APPEAL REF: 6003106
Land East of Rugby Road, Clifton-upon-Dunsmore

Appeal by Richborough Estates

Outline application (ref R25/0565) with some matters reserved for the demolition of all buildings and the residential development of up to 160 dwellings, and creation of associated vehicular access off Rugby Road, pedestrian/cycle access points, parking, landscaping, drainage features, open space, children's play area and associated infrastructure (all matters reserved except for vehicular access off Rugby Road).

CLOSING SUBMISSIONS ON BEHALF OF THE
LOCAL PLANNING AUTHORITY

Introduction and Planning Policy Context

1. In the adopted LocalPlan [CD5.1] the appeal site is unallocated. On the northern edge of Rugby to the southeast of the appeal site is the "Rugby Radio Station" land allocated by policies DS3.3 and DS4.2 [CD5.1.1, p25 & 28] and now being developed out as Houlton. Closest to and south of the village is the new access road, Houlton Way; the 6,200 homes and 16ha of employment land are some distance away, although within the parish. In the adopted local plan, no sites were allocated at the village of Clifton-upon-Dunsmore ("CuD") itself.

2. But now, CuD village is destined to grow. The referendum version of the emerging CuD Neighbourhood Plan [CD5.27, ¶4.26] ("the NP") expressly accepts that in the next round of plan-making the housing need for the parish will be met by allocations in the emerging local plan of "around" 150 dwellings. The "Reg 19" emerging Local Plan (now submitted for examination) ("eLP") [CD5.25], policy S6 [p17], does indeed include three allocations totalling 150 dwellings at CuD. Spatially, these sites are on the north side of the village

[CD5.26], predominantly on the northeast side. The appeal site was promoted for inclusion in the eLP [CD5.61] – the appeal scheme appears to be akin to "option 1" [p4]. Option 3, also being promoted by the Appellant with the 'blessing' of its agents, was for 700 dwellings over a much larger area (almost double the area of CuD itself) [p5]. It was conceived as following on from phase 1 (options 1 and 2) and with connectivity to Houlton's amenities in mind [p8].

3. The preferred options Reg 18 consultation took place between 24/3/25 and 19/5/25. It was then clear to the Appellant that its site at CuD had not been selected for allocation – not even the Phase 1 option. It was also clear why – the site selection methodology and assessment evidence was published with the consultation documents. On 26/3/25 (2 days after the start of the Reg 18 consultation) the Appellant sought pre-application advice which was received on 15/5/26 [CD3.3]; on 24/6/25 the planning application was submitted [CD1.1]. This application was clearly the result of the 'disappointment' in the plan-making process. Then, as soon as it was able to do so, non-determination was appealed without further reference to the Council. The Appellant says, [CD3.2, ¶3.12-13] that the Council was failing to engage. Nothing could be further from the truth. The extension of time had been agreed in order for statutory consultees to respond on further information that had been provided. The Appellant knows that the longer the local plan process goes on, the worse the prospects for development on the appeal site are.

4. The NP referendum is expected to take place on 7 May – the day after the inquiry closes. Of course, it may not be approved; in which case it will cease to be a material consideration. However, there is a stong likelihood is that it will be approved and 'made'' thereafter – but not for a couple of months. This inquiry and these submissions proceed on the basis that by the time the decision in this appeal comes to be issued, the NP will not have been made.

5. The putative reasons for refusal are set out in the Council's Statement of Case [CD6.1]. They balance, on a 'tilted' basis, the adverse impacts and the benefits

of the development. The adverse impacts concern settlement identity and character; (2) landscape and visual impact, the relationship with local topography, and the truncation of the important view. The proposal is also judged to be contrary to the development plan taken as a whole.

6. The post-CMC note confirmed three main issues. Each will be examined in turn; but the "potential availability of alternative sites" issue will be examined under the "housing supply" issue as that is where Mr Weekes took it into account.

