Rectory Farm, Kings Langley, Hertfordshire

S78 Town and Country Planning Act 1990

PINS Ref: APP/A1910/W/23/3333545

Final Submissions of the Appellant

Introduction

1. These closing submissions follow on from the Appellant's opening submissions and should be read together with them.

2. The Inspector identified in the case management conference summary note the likely main issues as being, in summary:
    (1) Whether the considerations in favour of the development amount to very special circumstances to outweigh the harm to the Green Belt by reason of inappropriateness and any other harm;
    (2) Whether the development would provide a Suitable Alternative Natural Greenspace to mitigate the adverse impact of the development on the Chilterns Beechwoods SAC.

3. These are addressed in turn.

Issue 1 – Green Belt and the Planning Balance.

<u>Introduction and Overview</u>

4. Issues 1 and 2 are logically separate issues. Any alleged material harm to a European site notwithstanding the obligations and conditions in place would mean that planning permission could not be granted under the Habitats Regulations[1]. If the mechanism is

[1] Although it would not require refusal – a deferral of the decision would be compliant with the Habitats Regulations.

effective then permission should be granted and there is no harm to way in the balance. If it not effective then permission cannot be granted, the development cannot take place, and so there is no harm to way in the balance. As such, the appropriate consideration of the planning balance must proceed on the basis that the SANG issue is resolved. These submissions proceed on that basis on this issue.

5. The Council's position on issue 1 is clear from the Statement of Common Ground at 7.11. It accepts the NPPF 153 balance is met and permission should be granted.

6. Mr Freeman's written proof confirmed this was because the harm to the Green Belt is limited and is capable of being outweighed by the very special circumstances should a suitable and deliverable SANG solution be secured and should SANG credits be provided to the Appellant's scheme.

7. Accordingly, as between the main parties, that is the local planning authority and the Appellant, issue 1 is no longer an issue, subject to issue 2 being satisfactorily addressed.

8. However, the consequences of that when placed alongside the agreements reached in relation to the matters raised under reasons of refusal 3 and 4 and the bi-lateral planning obligation entered into with the Council are far reaching – and all of these points were agreed by Mr Freeman on behalf of the Council:

    (1) The appeal proposals comply with all of the most important development plan relevant for determining the application;
    (2) The proposals accord with national policy in relation to Green Belt which also secures compliance with development plan policy on Green Belt;
    (3) As a result, the policies in the Framework that protect the Green Belt do not provide a clear reason for refusal in the context of NPPF 11(d)(i);
    (4) The proposals accord with all national policy;
    (5) The proposals accord with the development plan read as a whole
    (6) The proposals accordingly amount to sustainable development and the presumption applies.

9. These conclusions not only dispose of issue (1) but they are highly relevant to Issue 2 and the plainly unreasonable stance of the Council in refusing to release SANG credits within Council-owned SANG to the Appeal Scheme at this appeal stage when the Council has confirmed that the scheme is sustainable development, fully development plan compliant, is deliverable and would delivery housing and affordable housing as against acute housing and affordable housing need in the short term. The Council's response to this appears to be to take the defensive stance that they cannot be forced to release the credits without a court order. This issue is returned to below. It is extraordinary that the Council submits that the reasonableness of its stance on an issue that would allow this planning permission to be granted – and where the decision to allocate may be taken by the same delegated officer who refused the planning permission[2]. The reasonableness of the Council's position is directly relevant because the Council cannot say lawfully that it will continue to act unreasonably in the future.

Green Belt Policy and Approach

10. It is common ground that the proposed residential development constitutes inappropriate development. It is also common ground that any harm to the Green Belt should be given substantial weight[3].

11. The development plan through CS5 of the Core Strategy in effect applies national policy and so the single issue that arises in terms of national policy and development plan policy compliance is whether the potential harm to the Green Belt by reason of inappropriateness and any other harm resulting from the proposal is clearly outweighed by other considerations so that very special circumstances exist[4]. If it is, then the proposal is compliant with both national and development plan policy relating to the Green Belt, and such policies do not provide a clear reason for refusing permission[5]. The same is true of the Neighbourhood Plan[6]

[2] Council closing para. 6 and fn 11.
[3] See NPPF 153
[4] The considerations in favour do not themselves have to be "very special" – contrary to the apparent understanding of Mr Griffiths (proof at para 22) – see R v Wildie v Wakefield MBC [2013] EWHC 2769 (Admin).
[5] And so the presumption in favour of sustainable development remains engaged by the Council's failure to demonstrate a five year HLS – NPPF footnotes 7 and 8
[6] Agreed with Mr Griffiths XX GW – CD5.3 – KL1 Pdf 19

12. In its Opening Submissions the Appellant indicated that it would seek at the inquiry to take a proportionate approach to the evidence. This is because considerable weight should be placed on the views of the local planning authority who has considered the application in detail, fully consulted, and its views represent the output of its application of all relevant policies to the evidence within the statutory decision-making framework. Nonetheless, the Appellant's written evidence – all of which has been called – considers all aspects of the planning balance in detail, and the Appellant relies on its professional evidence which covers specialist landscape, affordable, housing and planning professional witnesses all giving their professional views in line with their declarations.

13. The Appellant's witnesses have also been at pains to understand and seek to address in written evidence and at the inquiry concerns expressed by JOG and the local residents.

The Alleged Harm

14. At the end of the inquiry and following agreement on the substantial points within the s106 the level of harm is agreed between the Council and the Appellant. There is "definitional" harm, that is harm because the proposal includes inappropriate development. Overall the harm to the Green Belt is limited[7].

15. The substantive harm to the Green Belt is limited, that is harm to the aims and objectives of the Green Belt[8]. The only conflict – and then limited – arises in relation to the third GB purpose – to assist with safeguarding the countryside from encroachment, and because there will inevitably be a degree of impact on the openness of the GB. There is also, as assessed by Mr Grierson, some identified adverse effects to the northern area of Kings Langley that have been minimised by the design approach so that the overall assessment of landscape and visual harm is assessed as between the Council and the Appellant as low[9].

16. These closing submissions do not rehearse the evidence on GB purposes, or landscape and visual matters, as these are well left to the evidence that has been heard. LVIA is a

[7] Mr Freeman para 8.4
[8] Mr Freeman Rebuttal Table as updated
[9] Proof of evidence of Mr Grierson para 6.9

technical assessment, and the LVIA has been prepared in accordance with the relevant guidelines, and deployed within the professional expertise of Mr Grierson. There is no dispute as to the methodology or the outputs. JOG confirms that it does not dispute the methodology, but applies different weight to the outputs[10]. The endorsement by the Council of all of the Appellant's conclusions on landscape and visual matters, and GB purposes is a reflection of the thoroughness and realism of the assessment. It is also the case that the scheme was amended through the pre-application and application process to respond to comments from the Council, and the urban design officer in his consultation response recommended the grant of permission[11]. Further, the site has been the subject of very considerable and rigorous objective assessment though the emerging plan process – summarised below – which led to the recommendation to remove the site from the Green Belt.

