different approach is going to be taken the inspector must provide a justification for doing so. The decisions relied upon by TS are relevant and on point, and if a different approach is to be taken in this case robust reasons must be provided.

49. The requirement figure set out in DP is out of date. Supply is to be measured against the need figure calculated using the SM. This much is agreed. The disagreement relates solely to the supply, and whether all of the supply should be counted or whether there should a discount from the supply to account for the fact that some of the supply has to meet the unmet needs of Coventry. As all the previous decisions show, and contrary to the evidence of NH, this has nothing to do with interpreting national or local policy, which is silent on the issue. It requires the exercise of planning judgment, and exercising that judgment does not amount to creating new DP policy (none of the previous inspectors said or accepted that they were doing any such thing).

50. The theme that emerges from the previous cases is that because the SM tells us what the need is for only the authority area in question, it is important when calculating 5YHLS to have regard only to that part of the supply which will meet the need for the authority in question (or, to put it another way, to ignore or discount from the supply that part of the supply which is needed to meet the unmet needs of an adjoining authority). The rationale for this is that any other approach produces a skewed approach, and has the potential to undermine the overall thrust of the NPPF which is to boost the supply of housing. Each and every inspector faced with this scenario took the same approach – NH was unable to produce any decision in which the approach he advocates was preferred.

51. NH drew the distinction that in some of these cases the DP in question specifically identified sites that were 'set aside' to meet the unmet need of adjoining authorities. That is correct as a matter of fact, but not all distinctions are material distinctions. The rationale underpinning these decisions was not based on this fact, it was based on the higher level analysis that counting supply that is needed not to meet the need of the authority itself as calculated using the SM but the needs of other authorities has the effect of over-estimating the supply that is present to meet the needs of the authority.

52. In any event, that distinction (sites specifically identified to meet the needs of other authorities) does not hold good for either the Warwick or S. Derbyshire cases. NH sought to argue that the policy wording in those cases may have been different (without providing evidence to this effect), but of course this issue has nothing to do with the policy wording in respective plans as such because the policy is not designed to address such a situation.

53. The Warwick case in particular is on all fours with the present case. Other than saying he disagreed with the approach, NH had no substantive critique of the planning judgment of the inspector in that case. The relevance of the need having gone down in Warwick to the point that is in dispute here was left unexplained. It was then said by NH that Coventry no longer had an unmet need, but there is no support for that proposition other than by reference to an emerging plan which has little to no weight. NH complained that TS's approach was a mix and match approach whereby he was relying on the DP for arguing that Rugby must provide for Coventry's unmet need whilst saying the policy in the DP was out of date. This criticism is misconceived. The policy in the DP as regards the requirement figure is out of date – it has been overtaken by the SM. But in so far as the plan requires Rugby to meet Coventry's unmet need, that remains up to date unless and until a new plan in Coventry is adopted which does not ship out any need to Rugby and a new plan is adopted in Rugby which makes no provision for

meeting Coventry's unmet need.

Clear Evidence of Deliverability

54. Once again, the starting point is to have regard to how inspectors and the SoS have considered the question of deliverability in numerous cases, and to take an approach that is consistent with those decisions. In his rebuttal NH seeks to dismiss the relevance of these decisions, but without setting out why the approach taken on those cases was wrong or why evidence which was dismissed as insufficient in those cases should be accepted as being sufficient in this case.

55. The PPG provides examples of the types of evidence that can be provided to meet the threshold of clear evidence, and makes clear that the onus is on the council to provide this evidence for category b sites. In this case the Council provided no evidence on 5YHLS, choosing to rely on their position statement. They then provided rebuttal evidence (some of which was in fact not rebuttal), and even in that referenced documents such as proformas that have not been supplied to anyone for assessment and analysis.

56. In the case of Braintree on sites with outline approval, proformas were submitted by developers explaining when RM apps would be made, when when discharge of conditions would be applied for, when a start on site would be made and so on. The SoS found that level of information provided was insufficient to meet the bar of 'clear evidence', and removed those sites. We invite the Inspector to look at that evidence and compare it with the evidence provided by Rugby Council, which is less, not more, than the evidence which was provided in Braintree.

57. The fact an application has been submitted is not clear evidence – Inspectors have found that applications subject to outstanding objections are not deliverable.

58. The LPA's reliance on Lichfield's Start to Finish is misconceived. That provides general information about delivery rates on sites that are consented; it does not tell us whether clear evidence exists in respect of individual sites that they will deliver in the 5 year period. The PPG requires this to be assessed on a site by site basis, by reference to the actual evidence provided.

59. ***Remainder of Houlton (680 dwellings):*** *outline approval only, no RM application, no firm of evidence when a RM application will be made, how long it will take to approve it (of course there can be assumption that it will be approved – until it is made we do not know what objections there may be to it). The Coucil has also wrongly relied on a pending RM application for 216 dwellings which does not relate to this site. Even on that site (which is not this site) the council accepts that only 157 dwellings will be delivered – that on application which has been made and where the LPA says approval is imminent. It is a mystery how all 680 dwellings can be claimed in respect of site on which no RM application has been made. There is reference to planning performance agreements and pre-app advice, none of which is before the inquiry and which in any event does not provide firm evidence as to when a RM will be made.*

60. *Removal of this site alone brings the supply down to 3.14 years.*

61. ***Cawston Farm 2 (80 dwellings):*** *we repeat all of the above points, but in addition emphasise that this site does not even have outline planning permission. The application has been pending for 6.5 years!! There is a resolution to approve subject to s.106, but 9 months have elapsed without this being signed. There are 7 pre- commencement conditions, with no evidence what has been done or will be done to discharge these if and when the consent is issued. We are a long way from any evidence on when a RM will be made (not least because there is no outline permission!).*