Issue 1: Whether the appeal site is an appropriate location for housing, having particular regard to relevant provisions of the development plan, ... and the connectivity of the proposed development to local infrastructure.

7. The relevant adopted LP locational policy is GP2 [CD5.1, p12] which provides that development on sites in the countryside (such as the appeal site) outside settlement boundaries will be resisted unless for exceptions which do not include the appeal scheme. The Appellant (GS proof ¶3.21) accepts a breach of GP2 which was confirmed during evidence in chief.

8. The eLP adopts a similar approach. Policies S2 [CD5.25, p13] and S6 [p17] allocate land for housing. The appeal site is not one of them. Outside settlement boundaries, policy S5 is again restrictive. The appeal site is therefore not in a location favoured by the eLP for housing.

9. The NP [CD5.27] updates the CuD settlement boundary [p19] and policy G1 supports development within it. Outside settlement boundaries (such as on the appeal site) national and local planning policies for development in the countryside apply. The appeal site is therefore not in a location favoured by the NP.

10. The connectivity issue turns on two matters. First, connectivity to the village via Rugby Road. The agreed (in XX) distances from the centre of the site to services and facilities are set out in the table in Mr Parker's proof [p17]. Of course, some

dwellings will be close, but as many will likely be further away. The 'quality' of the route (for example: gradient, width of footway, nature of traffic), lack of rest refuges) will have been observed by the inspector on the site visit and the footway improvements proposed will be taken into account. Nevertheless, the combination of distance and quality leads Ms Murphy to conclude that walking / cycling is not likely to be the 'mode of choice' even for shorter journeys of less than 2km.

11. As yet, there is no agreement for a surfaced footpath through the recreation ground to the village as a better route than via Rugby Road. The parameters plan shows a "potential" access on foot at the northeast corner of the site. The recreation ground is owned by the Parish Council. The public cannot be excluded from the recreation ground – including those who might live on the appeal site. But they have no right to a point of access through a perimeter fence, nor to a bound / surfaced link through to the village. The Appellant's primary case is that such a route is not needed. But it is keen to point out that it will provide a pedestrian / cycle route to the edge of the recreation ground. But there is no guarantee (whether by offer of a financial contribution or a negatively worded condition) for a connection through the recreation ground to the village.

12. As a result, the 'connectivity' to village facilities on foot / cycle is poor. Mr Weekes gives this factor limited weight in the planning balance [proof 10.12].

Issue 2: The effect of the proposed development on the character and appearance of the area, including considerations of landscape and visual effects and settlement identity.

13. Landscape character impact. There is actually not that much difference between the experts. Mr Berry (for the appellant) describes the evolution of the illustrative landscape strategy (CD1.7) which has been used as the scheme to compare against the baseline for the purposes of assessment in this appeal. His assessment of the landscape character effects are in §4, Table 1 of his proof [p22]. Mr Wakefield's assessment disagrees in some respects:

a. There is no material landscape character impact at National Character Area, County Landscape Character Area, or at a borough level at Year 15.

b. So far as the impact on the landscape character of the site and its immediate surrounds is concerned, there is a material difference:

    (1) In Y1 both Mr Wakefield and Mr Berry assess a major-moderate adverse impact.

    (2) However, at Y15 Mr Wakefield concludes a major-moderate impact remains while Mr Berry's assessment drops to moderate adverse

14. These differences are material. They result from the level of the magnitude of change adopted as described in the methodology [JB appx vol 2, p84]. The issue / difference is whether the magnitude will remain "large" at Y15. "Large" means that the change will be "highly noticeable" as a result of the introduction of "highly conspicuous new development" bringing about "fundamental change" to the baseline. At a site / immediate surroundings level it is submitted that this will plainly be the case. The change will affect the majority of the receptor and will be permanent.