17. In respect of the evidence given on behalf of JOG, and the considered views there expressed, and in order to address these concerns, the Appellant makes the following succinct points in response.

18. Green Belt. The proper starting point for an assessment of the GB contribution and landscape sensitivity of the Appeal Site is the detailed and objective three stage GB review undertaken by Arups for the emerging Local Plan[12]. This is addressed in detail by Mr Morton. It is important that the studies used an objective methodology across the borough (and beyond in Stage 1) to identify the weakest and strongest performing GB. Mr Griffiths agrees that the contribution to GB purposes is a relative concept and so a frame of reference which addresses relativity is important. Ultimately, Arups concluded that the sub-area reflecting the Appeal Site was one of the weakest performing sub-areas against GB purposes in the borough[13].

19. The sub-area KL-A1a was identified as making no contribution to Green Belt purpose 143(a) parcel as the site is not adjacent to any large built up area (and not London); made no contribution to was identifies as having potential for further assessment in its

[10] CD 9.10 para 15
[11] CD 4.1, para 5.73 on p15
[12] CD 5.26 and 5.27
[13] CD 5.26 pdf 102 table 5.2

southern portion; this was then assessed as KL-A1a; that assessment showed that the site also made no contribution to purposes 143(b)[14] because the release of this parcel in context would have no impact, "neither in physical or perceptual terms" on the merger of Hemel Hempstead and Kings Langley. This is well-illustrated at CD 2.26 pdf 27. The site remains to the south of the northern edge of Kings Langley along the western site of Hempstead Road and also to the eastern side of the canal.

20. In relation to purpose 143(c), the conclusion was that the parcel has weak linkage with the wider countryside and is subject to urban influences on its southern and western edges, as well as being visually enclosed to the east – "its release would have no impact on the ability of the wider Green Belt to meet this purpose"[15]. Overall the conclusion was that the sub-area would not compromise the ability of the wider Green Belt to meet is purposes.

21. This combined with a landscape assessment of low sensitivity[16] to mean that the parcel was identified as being within the weakest category of GB contributors and the site was at stage 3 recommended for removal from the Green Belt[17]. The revised boundary recommendations have been incorporated into the appeal proposals[18].

22. When considering some of the more historic documents, including the 2002 Examining Inspector's report[19], it is important to bear in mind change over time. In particular, the appeal site – or parts of it – have frequently been considered – as in the Arups study – alongside or in light of – the proposals for what is now the Miller Homes site. At the time of the stage 2 study the Miller Homes site was redundant farm buildings with some employment uses. As at 2002 it appears to be simply redundant farm buildings[20]. The circumstances are materially different as to the existing condition of the land in question, and also as to the land now under consideration[21]. There has been considerable

[14] CD 5.26 pdf 166
[15] Mr Morton Appendix p35
[16] CD5.26 pdf 99 table 5.5
[17] See Mr Morton App. 4 p47
[18] Mr Morton App 4 p47 and 51
[19] Mr Griffiths's App. 4
[20] Mr Griffiths App. 4 4.38.7
[21] See Mr Griffith's App 4 – 4.38.6 and 4.38.7 the inspector was there considering a site that included the Miller Farm development

new evidence since that time, most notably the Arups work on a comprehensive borough wide basis for the Local Plan. The stage 3 study and the draft allocation took the two sites together and proposed combining them with a robust GB boundary surrounding the combined site[22]. As evident on site, the Miler Homes site has progressed and renders the historic GB boundary – placed to its south – out of date. Mr Grierson's images showed the Miller Homes site protruding into the GB unmitigated and largely un-landscaped – certainly in a structural sense. The Appeal Scheme provides the opportunity to provide a comprehensive boundary treatment and a robust GB boundary going forward, as well as a designed landscaped edge which addresses both developments.

23. Openness: It is well established that the concept of openness is open-textured and a number of different factors may be relevant in forming an assessment of the impacts of a particular scheme on the openness of the Green Belt[23]. Generally, it concerns how built up the GB would be and would appear to be if redevelopment occurs. Visual and spatial openness are not two distinct elements. They are bound together in an overall assessment of the impact of the development on the openness of the Green Belt. The assessment is of the proposed development as a whole. So here, one is not just considering the impact of the elements of built form – but the built form, as disposed, orientated, articulated, how it is perceived, and also the beneficial impacts of the open space, the landscaping, the allotments, the filtering and screening, and in the particular contextual setting recognising the external influences. As Mr Morton said, it is not a mathematical sum – or a two stage process – but an open-textured, comprehensive assessment. One need not calculate percentages but consider as he has the physical development that forms the development in its context[24]. It has been and should be addressed through the iterative design process. The conclusion of the Council and Mr Morton that the overall impact on the objectives and purposes of the Green belt is limited is fully justified in the circumstances of the site and its context.

[22] Mr Morton App. 4 p51, Mr Ledwidge App. 3

[23] See Mr Morton paras 5.15 and 16

[24] JOG's closing is plainly misconceived in suggesting Mr Morton's evidence should be discounted. It represents a considered professional view. The Inspector will have criticised that Mr Griffiths evidence does none of the things that JOG' closing suggests Mr Morton's evidence should have done – and deals with both visual and spatial openness in one paragraph – paragraph 8.

24. The Arup assessments were made on a generic basis. The inquiry now has the benefit of a fully worked up and well-designed scheme which comprises not only the residential development but the significant new area of public open space and landscaping which provides a robust Green Belt boundary going forwards as well as an attractive setting for the high quality development. The proposals are comprehensive in delivering not only housing and affordable housing, but a 2.56 ha canal-side park to serve the local community, and community facilities including orchards, play space, fishing and viewing platforms, and local facilities to be owned and managed by Sunnyside Rural Trust – a local charity that supports young persons and adults with learning disabilities which will provide a café, repair shop and cycle hub and village store[25]

Landscape and Visual Harm

25. As to character, again the Arup study is helpful. It assessed the overall sensitivity of the KL-A1a landscape in context as **low** by virtue of its degraded urban fringe landscape character and quality, its general visual containment and weak relationship to the wider landscape…"[26]. That is also the view of Mr Grierson and the Council. JOG's analysis appear to take no account of the surrounding context. No alternative landscape evidence is called. The assessment does recognise that there are inevitably changes to the character of the site, to the extent it displays an agricultural / rural character with a degree of openness[27] – but the site is already highly contained with residential development enclosing to the south and east, and the canal corridor and its trees enclosing to the east. This means that the change in character is largely at the site level and is an inevitable consequence of its development. Nonetheless, the scheme incorporates considerable areas of open space, and this will be laid out along the Canalside in a naturalised way[28].