62. ***Cawston Farm 2 (80 dwellings) –*** *no planning permission. An outline application for up to 350 dwellings has been pending determination for* ***over 3 years****. The application has received* ***objections from National Highways and***

the LLFA. *As the previous appeal decisions show, applications subject to outstanding objections do not meet the standard of clear evidence to be deliverable. No clear evidence in relation to firm progress towards the submission of a RM app, nor firm progress with site assessment work.*

63. ***Land South West of Cawston Lane (75 dwellings) –*** *not even an outline planning permission, has been pending determination for 6 months. It is subject to objections from the woodland trust and the LLFA. No evidence of progress towards RM application or site assessment work.*

64. ***Land to the North East of Cawston Lane & Land to the East of Alwyn Road (Taylor Wimpey) (72 dwellings):*** *outline app pending determination, noclear evidence for deliverability of the site. Application been pending for 6 months with several outstanding objections including from the County Council, the Wildlife Trust and Active Travel England.*

The Planning Balance

65. For all of the reasons set out above, this is a proposal that accords with the DP – it enjoys the s38(6) statutory presumption in favour of the grant of permission, and the NPPF states that such proposals should be approved without delay:

    a. It represents good design, and the correct decisions have been made regarding tree loss and tree replacement having regard to all of the other objectives a successful design has to secure, not least of all that it produce a scheme that is financially viable so that it will actually get delivered.

    b. Although there is a breach of policy HS4, there is no breach of the development plan applied as a whole having regard to (i) policies which are much more central to the decision that has to be taken in this case, (ii) the very limited weight that can be attached to a policy

which is in marked conflict with national policy, and (iii) the fact the scheme cannot afford to make contributions towards sports facilities given the agreed viability position (which means that the requirement for such contributions should be waived having regard to Policies DS4 and DS5).

c. The reliance on the 'harms' created by not making the remaining financial contributions is misconceived – the non-payment of such contributions accords with Policies DS4 and DS5 and there is no suggestion by the council that the failure to make such contributions amounts to a breach of the DP.

66. If those submissions are accepted there is no need for any further analysis. The application accords with the DP, and should be approved without delay. However, if the Inspector concludes there is breach of the DP applied as whole, the tilted balance applies. Permission should not be refused unless adverse impacts significantly and demonstrably outweigh the benefits.

67. The benefits in this case are substantial:

a. The Council accepts that significant (top of scale) weight should be attached to the delivery of housing regardless of the dispute about the degree of shortfall against the 5 YHLS requirement. The Appellant agrees, and adds that the shortfall is very significant on TS's figures, and it will not be rectified any-time soon (the draft plan is at an early stage, and even if submitted and examined according to the current timetable (which rarely happens) there is nothing to say it will be found sound. CB attached very significant weight to this benefit, but little turns on this difference because both planning witnesses place the weight at the top of their respective scales.

b. The Council accepts that significant weight should be attached to the economic benefits of the development.

c. It further accepts that significant weight should be attached to the provision of POS in a ward with deficiencies of all types of open space.

d. In addition, it accepts moderate weight should be attached to the provision of new footpaths across the site, and enhanced pedestrian and cycle links into and out of the site. Overall it agrees that the social benefits of the development should be accorded moderate positive weight.

e. LD accepted in her RTC that moderate weight should be attached to the environmental benefits of the proposals, and this was at a stage when she believed that the scheme would not deliver BNG. Now that it is agreed that the scheme will deliver such gain, the environmental benefits are even greater.

68. If the Appellant's primary case that there are no harms is rejected, we must ask what are the harms, how significant are they, and do they 'significantly and demonstrably' outweigh the benefits. The only potential harms are:

a. Failure to make a financial contributions to alternative sports provision. This can only be accorded very limited weight for all of the reasons set out above.

b. Failure to make other financial contributions. Even if it is possible as a matter of principle to have regard to the failure to make contributions (which everyone agrees cannot be made given the viability evidence), for all of the reasons set out above this harm can be accorded only very limited weight.

c. Design/loss of trees – the Council sought to suggest that the matter of design is binary. It is either good design or bad design, and if it is the latter the NPPF uses strong language – it should be refused (NPPF 139). Both limbs of this argument are wrong:

    i. Design is not binary. There is no such thing as perfect design. It is all about compromises. It is almost inevitable that two designers will disagree about which compromises should be made, where and how. If the decision-maker decides that in some respects the design could have been better, he must further decide how severe the harm is and what weight should be attached to it. In this regard we draw attention to the Rushwick decision (CD 16.7) at para. 11 where the inspector found design harms which he deemed 'moderate'.

    ii. The legal position is clear: even where the NPPF language of refusal it does not mean that refusal must follow. Having determined the degree of harm and ascribed a weighting to it, the decision-maker must ask whether this level of harm significantly and demonstrably outweighs the benefits. In this regard the appellant relies on the Rushwick decision at para. 26 and 31 where the type of argument put forward by the LPA here was rejected. It also answers the LPA's point that there are no cases where the tilted balance was satisfied despite design shortcomings.

69. The harms in this case do not come anywhere close to significantly and demonstrably outweighing the significant benefits of this scheme. It should therefore be approved, either because it accords with the DP read as a whole, or because it passes the tilted balance set out in NPPF para.11(d)(ii).

Conclusion

70. For all of the above reasons, the Inspector is respectfully requested to allow the appeal and grant planning permission.

Satnam Choongh
Number 5 Chambers

23 January 2026