15. We submit that Mr Wakefield's assessment on this issue is to be preferred.

16. Appearance / visual impacts. The representative viewpoints that fall to be considered are agreed. Mr Berry explains [proof ¶2.15+] that the LVA contained a ZTV which then identified representative VPs 1 to 16. At the Council's request VPs 17-22 have been added (JB ¶4.6). In some instances Mr Berry has found (¶7.39) a greater impact than the LVA. The key differences are in respect of VPs 1 & 20, 17, 18, 21, and 22.

17. VP1 & 20.To the immediate north of the appeal site is the village's recreation ground. The views south will plainly be materially impacted. The appeal development will fill and dominate the view even in Y15. Mr Berry's assessment

that the impact will be moderate adverse, and does not reach a threshold which is objectionable, is simply not credible.

18. The open view to the south across the appeal site is also an “important view” recognised by NDP policy ENV5 [p51]. These views have been identified as being important to the setting and character of CuD. Development proposals should respect them. Development proposals having a significant adverse harmful visual [effect] will have to be justified on the basis of the need for the development and be appropriately mitigated. Again, the important view will be all but obliterated. The view to the south and southwest (see Ms Murphy’s appx Figs 2.1 & 2.2) will be gone. This is not ‘respect’. There is no mitigation. The Appellant’s answer is that when layout and landscaping come to be approved at reserved matters ‘all will be well’. That is not an answer. First, that is not what has been illustrated for assessment purposes at this stage. Second, the parameters plan has a horizontal grain and any view corridor to the south would cut across it vertically. If that is approved, the LPA will be unable to insist on changes at reserved matters. Finally, even when the concern over the important view became clear, the Appellant has not sought to ‘update’ its original vision set out in the February 2024 Vision Document [CD5.61]. The Appellant also sought to down-play the Important Views on the basis of the Examiner’s comments on the evidence base behind them [CD 5.27.1]. However, the outcome of the examination is that an important view policy (now ENV5) remains in the plan. It was not deleted altogether. The Examiner must have been satisfied that the basic conditions for including it were met. It is now the task of decision-takers in development management to apply it not ignore it.

19. VP17. This is the representative viewpoint from Houlton Way. Mr Berry approached his assessment using the motorist as the receptor. Mr Wakefield appreciated that there would also be the more sensitive pedestrians and cyclists. Therefore Mr Wakefield’s assessment is more robust and should, we submit, be preferred.

20. VP18. This is the representative viewpoint from the golf club. Although it is a 'private' club, the public are welcomed onto the terrace for recreation and to play golf for a fee. It is not therefore a private view. We submit that the development extending from the village, down the slope towards Rugby, will plainly be noticeable and have an effect that will be significantly harmful.

21. VP21 represents the track behind Newall Close off which the allotments area accessed. Both experts agree an impact of moderate significance. Mr Wakefield judges it to be significantly harmful. VP22 represents the view from the dwellings on Newall Close.

22. We again submit that Mr Wakefield's assessment is to be preferred.

23. The final element of this main issue is the effect on settlement identity

24. CuD is a hilltop settlement, modest in scale. ¶1.12 and ¶1.16-18 of the NP [CD5.27] gives some background. The Conservation Area Appraisal also notes the hilltop character of the settlement. The heights AOD are discussed in Mr Berry's proof for the Appellant at ¶2.5 on p8. The appeal scheme will plainly take the built up area down the slope, off the hill top, towards Rugby. Why is this important? As the NP notes [¶3.5] the settlements of Houlton, Rugby and CuD each have their own individual characteristics. Since the 2011 Census, the village of CuD has grown by 16 houses [¶1.24]. Maintaining appropriate separation from Rugby is required to deliver the NP's vision, as is preserving CuD's separate characteristics [3.9]. This is a matter of great importance in this case to the Parish Council [CD4.10, 4.27 & 12.4]. The policy response in the NP to the need to protect settlement identity includes the designation of Important View 9 which is "important to the setting and character" of the village. If that view is not respected, there will be a negative impact on settlement identity. The Appellant sought to suggest that the inclusion of the Rugby Road ribbon development inside the settlement boundary in the NP was somehow significant in terms of the character of the village. This is plainly wrong. The simple drawing of a line whose purpose is to define where certain policies apply (ie where the

countryside is for policy purposes) does not of itself alter the character of the settlement. If the NP is rejected at referendum so that the modified settlement boundary does not come into effect, that will not change the character of the settlement either!