26. As to visual harm, the concerns of residents understandably focus on points of particular concern to them. An objective assessment must begin by assessing the baseline. Here the site has a high level of visual containment, and the effects will be highly localised. The experience is a kinetic one and the assessment should be undertaken in the round. Concerns

[25] See statement from Sunnyside at Appendix 2 to the proof of Mr Ledwidge,
[26] CD5.26 pdf 99 – and see the description of "low" on pdf 46
[27] CD 1.13 at section 6.6
[28] As explained by Mr Grierson in the RTS- and see LVIA sections 8.3 and 8.5

focus on particular images – and as Mr Grierson explained the verified views have been undertaken using a worst case scenario – they involve looking directly at the development on a winters day and without showing any of the proposed mitigation. The mitigation will soften and filter views, and will be managed in the long term. Existing trees – and of note the TPO willow trees along the canal and the poplars through the centre of the site - will be maintained and managed, and the landscape proposals provide for a naturalised zone along the eastern edge of the site, and a very considerable amount of tree and shrub planting. The Appellant also draws attention to the measures built into the scheme not only to reduce visual impact, but to ensure that where the development is seen it will e a high quality and well-designed development that responds to the site and importantly its topography. The landscape proposals also, and importantly, provide a real, and the only, opportunity to provide landscaping that will soften the appearance of the Miller Homes development from the tow path. This is not to criticise the Miller Homes scheme – at the time as the emerging allocation progressed, and in line with the GB Stage 3 study – it was anticipated that the Miller Scheme would sit alongside the Appeal Scheme with a new landscaped Green Belt boundary around the northern edge of the appeal site and the eastern edge of both[29]. Overall, the landscape and visual effects are no more than minor[30].

27. There is no other harm alleged by any other party.

<u>The Benefits</u>

28. Mr Griffith's written proof did not clearly identify the full range of benefits or the weight given. Helpfully, during the inquiry he has clarified his position – broadly aligning with the Council. As a result there is a tableau of benefits, with fairly narrow differences.

Benefit	Council	JOG	Appellant
Housing Delivery	Very Substantial[31]/ substantial	Very substantial / substantial	Very Substantial
Affordable Housing	Substantial	Substantial	Very substantial

[29] See draft allocation at Mr Ledwidge Appendix3; and Stage 3 study Boundary recommendation – see Mr Morton App. 4 p51.
[30] See conclusions of Mr Grierson proof 6.9-6.12
[31] HLS SOCH at 1.10 and agreed XX RF if delivered within 3 years.

Plan-led failure	None	Some	Substantial
Improved Access to Green Belt	None	None	Substantial
Public Open Space	Moderate	Moderate	Substantial
Allotments	Moderate	Moderate	Addressed under Community Facilities
Child Play Space	Moderate	Moderate	Ditto
Community Facilities	Moderate	Moderate	Substantial
Biodiversity Net Gain	Substantial	Substantial	Substantial
Socio-economic	Moderate	Moderate	Substantial

29. As in any such assessment, the assessors will structure their benefits and weightings differently, and use different terminology. For example, the Council separate out the children play space, allotments and community facilities, whereas Mr Ledwidge assesses these all as community facilities. JOG appear to criticise Mr Ledwidge for separating out GB access and Public Open space. As Mr Ledwidge said, these have different objectives – the GB access point relates to NPPF 150; the POS point relates to the massive exceedance of public open space against policy requirements and in addition the benefit in providing a Canalside park and walks which may alleviate pressure on the SAC. But as always, it is the substance of the benefit that matters, and in relation to all of the above considerations all parties recognise a very substantial amount of benefit across a wide range of matters gong to the three elements – economic, social and environmental – of sustainable development.

30. Reference is made to the superseded Written Ministerial Statement[32] - JOG entirely fails to recognise that post the WMS the same statement was inserted into the PPG, but then deliberately removed. It has been superseded and is of little weight. It is clear from a range of decision letters[33] that housing led schemes may be permitted in the GB. The

[32] See Mr Ledwidge proof 5.10-5.12
[33] See EL proof e.g. those at 5.118

question is one of balancing the harms and benefits – not labelling them. Further, r Griffiths aligns himself with Mr Freeman who gave very substantial weight to the housing contribution if it can be delivered within 5 years – which it can. Regardless of that this is not a case where of reliance only unmet housing need to justify development in the green Belt. It is a carefully conceived, comprehensive and diverse scheme which takes full advantage of its location and the local community in opening up this western side of the canal, and delivering a large number of community benefits which have not only been drawn up but secured through discussions and considerable interaction with the Sunnyside Trust. The Appellant draws particular attention not only to their involvement[34] - but the measures in place to secure the delivery of this hub of community facilities.

31. The delivery of housing is agreed to attract very substantial weight. The scheme is deliverable within 3 years. The Housing Land Supply at 1.69 years is critically low It has not been much focused on at the inquiry as it as matter of agreement. But the picture is a stark one – in a period in which the Council should be able to demonstrate 6,102 homes coming forward it can demonstrate 2,063[35]. That means there are 4,039 homes not being built which Government policy states should be – and that is only to 2028.

32. The affordable housing performance has been incredibly poor. Mr Stacey provides a detailed analysis of the affordable housing need, and the very substantial shortfalls against assessed needs that have built up, and concludes the borough has experienced serious and persistent shortfalls in the provision of affordable housing and the future supply is only a fraction of what is required He identifies a backdrop of eye-watering affordability problems, and overall the 40% of the new homes being provided as affordable homes on the Appeal Site should attract very substantial weight. Again, to give but one example, need assessments have shown the need for affordable housing borough to be rising at an alarming rate from study to study – 2008 = 220 dpa; 2016 = 366 dpa; 202 = **611 dpa.** This shows a rapidly and chronically worsening need. In the 3 years since that oms recent assessment 1,833 affordable homes should have been provided and only 445 have been. Even in those 3 years 1,388 households whose needs

[34] See Mr Ledwidge App. 2
[35] HLS SOCG at 1.9

should have been identified have not been provided for. It is unsurprising that the affordability indicators show a huge affordability problem which calls for urgent action. The future supply – perhaps unsurprising given the huge shortfall in identified housing land – shows that picture is going to continue to get even worse even more rapidly – with Mr Stacey predicting shortfall accumulating to 3,316 households by 2027[36]. None of this evidence is challenged.

33. The mix of affordable units has been tailored to the local needs and provides for 54 affordable homes of 28 are to be affordable rent units (of which 7 (25%) will be social rent), 15 units as First Homes, and 11 units as shared ownership. The housing will be delivered in the very short term[37]. Criticisms as to the mix are unwarranted and perhaps portray a misunderstanding of affordable housing policy. All of the affordable units provided in the development meet an element of the chronic need for affordable housing. All will be occupied by a household in real and assessed need. The aim of the NPPF is to provide an appropriate mix of housing types for the local community[38]. All units meet the definition of affordable housing and the requirements of the Council[39]. It is not a question of providing as much as possible of one type or another – but a mix agreed with the Council as housing authority which provides the most appropriate mix for the development and the community. This has been done led by the Council and the Appellant has provided the mix sought. Although JOGs closing seeks to criticise the affordable housing provision – Mr Griffiths was himself ready to acknowledge the acute housing need analysed by Mr Stacey and to attach substantial weight to the affordable housing contribution.