25. Policy NE3 in the adopted Local Plan requires development proposals to "guard against the potential for coalescence between existing settlements". In the eLP the appeal site is designated as an Area of Separation under policy EN4 [p41] which is to the south of the village and north of Rugby [CD5.26]. The village is linked to Rugby via Rugby Road, along which there is some ribbon development on the south east side. The appeal scheme will reenforce and expand the linking effect of the ribbon development (see as an aide-memoire, Ms Murphy's Figure Ground Plans in CD 10.1.4)

26. The Area of Separation Study [CD5.45] is freestanding evidence. This is a logical and measured report. From it we should conclude:

    a. The physical and visual separation of the village from Rugby is important to the character and identity of CuD [¶3.1]. This is recognised in the eNDP [¶4.14]
    b. The area between CuD and Rugby (including the appeal site) contributes strongly to their separation [3.5, 2nd bullet].
    c. There is no 'in principle' national policy objection to an area of separation policy approach [¶4.5-7].
    d. The study uses appropriate evaluation criteria [p11].
    e. It recognises the existing ribbon development [¶6.9, 6.15, 6.18]. It accurately describes the extend of the gaps [¶6.10]. It recognises physical features that have a separation function [6.12]. It correctly considers topography [¶6.13] and intervisibility [¶6.14].
    f. The development of the appeal site (site 335) would draw the village and town closer together and diminish visual separation [¶6.22].

g. The appeal site is recommended for inclusion in the proposed area of separation [¶6.24].

27. The Appellant's approach is, apparently, to note that while the gap / separation will be reduced in width, there will still be a gap in the vicinity of Houlton Way, the canal and the Brook. That is as may be, but a large part of the 'ribbon' along Rugby Road will be very much reenforced by a block of development behind it which will have the effect of bringing the village down the hill to Rugby. While the views may not be materially harmful in impact terms from VPs 4 to 7 on the footpaths to the east of the site, the gap will be seen to close. Rugby Road is plainly an inappropriate precedent to follow. It is not a logical progression so far as settlement morphology is concerned.

28. Mr Weekes is right to give this [10.17] very significant weight.

Issue 3: housing land supply and the availability of alternative sites.

29. Housing. Following a recent appeal decision [CD7.1] in which the matter was in issue, the SoCG [CD9.1, ¶4.2.2] records agreement of a 3.4 year supply when considered against the standard method requirement of 618 dpa. The question is what weight to give the benefit of delivering market housing in this situation.

30. A 3.4 year supply means that in numerical terms the shortfall is 989 dwellings (618 x 1.6). The 5 year period is the same period that remains in the adopted Local Plan period. Rugby BC is not an LPA which has a history of under delivery. Far from it. So far in the life of the plan there has been an 'over delivery' of 1,218 against the plan requirement [CD5.44, p2]. By the end of the plan period, the likelihood is that the plan will have delivered about what it set out to deliver – an average of 620 dwellings a year. The current standard method figure is almost identical to the plan's average requirement.

31. It is agreed that the achievement of a 5YHLS will coincide with the adoption of eLP. There is a difference of opinion as to when that will be. If all goes well, then

it may be before the start of the 2027-28 housing year. If not, then there will be a delay. If the delay was significantly longer, Mr Holly's evidence was that the 5YHLS could be reestablished before adoption. So the lack of a 5YHLS will be remedied within 12 to 18 months or so.

32. In the interim, Mr Holly explains in his HLS proof at ¶4.19 what short-term active strategies the Council has adopted to address the shortfall and try to ensure it at least becomes no worse.