[36] See table 7.2 p39.
[37] See Delivery Statement from Cala Homes at Appendix 4 to Mr Ledwidge's proof of evidence. 10
[38] NPPF 60 -and see also CD 8.20 p2
[39] And see CD 8.11 at 114: "The council has noted that the tenure offered by the scheme is not that which emerging policy supports and also sets out there needs to a focus on social rented housing, so that they will be affordable to a greater number of local people than affordable rents. However, the council has not sought to demonstrate that there is no need for affordable rent in the borough and there is nothing in adopted local policy or national policy or guidance that justifies ranking one form of affordable housing over another. The Government's Planning Practice Guidance is clear that all households whose needs are not being met by market housing and who are eligible for one or more of the types of affordable housing specified in the Glossary to the framework are in affordable housing need."

34. The delivery of the open space, access to the Green Belt and Community Facilities are all substantial benefits. They take the opportunities that the site presents to deliver on all aspects of sustainable development, and to promote a sense of community and to integrate with the community by providing a range of community facilities that will be used by all. The Appellant is rightly proud to have worked with and secured the involvement and commitment of the Sunnyside Trust, and this will create a very valuable new hub of activity and facilities for the community. It is interesting to hear local residents such as Mr Ingleby speak as to the community attempts to secure land for growing local produce – and to reflect how well the scheme addresses issue such as this providing public orchards, community orchards, toilets, a cafe/farm shop, bike repair facility as well as recreational and equipped play facilities. It will make a very substantial contribution to village life. It will also for the first time open up the western side of the canal to the public. Again, it is clear from listening to residents – as the Appellant did through the consultation processes – the value placed on the Canalside walk along the tow-path – that the new Canal-side park will provide a very attractive and useable space which will be much valued by the community. Ecologically, the management of the site will also bring biodiversity gains, which all parties agree attract substantial weight[40]. The development and its construction will have a substantially positive benefit on the economy and the local economy through construction and the creation of an active neighbourhood, and a village hub.

Conclusion

35. The main parties agree that the NPPF 153 balance is clearly met. S notes in opening, since the time that the Council resolved to concede the Green Belt issue, the further agreement has swung the balance further in favour of the scheme.

36. There is full compliance with the development plan such that there is a strong statutory presumption in favour of the grant of permission.

37. There is full compliance with the Framework.

[40] Again JOG's closing seeks to reduce the weight given to these – but Mr Griffiths agreed with Mr Freeman that this should attract substantial weight.

38. The Council is unable to demonstrate a five year housing land supply such that the tilted balance is engaged further reinforcing the strength of the presumption in favour of the grant of permission.

Issue 2 – SANG

Scope of the dispute

39. The issue in dispute between those parties is only (see 8.1(1) of the Statement of Common Ground), whether there is:

> "An appropriate mechanism to secure a Suitable Alternative Natural Greenspace (SANG) solution to mitigate any adverse impact of the development on the Chilterns Beechwood Special Area of Conservation".

40. The extent of the dispute is a narrow one. It is also in the Appellant's submission very easily answered. Grampian conditions are an established means of providing the certainty required by the Habitats Regulations and imposed regularly by the Secretary of State. That is really the answer to the whole issue – but it is necessary given the Council's intransigence to agree to a condition in the particular circumstances of this case to address the issue in detail.

41. The use of SANG and SAMMs to mitigate the recreational pressure arising from new housing on the SAC is tried and tested in the country and specifically within Dacorum in relation to the Chilterns Beechwoods SAC. There is no question that it is effective as mitigation. The Appellant's Statement of Case identified two alternative solutions to the SANG reason for refusal, as follows:

    (1) Of-site LPA SANG: The LPA SANG sites have capacity to accommodate the quantum require for the Appeal Proposals. The Council's Protocol states that capacity will be retained for those schemes allowed at appeal [footnote: Chilterns Beechwoods Special Area of Conservation (SAC) – Mitigation Strategy (November 2022) Footnote 12]
    (2) Off-site Private SANG: Private SANG at Westbrook Hay owned by the Boxmoor Trust has been identified. Natural England has approved the

SANG Management Plan for the site and it is also supported by the LPA as the only third party SANG site in the Borough.

42. It was therefore very clear that the Appellant was throughout the Appeal process seeking to rely on these two options, and seeking the release of Council SANG credits. The Grampian condition sits alongside these to hold back the development until the identified mitigation is in place.

43. Natural England has confirmed[41]:

> "6.12 The Appellant's statement of case lists two alternatives for SANG provision (see above). Natural England is content with both alternatives, subject to the SANG being secured in perpetuity".

44. It is therefore a position of common ground across all parties that reliance on Council owned SANG through entering into a s106 to secure credits now, or through reliance on the SANG solution at Westbrook Hay once it is operational and secured in perpetuity as a SANG, are fully effective means of providing the certainty required to avoid any adverse effect on the integrity of the SANG. This is confirmed by the Council's letter of 8 March 2024[42]. It is also confirmed in the cross-examination of Mr Freeman.

45. It is also common ground with the Council through Mr Freeman that a Grampian condition if put in place so as to prevent occupation prior to the SANG solution being secured at either the Council-owned SANG or the Westbrook Hay SANG would mean that no harm could even potentially occur to the SAC.

46. As a result, Mr Freeman also agreed that using the NE Flowchart of the Decision Making Process Under the Conservation of Habitats and Species Regulations 2017[43] the above points of agreement meant that:

[41] CD 10.2
[42] CD9.5
[43] Attached as an appendix to CD10.2

Box 6 asks: Would compliance with conditions or other restrictions, such as a planning obligation, enable it to be ascertained that the proposal would not adversely affect the integrity of the site?

The answer to that in this case was Yes.
And So Box 7 applies:
Permission may be granted subject to conditions.

47. It therefore further follows that the issue is narrower still. It is not whether a Grampian condition would be effective to prevent any harm to the European Site in the circumstances of this case – it is agreed that it would be – but whether even though it would be, is it appropriate for such a condition to be imposed.

48. In this regard there are two stark points:

    (a) If the Council released its SANG credits then a condition would not be required. It refuses to do notwithstanding its view that the proposal is fully policy compliant sustainable housing development where it has a land supply of 1.69 years, and a chronic affordable housing need.
    (b) Having created the need for a condition, it then contends that the imposition of such a condition, which it agrees obviates any prospect of harm to the SAC, and which has been deployed in other appeals, is "unreasonable".

49. This is an unreasonable position. Not only because it is unreasonable of itself in refusing to follow a well-used path, but it reflects a stance that is entirely inconsistent with the central aim of national policy to promote sustainable development. At the end of the inquiry it remains unclear why the authority will not release the credits even if the Inspector takes the view that it is unreasonable not to; and why the Grampian condition does not provide the required certainty that there will not be harm to the SC – which after all is the only real issue.

<u>Habitats Regulations and National Policy</u>

50. The legislative provision of central importance in this case is regulation 63 of the Conservation of Habitats and Species Regulations 2017 (as amended). This contains the following requirements:

    (1) A competent authority, before granting planning permission for a project which is likely to have a significant effect on a European site, must make an appropriate assessment of the implications of the project for that site in view of the site's conservation objectives (63(1) applied specifically by 70(1));

    (2) In the light of the conclusions of the assessment, and subject to regulation 64[44], the competent authority may agree to the project only having ascertained that it will not adversely affect the integrity of the European site (63(5));

    (3) In considering whether a project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given (63(6) and 70(2)).

51. This is reflected in policy in the NPPF paragraph 188:

    "The presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site".

52. The language of regs 63(5) and (6) and 70(2) makes entirely clear that the consideration for the decision-maker is whether the project <u>with the conditions and obligations in place</u> **<u>will not</u>** adversely affect the integrity of the European site. It is common ground that with the Grampian condition in place no such effect will occur. It follows that there is no legal prohibition on granting permission with the Grampian condition in place.

<u>The SANG Options</u>

[44] Which is not relevant here

53. For the reasons just given compliance with the Habitats Regulations does not require certainty at the decision date of the location of the SANG. Nonetheless, in this case the three relevant SANG sites (2 Council owned and 1 privately owned) have been identified, and well-known to all relevant bodies, and agreed to present suitable mitigation.

54. In the present case there are two options proposed:

    (1) Off-site provision through credits at a Council led SANG

    (2) Off-site provision at a third party SANG.

55. These closing submissions address the On-site Option briefly in light of the comments made at the inquiry by the Council. However, it has not been advanced as a live option through this appeal. The Appellant did propose an on-site mitigation strategy, described in Mr Kirkpatrick's section 3. It was proposed that this would be effective and accepted as mitigating the impacts of the proposal on the SAC. However, NE wrote a consultation response which made it very clear that it rejected this as appropriate against the relevance guidance in the March 2022 Footprint Ecology report[45]. NE identified proposed ways forward – which was only to seek off-site SANG[46]. It did not suggest re-visiting the on-site option, even when (CD 3.5), noting that it had sympathy for the Appellant in trying to find off-site solutions. As Mr Freeman confirmed nor did the Council at any point in the application process suggest an on-site SANG may be appropriate as part of a scheme re-design or otherwise. No such suggestion was made in the Council's Statement of Case or Mr Freeman's proof, and no evidence at all has been put forward as to how the NE points of objection might be overcome. In fact, not only did the Council agree with NE's position in refusing the scheme, it added further criticism as to the overlap between the proposed SANG and the public open space[47].

56. Against this background it is bizarre that the Council advances a case at the inquiry that the Appellant should have done more to revisit the On-Site SANG. If the Council had suggested that there was an on-site SANG solution which would avoid the need for off-site SANG and all the difficulties the Appellant has faced with the Council in relation

[45] SK App A
[46] CD 3.2 p4.
[47] CD4.1 at 5.63

to the off-site strategy – or if the Council had suggested a condition to provide for on-site SANG – then of course the Appellant would have taken that forward. The reality was, as Mr Kirkpatrick said, that the NE response and meetings with NE made clear that NE would not countenance the on-site solution as it could not meet the guidance, would not have the right character, and could not provide an appropriate circular walk. The Appellant therefore did what it was being told to do and has since that date done everything possible within its power to secure an off-site solution.

57. It is also odd that the Council now seeks to lay some blame at the Appellant's door for appealing rather than seeking a resolution to grant permission subject to a section 106 agreement. The short point is that, as Mr Ledwidge said, the Council made clear that it was going to refuse the Scheme on Green Belt grounds, which it then did[48]. It is only since the Council reviewed its position that the notion of a resolution to grant would have come into view, but by then the Council had refused permission. The proper sequence in this case is that the Appellant engaged fully in pre-application advice, and during the application period[49]. When it indicated an intention to appeal against non-determination, the Council reached a delegated decision to refuse. During the appeal process the Council's statement of case indicated it would review its GB position if a SANG solution is found[50]. It was the 8 March 2024 letter than the Council confirmed formally that if the SANG solution was considered deliverable then it considered paragraph 153 NPPF was met in relation to the scheme. The Appellant cannot be criticised for continuing its appeal in these circumstances.

Council Owned SANG

58. Following the evidence there is considerable common ground in relation to the Council owned SANG:
    (a) There are two Council owned Sites – Bunkers Park and Chipperfield Common.
    (b) Each is fully operational and suitable as SANG;
    (c) The Appeal Site is in the catchment of both;

[48] CD 4.2
[49] See SOCG para 7.3
[50] CD 9.9 para 6.32

(d) Both presently have capacity. At the date of this appeal:

40.13 % of the total capacity is unallocated;

That is 1518 residential units;

51% of the capacity of Chipperfield Common is unallocated

That is 852 units;

31.5% of Bunkers Park is unallocated

That is 666 units

(e) If the appeal site were allocated credits there would remain a capacity of 1,383 units – and so 37% capacity would remain.

(f) There is accordingly presently capacity at each site to accommodate the Appeal Scheme;

(g) The Council presents no evidence of any capacity concern based on future likely take up of credits by other schemes;

(h) The Council accepts Mr Kirkpatrick's analysis that the existing capacity at Chipperfield Common alone for the anticipated delivery of small sites over the 5 year period even allowing for credits allocated to the Appeal Site;

(i) The Council has not used its "early warning system" to indicate to applicants any upcoming capacity constraint at either site.

59. Mr Freeman addressed the reason why credits were not being granted in his proof of evidence at 4.12. He said:

> "The Council will not allocate Council led SANG solutions at the two SANG sites identified in the Chilterns Beechwoods Mitigation Strategy to this proposal given the sites Green Belt location, its clear conflict with the Development Plan and given the finite capacity of the identified sites at Bunkers Park and Chipperfield Common. This is in accordance with the SANG Allocations protocol."

60. This contrasted to Mr Kirkpatrick who said:

> "6.2.13. I consider that, in the context of the existing and proposed DBC SANG capacity, an allocations protocol that retains SANG capacity for schemes that are allowed at appeal and the emerging third party SANG solute]on at

Westbrook Hay that DBC consider would play a strategically important role in delivering housing, it would be unreasonable for DBC not to agree to the sale of SANG credits through a Section 106 agreement or Unilateral Undertaking. It is anticipated that these agreements would be completed before the determination of this appeal.