33. Mr Holly estimates (¶4.22) that the appeal site could contribute 30 or 70 units to the 5YHLS (depending on the date of adoption of the eLP / start date for the supply period).

34. Alternative sites. There is no doubt that the existence of alternative sites can be a material consideration. At appx NHAS1 [CD10.1.10] an agreed (Mr Carter during the inquiry) summary of the legal position is set out. First, a 'gateway' planning judgment has to be reached: are there clear planning objections to development on the appeal site? If not, that is the end of the matter and there is no need to consider alternatives any further. The LPA submits there are (see above). Even the Appellant's case is that the planning disadvantages inherent in the appeal scheme are outweighed by the need for it. The law also indicates that the relevance of alternative sites is only likely to be relevant in exceptional circumstances. That does not mean, as the Appellant appeared to suggest, that every factor has to be exceptional. The sum total of the factors just needs to indicate that the normal position that alternatives a not relevant, should, as a planning judgment, be departed from. That combination of factors gives rise to the legitimate question: are there more appropriate sites elsewhere? The LPA says that there are. Further, these alternatives are not vague or inchoate schemes which have no real possibility of coming about. The sites have been identified and assessed. The alternatives thus become a relevant planning consideration. To be clear, we do not say that to fail to have regard to them would amount to an error of law. But we say, it is legally open to the inspector

(as a matter of planning judgment) to take them into account. The legal tests in summarised in Appx NHAS1 are therefore made out.

35. Mr Holly sets out the progress these sites have made towards delivery. They are all allocations in the Reg 19 local plan. Of course, these draft allocations have to 'survive' the local plan process. There are some objections to them. But not 'in principle' from the Parish Council. The LPA also regards them as being 'sound' allocations. It cannot be said that there is not a "real possibility" that they will deliver. When will they deliver? Mr Holly looks at that too [¶4.4.5]:

    a. Site 202 Newton Road for 80 dwellings is subject to pre-application discussion with the LPA. The Land Promoter is working with a developer of affordable housing.
    b. Site 129 North of Lilbourne Road for 60 dwellings is in the hands of a developer with a recent local delivery record and pre-application advice is complete.
    c. Site 307 North Road is for 10 dwellings.

36. These alternatives were considered alongside the appeal site (and others) in the local plan site selection process. Mr Holly [¶4.6 to 4.16] explains why the alternatives are to be preferred to the appeal site in planning terms. In broad terms:

    a. They were all assessed by Mr Holly and the Council's landscape consultants, Lepus. The appeal site was judged to be of greater sensitivity.
    b. There was a concern about the impact on the hilltop character of CuD.
    c. There was a concern about developing in the area that separates CuD from Rugby; this was not a factor in the three alternatives.
    d. There were concerns about pedestrian connectivity. The alternatives were judged to have better relationship to the village.

e. Mr Holly acknowledges the heritage sensitivity about developing site 129, but this can and will be mitigated.

37. Mr Wakefield has also considered these alternative sites (proof §8). He agrees with the assessment of sensitivity. He finds [¶8.48 – 8.59) that the main differences with the appeal site to be:

a. Effect on separation.
b. Effect on NDP important views
c. Topography – generally on higher ground.
d. Landscape of lower sensitivity
e. Urban form
f. Less adverse visual effects likely

38. There is also no scope for developing the three alternatives and the appeal site. Not only will the cumulative effects on village and landscape be greater, the evidence of Mr Holly [Holly chief and ¶4.17.2] is that the village primary school could not support this level of growth and the borough and county councils are seeking to ensure that children have the opportunity to go to their local school.

39. Therefore, the availability of these alternatives, much reduces the weight to be given to the benefits of the appeal scheme in the planning balance. Some time in the XX of the Council's witnesses was spent suggesting that PRfR3 on alternative sites was not phrased as a reason for refusal. That is as maybe. It might have been better to have included the text of PRfR3 in PRfR4 and make the Council's approach to the planning balance (which is obvious from reading the Statement of Case as a whole) clearer in the PRfR.