6.2.14 If the appeal scheme is considered by the Inspector to be acceptable in planning terms (other than in relation to SANG) then it is the case that there is an established SANG site and SAMMS mitigation strategy in proximity to the Appeal Site with capacity to accommodate the Appeal Scheme should DBC choose to exercise its "absolute discretion" to make those credits available for this scheme that the Secretary of State considered to be sustainable development compliant with national policy, and which would contribute towards DBC's housing needs."

61. The Appellant addressed this squarely in Opening submissions by saying:

> "There is substantial capacity in the Council owned SANG sites. The Council is refusing to make this available for the Appeal scheme notwithstanding that it now accepts that there is no valid reason to refuse permission other than in relation to SANG provision in circumstances where it acknowledges an acute housing shortfall. The reasons for this paradoxical position will be explored in evidence. It is a well-established legal principle[51] that any discretion exercised by a statutory body such as a local planning authority must be exercised in furtherance of the purposes and objectives of the statutory scheme and not contrary to it. Here, the refusal to release SANG credits for a housing and affordable housing scheme that the Council accepts otherwise represents sustainable development is plainly contrary to the furtherance of the good planning of its area, and the objective to boost significantly the supply of housing. As stated in paragraph 7 of the NPPF: "The purpose of the planning system is to contribute to the achievement of sustainable development, including the provision of homes, commercial development, and supporting infrastructure in a sustainable manner." The Council's current position is

[51] The Padfield principle after Padfield v Minister of Agriculture [1968] AC 667

contrary to the promotion of sustainable development and is plainly unreasonable.

62. Having explored that paradoxical position with Mr Freeman the established position is as follows:
    (a) Mr Freeman's 4.12 is duplicated from the Officers' report and has not been updated to reflect the Council's current position on the appeal.
    (b) As such, the references to the proposal being in clear conflict with the development plan are wrong and out-of-date. The Council's position is now that the proposal was fully compliant with the development plan, national policy on the Green Belt, and amounts to sustainable development delivering housing and affordable housing against acute needs.
    (c) Mr Freeman said that the decision not to allocate was historic and had not been and would not be reviewed as part of the appeal process.
    (d) The only reason he now gave for the non-release of credits was that the proposal amounted to inappropriate development in the Green Belt – notwithstanding that he accepted national policy was that inappropriate development was sustainable development where justified in accordance with NPPF 153.
    (e) Mr Freeman advanced no evidence based case on capacity and accepts Mr Kirkpatrick's analysis.

63. The Council's reliance on inappropriate development and what it calls "total discretion" are both fundamentally misguided, wrong in law, contrary to national policy and unreasonable in every sense. The two points are also mutually inconsistent. If the Mitigation Strategy refers to inappropriate development as not attracting SANG credits, then the Council's discretion allows them to depart from that where that inappropriate development is sustainable development. The Council in one stroke views the Mitigation Strategy as both mandatory and ignorable. There can be no reasonable justification for an immutable policy not to grant credits to any scheme of inappropriate development even where it agrees it presents sustainable development.

Mitigation Strategy

64. It is necessary to say something briefly about the Strategy itself – although the Appellant's case relies not on the unreasonableness of strategy per se but on the Council's unreasonable decision in this case not to allocate – and not to undertake to review whether to allocate in light of the Inspector's decision – credits for the Appeal Scheme[52].

65. Firstly, Mr Freeman confirmed that the allocation of credits was in the Council's gift. Earlier this year the Council delegated the allocation of credits to 3 people: Strategic Director – Place; Assistant Director – Planning; and the Head of Development Management. That decision was taken by the Strategic Planning and Environment Overview and Scrutiny Committee[53]. It was the Head of Development Management who refused permission for the Appeal Scheme under delegated authority[54]. The discretion is being exercised as a planning function by the Council and the Council as a whole has conferred those functions to the planning department who exercise them as local planning authority. In reality, the Council's dissembling in relation to this serves no purpose. It is no better or more reasonable if sustainable development is held up by some other arm of the Council refusing to release credits based on an understanding of Green Belt policy inconsistent with national policy. There is no reason at all why the Planning department could, on review of its case, not decided to allocate the credits – and why it should not do so on receipt of the appeal decision.

66. Secondly properly understood, the allocation of credits to the Appeal Scheme would be consistent with the Mitigation Strategy[55]. The sub-section from 7.1.8 addresses "Where Strategic SANG capacity will be prioritised". Para. 7.19 contains a box and an order in which schemes will be prioritised. It is common ground that the Appeal Scheme falls within the box, at point 6. Its sequencing means that it is low priority – but still a scheme for which Strategic Sang is intended. The priority sequence would be relevant if there was a capacity issue and a number of schemes were before the Council which exceeded

[52] Incidentally, the Appellant refutes any suggestion it should have challenged the strategy. The relevant issue for the appellant is the position of the Council on the appeal, and whether its position in the appeal context in not releasing credits to enter a 106 agreement, or to agree to a condition is reasonable.
[53] See the report at CD 5.30 and 2.23 box 10
[54] CD4.2
[55] CD 5.31

the capacity of the SANG. But that is far from the case. The Appeal Scheme can be allocated and there would remain over 1300 spaces for new permission including all the anticipated small schemes at Chipperfield alone. As such, this falls into the category where the Mitigation Strategy says "…the Council will do it all that it can to make the capacity of its Strategic SANGs available to the developments…"[56]. The strategy recognises that capacity may become limited, but contains two express provisions for that. Para 7.1.8 makes clear that it will at all times seek to retain 10% of existing capacity to allow developments of less than 9 homes to progress. And 7.1.13 says that applications will be monitored regularly against capacity and an early warning system put in place. There is currently over 40% capacity, and no early warning. There can be reason not to allocate based on capacity and the Council should be "doing all it can" to allocate to the Appeal Site as sustainable development. The Appeal Scheme is entirely consistent with that part of the Strategy which addresses where Strategic SANG will be prioritised, but instead the scheme has been treated as if under 7.1.12 "where proposals do not form part of the priority list set out above, the Council will expect such schemes to deliver their own bespoke SANG or alternatively a solution to securing SANG elsewhere..". The Council has turned its own strategy on its head.