40. Mr Weekes considers all this, and concludes [¶10.5-8] that a reduced "moderate" weight should be attached to this benefit.

41. Affordable Housing. Mr Weekes accepts [¶10.9] "very significant weight" attaches to the provision of up to 48 units of affordable housing.

Planning Balance

42. There is no 5YHLS so it is agreed that the tilted balance is engaged. Mr Weekes accepted in XX that the "basket of most important policies" Wavendon approach is not needed in such a case. As well as the housing and affordable housing benefits (see above) there are the following other benefits to consider.

    a. Economic benefits. Mr Weekes accepts [¶10.10] limited weight to the economic benefits during the construction phase, and [¶10.11] limited wight during the occupation phase. There is no evidence that any current facilities will close without an increase in population which would justify a greater degree of weight.
    b. Public open space / sports facilities. SoCG ¶3.7. Mr Weekes [10.13] ascribes moderate weight.
    c. Mobile phone and broadband coverage. Mr Weekes [10.15] gives limited weight.
    d. BNG. Weekes [10.19] favours limited weight.

43. The adverse impacts to consider are as set out by Mr Weekes:

    a. Landscape harm – moderate weight [10.18].
    b. Visual impact – significant weight [10.18].
    c. Separate identity – very significant weight [10.17].
    d. Poor connectivity on foot – limited weight [10.12].
    e. Archaeology – limited / moderate weight [10.20].

44. It is agreed that the development is contrary to the development plan as a whole. Therefore the outcome of the tilted balance is crucial to the Appellant's prospects of success.

45. One of the adverse impacts – settlement identity – relies to a significant degree on the NP. Mr Weekes accepted in XX that on its strict wording, ¶14 of the NPPF could not be engaged even when the NP is made. This provision of the NPPF is plainly intended to encourage parishes to bring forward a NP which is positive about accepting housing development by (a) requesting a housing number from the LPA and (b) allocating sites. In this case, the NP does not simply provide for housing to meet the needs of CuD. The 150 dwellings in the eLP will do that and contribute to meeting the needs of the wider borough. Further, the development of c6,200 houses at Houlton is also within the parish. The parish of CuD is a growth area. The Parish Council has decided to accept that 150 dwellings for CuD will be allocated in the eLP rather than on sites to be identified by it. That approach has been (will be) supported at referendum. All of this is a material consideration in its own right.

46. Had the Parish Council sought to find the sites for 150 dwellings itself (either at the village of CuD, or at Houlton or elsewhere, #14 would have been a material consideration which means that the conflict with the NP should be given such weight as to make it likely that it will significantly and demonstrably outweigh the benefits of the development. The Parish Council has chosen another path, but the outcome will be the same. There is no difference in the 'positivity' or 'welcome' of the Parish Council to housing development. In the conduct of the overall planning balance this needs to be remembered.

Conclusion

47. S38(6) and the development plan . The appeal scheme is outside the adopted development boundary and therefore contrary to policy GP2. The Appellant accepts that this gives rise to a conflict with the development plan as a whole (see Statement of case at ¶4.8.1). The LPA agrees that the development plan indicates a refusal / dismissal due to conflict with GP2 as well as a number of other local plan policies. Both parties agree the tilted balance is engaged. Therefore the outcome of that balance witll determine the outcome of the

appeal. If, as the LPA contends, the outcome of the tilted balance is that the adverse impacts do significantly and demonstrably outweigh the benefits, then it is understood that the Appellant accepts that the appeal will be dismissed.

Endnote

48. If, contrary to the LPA's submissions planning permission is to be granted in this case, the inspector will have to consider and decide the request from the University of Coventry and Warwickshire NHS Trust ("the NHST") for a financial contribution of £259,778. The inspector will recall from the inquiry session on this issue that the Council's case is that the request does not meet the requirements of Cil Regs r122 and so would be unlawful.

49. The NHST told the inquiry that it accepted that it had to satisfy the inspector that the claim was CIL Regs compliant – if it could not do so to the required standard, then its claim must fail. In *R(Worcestershire Acute Hospitals NHS Trust) v Malvern Hills District Council & ors* [2023] EWHC 1995 (Admin) ("the *Worcestershire case*") [CD12.7] Holgate J. held that it was for the Trust to show / make good with sufficient evidence that its request met the requirements of reg 122. If it could / did not, then a LPA is entitled to draw the conclusion that the request was not "necessary" for the purposes of reg 122(2)(a).

50. The NHST's argument for a contribution in its consultation response [CD4.13] can be summarised as follows:
    a. An increase in the number of A&E attendances resulting from the proposed development. The current A&E is said to be working at full capacity and so contributions are required to support "increasing A&E infrastructure capacity".
    b. The number of unplanned hospital admissions resulting from the proposed development. This is said to give rise to the need for additional capacity which may include increased use of equipment such as "scanners, laboratory equipment, beds and theatres".

c. The number of planned admissions and day cases. The same argument as for unplanned admissions is put forward.

d. Outpatient attendances is also said to be running at full capacity and additional capacity is needed to meet additional demand in terms of clinics, equipment (scanners, monitors and surgical equipment) and clinic infrastructure.

e. GP referred diagnostic attendances. The same capacity arguments are run in respect of "ultrasound, X-rays, CT scans and MRI scans".

51. In its consultation response at Appendix B the NHST states:

> "2.2 Safe hospital care is provided when the hospital is operating at or below 92% of full bed capacity. This is the standard set by NHS England for English acute hospitals.
> However, the Trust's hospitals are on average operating well above 92% capacity and increasingly experiencing surges where demand exceeds 100%. This happens when the requirement for emergency admissions exceeds the number of patient discharges it is safe to make. At these times, the Trust's infrastructure and equipment is over-used and additional infrastructure and related staff are brought in, adding premium costs.
>
> **2.3.**The residents of the Proposed Development will cause detrimental further pressure to hospital infrastructure as shown in the impact calculation. This is the reason a developer contribution is required."

52. The increased attendance is 'monetised' (see Appendix A) by reference to "the average cost of activity across the NHS":

a. An "average tariff" for each activity is given.

b. The average tariff is then multiplied by the expected number of activities generated by the new development to give a "delivery cost" for the development.

c. In some cases the delivery costs is discounted by 20% on the basis of "new activity". This gives the "marginal impact" of the development.

d. There is then an uplift to reflect "premium cost of delivery" resulting in the "cost pressure" which is the amount of the s106 request.

53. The Council is effectively being asked to take the information shown in the Appendix A spreadsheet 'on trust'. The background data for the "activity 2018/19" is not given.

54. The Council is also concerned about the transparency of the following statement in Appendix A: "The Trust's calculation ascertains the additional impact the new development will impose on the Trust's capacity. The Trust has been advised by specialist planners in devising the following method to establish the incoming population which is new to its operational area:". This methodology includes, at step 5 "Any relevant adjustments are made to estimate sources of population from inside or outside the Trust's operational area. This step addresses any plan-led assumptions for migration and adjusts for the proportion of full-time student households." This is not transparent. No information is given as to what "relevant adjustments" have been made. This makes a mockery of the 'assurance' that "It is important to estimate only the impact of those people who are new to the Trust's operational area. The calculation avoids counting the impact from residents who are moving from an address within the Trust's operational area and whose demands are therefore already anticipated in the Trust's infrastructure plans."

55. Of equal concern is the figure for the "average tariff" for each activity type. There is no assurance that the average tariff relates only to the infrastructure (essentially equipment) claimed to be impacted. Appendix A states: "Each activity undertaken by the Trust has a nationally determined price associated with it set out in the public domain under the NHS Payment Scheme. These prices are based on the average cost of activity across the NHS." It is not clear how, for example, an NHS trust measurers the 'capacity' of piece of equipment

such as a MRI scanner – when is it at 'capacity'? Does it run 24 hours a day? In the case of hospital admissions, is the claim here for beds and sheets? Or is it for nurses and other staff?