67. Thirdly, the Council's now sole reliance on "inappropriate development" as a reason not to allocate strategic SANG is absurd, contrary to national policy, and unjustifiable. It is also contrary to the stated objective of the strategy – "to ensure a continual and predictable supply of new homes across the Borough…"[57]. Essentially, box 7.1.5 says SANG will not be allocated where permission is refused; but if that refusal is overturned on appeal the Council will seek to make SANG available if capacity[58]. On the face of it that would be this case – there is capacity and the priority system means that this scheme should be granted credit. The third bullet says that SANG will not be allocated to inappropriate development. There is a footnote intended for this provision – but it has been omitted. The Council's interpretation and application would mean that even a ten unit scheme in the Green Belt with overwhelming special circumstances could not receive SANG. There is no justification for this position in the Strategy, Mr Freeman

[56] Para 7.1.8
[57] 7.1.2 – although the Council has at a very late stage suggested more could have been done to cast around for an on-site solution despite NE's clear advice – the failure to deliver on-site SANG is not a reason why the Council has not allocated SANG credits.
[58] Footnote 12

could give none. He accepted it would lead to refusals on a Green Belt basis masquerading as a Habitats basis. He accepted the provision was inconsistent with national planning policy. He accepted it would prevent sustainable development making a meaningful contribution to the Council's housing and affordable housing shortfalls. The approach is simply unreasonable. It seems most likely that the footnote should have said wording to the effect of – unless justified in line with national policy. Even if those words are not there that is the only reasonable application of the strategy in a case such as this where the Council's position is that the scheme is fully compliance with all national and local policy – and the housing supply sits at 1.69 years.

68. The issue is brought into real focus by considering the consequences. If the Council had, on changing its position on the appeal, decided to allocate credits then a section 106 could have been agreed with the Council and as far as they were concerned permission been granted by the Inspector in his appeal decision without any question of Grampian conditions or adjournments.

69. Even so, the real relevance of the point at this stage is that it goes to the prospective satisfaction of the Grampian condition. If the Inspector agrees with the Appellant then in addressing the prospect of the Grampian being satisfied he may say that the Council's position at this inquiry in relation to the allocation of credits was unreasonable. The Council is bound to have to review its decision in light of that decision. It would be irrational of the Council in those circumstances not to decide to allocate credits to this deliverable scheme of sustainable development.

Westbrook Hay / Boxmoor Trust SANG

70. There is also considerable common ground at the close of the inquiry in relation to the factual position relating to the Westbrook Hay SANG. These factual matters were set out in Mr Kirkpatrick's proof[59] and are agreed by Mr Freeman:

"The following agreement has been reached between the Appellant and DBC/NE in respect of the Westbrook Hay SANG site:

• The 63.2ha Westbrook Hay site has approval from NE as a suitable SANG site

[59] Para 4.1.5

• NE have approved a revised Management Plan which identifies the site to have a capacity of 3029 SANG credits

• BMT has a board approval to sell all their SANG credits following an initial board approval only to sell 200 units

• DBC has approved a recent planning application (23/01815/FUL) by BMT to increase the car parking capacity at Westbrook Hay SANG site which satisfies one of the key upgrades identified within Phase 4 of the approved Management Plan

• BMT has now completed the majority of identified improvements required by the Management Plan to enable the sale of all 3029 credits

• BMT has a board approval to engage with DBC to agree a long term management agreement for their SANG site via a Section 106 agreement

• BMT has full discretion for the sale of SANG credits to appropriate consented sites

BMT has a historic board approval to negotiate a SANG credit sale agreement for 135 credits to be allocated to the Rectory Farm site, subject to planning

• Angle Property Ltd agreed the SANG cost per credit and issued a draft set of Heads of Terms to BMT in June 2023

• NE and DBC are fully supportive of the Westbrook Hay SANG coming forward as a suitable SANG mitigation site for new residential developments

• The principles of the proposed Section 106 agreement between BMT and DBC have been reviewed and no immediate “red-flags” raised

• DBC issued a draft Section 106 legal agreement to BMT on 29th February 2024 that reflected the position reached in negotiations regarding i) the works required to practically deliver the SANG, ii) securing the SANG in perpetuity, iii) management and maintenance to ensure that the SANG continues to provide effective mitigation, and iv) an allocation mechanism.

• DBC and NE acknowledge the Westbook Hay SANG site would be an acceptable mitigation site for the proposed development at Rectory Farm, Kings Langley (i.e. within 5km of the SANG)

• DBC anticipate that the Westbrook Hay SANG Section 106 documentation will be completed by June 2024, as set out in the Brown Jacobson letter to the Appellants on behalf of DBC dd.

8th March 2024 [CD 9.5].

71. NE are fully satisfied that the Westbrook Hay SANG will provide suitable SANG mitigation for the Appeal Site. NE is also categoric that its objection falls away if the Planning Inspector, through this appeal process, can suitably secure either of the two identified SANG solutions[60]. This is obviously a matter for the Inspector – if he is satisfied either of those solutions is secured then NE's position is clear. They themselves do not make submissions to the effect that a Grampian is inappropriate, despite being aware that this was the Appellant's proposal[61]. They leave this matter to the Inspector.

72. It is also agreed that once secured the Westbrook Hay will provide appropriate mitigation for the Appeal Site such that there will be no adverse effect on the integrity of the SAC.

73. The only issue is the delivery mechanism.

74. The Council rely on three steps that are to be secured before it would be satisfied that permission could be granted, set out in Mr Freeman's paragraph 7.8. These are:

    (a) A s106 Agreement between the Council and Boxmoor Trust to secure the Boxmoor Trust SANG in perpetuity;
    (b) An agreement between the Appellant and the Boxmoor Trust to buy / sell SANG credits;
    (c) A s106 between the Appellant and the Council to restrict occupation of the development until the SANG is delivered.

75. The Council accepts that there is a real prospect of each of these happening. That is sufficient for the imposition of a Grampian condition – but the Appellant considers it significantly understates the likelihood of these matters occurring and how soon they will occur:

[60] CD102 at 6.19
[61] Para 6.3

(a) The s106 is travelling between the parties and the Council anticipate it being entered into before June[62];

(b) The Board unanimously approved in June 2023[63] to engage with Rectory Farm as to the sale of credits. In fact, Rectory Farm was identified in relation to the pilot scheme at that time. Since then the whole SANG has scheme has been rolled out and the Board has resolved to take forward selling the full 3029 credits. The Board is actively promoting the sale of credits and its commercial model is to seek revenue to drive forward the programme. The Appellant confirmed it is in regular contact with the Trust. This is a commercial arrangement between a developer wishing to buy and a Trust with approval to sell looking to sell those credits. Such contracts are straightforward, and as soon as the overarching 106 is agreed the Appellant will quickly be able to reach agreement.

(c) Such a s106, if required, is a formality. The Appellant has already in its bilateral planning obligation committed to pay the SAMMs. It has offered unilateral undertakings not to commence development until it has one way or another secured SANG credits. It has also offered the Grampian condition which would have a similar effect. Again, step three is straightforward and readily achievable once the overarching s106 is in place.

Grampian Condition and Mechanism

76. The Habitats Regulation requirements are set out above.

77. The Appellant submits that the Council has significantly overcomplicated this issue.

78. This is not a case where there is any question of 'scientific' doubt as to the effectiveness of the mitigation strategy. The Council and NE are fully satisfied that each of the off-site SANGs are fully effective in ensuring that there will be no adverse impact on the integrity of the European Site.