56. In the *Worcestershire* case [CD12.7], which included claims for staffing costs (see Holgate J's judgment at [¶17], the NHST also referred to "activity levels" (para [18]). There is also reference to staffing costs at premium times in Appendix 2 at para 2.2 in the NHST's consultation responses (see para 9 above). That all at least gives rise to a suspicion that the unit costs claimed for each "activity" in Appendix A to the NHST's consultation responses is not the correct figure for infrastructure / equipment alone but includes staffing etc.

57. The NHST avows that these requests are different from the previous 'temporary funding gap' claims. Indeed in footnote 1 to Appendix B of the consultation response the NHST says:

> "The Trust is not seeking 'gap funding' as defined in the case of (R & Another on the Application of University Hospitals of Leicester NHS Trust and Harborough District Council CO/2298/2022). In this case the Court (in paragraph 138-139) Judge Holgate confirmed that *"If for example, a development would itself cause direct harm to the public facility, so that the three tests in Reg.122(2) of the CIL Regulations 2010 are satisfied, the local planning authority would be entitled to require the developer to mitigate the harm under a Section 106 obligation, irrespective of whether the authority responsible for that specifically is able to raise taxes or has borrowing powers."* (our emphasis)."

58. But the explanation earlier in Appendix B at para 3 and 4 includes all the 'old' concerns about there being no consideration of in-year population growth. Although recast in terms of population growth and its effect on infrastructure (equipment), the NHST's case should really be (or is) this:

    a. We don't get money for new people arriving in Year 1 until the following year.

b. This means there will be demands on equipment which we are not budgeted for.

c. But we will be budgeted for that in year 2.

d. Therefore we want a s106 contribution to cover the provision of the equipment in Year 1

59. On that basis, if new equipment is needed to treat a rising population, and there is no budget for this equipment until the year after new people move into the area, then this is a "funding gap" claim. The claim against the notional developer ought to be for the cost of providing the equipment one year earlier than it would be under the funding model. That cannot be the whole costs of the equipment. That is why it is so important to have transparency over the financial value of the "activity" 'average tariff'.

60. The thrust of this argument was set out in the Council's CIL Statement [CD11.2]. That generated a Rebuttal from the NHST [CD4.33]. In the rebuttal the NHST now avers at ¶27 that its intention for the use of the contribution is to "replace older buildings that are no longer fit for purpose". That is a completely different justification to that advanced hitherto. It also suggests that the real reason behind the request is to remedy existing deficiencies in its estate rather than to address impacts of new residents.

61. In oral submissions at the inquiry, the NHST's representative seemed to be suggesting that the sum claimed was not an exact science and while the sum claimed would not completely address the 'harm' would at least mitigate it. This does not inspire confidence either. The sum claimed is very precise – down to the last pound. It is not the product of a 'broad b rush' approach. It is also justified on the basis of activity that does purport to lead to an exact outcome. Alternatively it was suggested that the NHST's approach was a "sensible" one which led to a "fair" outcome. That simply illustrates that the whole approach of the NHST is not transparent, is being carried out inside a 'black box' with a funding model that has now been argued over in two High Court cases without

the experienced Judge being able to draw any firm conclusions on the model and how it operates. Finally, it was suggested that the Council had a duty, as decision-maker, to equip itself with the necessary information to reach a decision. In the context of an appeal it is plainly not for the inspector to cast about for further information. The NHST must put what it wants to before the inquiry.

62. The Rebuttal therefore raised more questions than it answered.

63. Fort all of these reasons the Council submits that the inspector should not be satisfied that the NHST has demonstrated to the inquiry that each of the r122 (2) tests are made out.

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