[62] CD 9.5
[63] CD 11.3

79. The residual question then is whether there is any reasonable doubt that with the Grampian condition in place there will be an adverse impact on the European Site. The answer is likewise – no. There can be no impact on the European site from the proposed development if it is not built and occupied. This is axiomatic – but in any event confirmed at paragraph 8.1.3 of the Mitigation Strategy[64].

80. In this way, the wording of regulation 63(6) and 70(2) which specifically relates to planning permission is clearly met: "…the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European Site…would be avoided if the planning permission were subject to conditions or limitations,, grant planning permission…"

81. In this sense, the question is only where it is appropriate to impose a Grampian condition. The imposition of a Grampian is a lawful imposition of a condition as it is for a planning purpose, relates to the development proposed, and is not unreasonable in that it is one that no reasonable planning authority could impose[65] – as evidenced by the imposition of such conditions by the Secretary of State.

82. The concerns raised by the Council at the round-table session on SANG mechanisms can be summarised as follows:

    (a) NPPF – condition not enforceable, precise, reasonable
    (b) NPPF – paragraph ID21-10 applies and there are not exceptional circumstances.

83. These points were answered in the discussion and those points summarised here.

84. As a starting point, it is very hard to see how any concerns relating to enforceability, reasonable or precision, can be made give the number of appeal decisions in which such conditions have been imposed.

[64] CD5.31
[65] Newbury BC v SSE (1978) 1 WLR 124

85. More substantively, the condition is clearly enforceable. A breach will be clear to the Council, the Appellant must notify the Council of commencement under the planning obligation, and it will know whether or not it has approved the SANG strategy. It can take enforcement action. All the Council's submission on enforceability[66] ignore the fact that the condition is deliberately a negative one – ie a Grampian condition. The Council's closing at 20 cites part of para 9 of the PPG – but that part of the PPG is saying why such conditions should be negative and is entirely supportive of the Appellant's case and contradictory to the Councils case.

86. The condition is precise in that it tells the Council and the Appellant and any other reader what is required for compliance with condition. The comments of the Council as to this in its closing are not any points made in the round-table session, and are odd given that the condition was proposed by the Council. It is entirely precise, and does not require any party to do anything which it cannot do – and which in fact the evidence shows is extremely likely to do.

87. The condition is reasonable. Grampian conditions are frequently imposed. The condition is not onerous or uncertain. It is not clear in what way it is said to be unreasonable. In this case for the reasons given above the potential SANG solutions have been identified and assessed as suitable by NE and the Council. The Appellant has indicated it is content with either solution and has offered undertakings to make the relevant commitments. The Grampian condition does no more than hold the development back until one of those solutions is secured.

88. Turning to the PPG there is a difference between the parties as to whether para ID21a – 9 or 10 is the applicable paragraph. The answer is that paragraph 9 – as it says – is the applicable paragraph because the condition relates to land not in control of the applicant. It gives as an example – "such as the provision of supporting infrastructure". That is in effect what a SANG is. As such, the question whether there is a real prospect of the action in question being performed within the time limit imposed by the permission – and it is common ground that there is

[66] Closing para 20

89. Paragraph 10 is directed, again as it says, to situations where the parties are in a position to finalise the planning obligation in a timely manner. It has nothing to do with reliance on third party land. The proposed condition is not one where a condition is being used to require an obligation to be entered into that could be addressed now by an obligation. The Appellant has taken the obligations forward in a timely manner as far as it can. The final piece of the jigsaw requires third party land, and so paragraph 9 is appropriate. Even if paragraph 10 were engaged, the circumstances of this case are, for the reasons given above, exceptional so that it is appropriate to impose a condition under that paragraph. The only outstanding issue between the Council and the delivery of the Appeal Scheme is the SANG delivery mechanism -and that can be addressed by the Grampian condition. If paragraph 9 is the applicable paragraph then the Council accepts that this guidance is et and the condition can be imposed in line with the PPG. The Appellant would add that there is also a prospect of the Council's credits may be released. The Council's position on this seems to go round in circles. Mr Freeman said the decision had been taken and would not be reviewed. The Council's closing now suggests it will be reviewed[67]. If so, then there must be a prospect that credits will be sold to this scheme given all the issues reviewed above.

90. The other appeal decisions were discussed at the round-table discussion. It is inevitably the case that each decision is a response to the factual circumstances of the individual case. Other appeal decisions are not statements of law or policy. The relevant law and policy in this case is addressed above. The real value of the other appeal decisions is:

    (a) It is evidently the case that Grampian conditions are used regularly and without controversy to prevent development until a particular SANG strategy has been put in place;
    (b) The most analogous decision is CD8.1 where again there was identified SANG and no doubt as to its suitability. The issue was one of when it would be available. The Inspector's paragraphs 21 and 22 are clear statements of the proper approach to the policy and guidance set out above. Planning permission should not be refused unless there are clear adverse implications of granting a planning permission that may not be implemented. But it is wrong to refuse to impose such a condition solely because there is no

[67] Closing para 9

guarantee that the action in question will be carried out within the time limit of the permission. That is a direct application of PPG para 9 addressed above and accords with wider planning principles that permission should not be refused when the harm can be avoided by condition.

(c) Despite the volume of decisions out into the Core Documents the majority discussed are scenarios where there has been absolutely no difficulty in imposing a Grampian condition in the context of the Habitats Regulations. That includes by the Secretary of State (CD 8.16) – see para 50 of the DL, and e.g. condition 52 on pdf 166. The Appellant also relies on CDs 8.1, 8..2, 8.16, 8.21.

(d) The difficulties for appeals arise where the decision-maker cannot be satisfied on the evidence before them that the mitigation to be secured will be effective. That arises for a number of reasons – often because the appellant or parties have not provided the Inspector with sufficient detail as to the mitigation strategy to satisfy him/her that the mitigation will be effective. But this is the case regardless of whether the proposed mechanism is a s106 agreement (e.g. CD8.12) or a condition (CD8.18). For example, the case that the Council relies on particularly is CD8.18. That is the only decision in the entirety of the Core Documents where a Grampian condition was considered and rejected. But the circumstances were very different and quite particular. It was a decision from 2009 when there was considerable uncertainty as to issues of certainty arising under the (then 1994) Habitats Regulations, as evidenced by the legal debate addressed in the decision letter. The particular issue however of concern to the Inspector was that the Appellant (HCA) was not willing to contribute the full contribution to secure the appropriate amount of contribution to make up for the deficiencies in its SANG solution (para 15.3.45). There was no alternative way identified of providing suitable SANG or funding it. As such, the Inspector found that the necessary SANG had not been identified as to where it was to be and how it was to be funded, and this was not addressed in the unilateral undertaking (15.630). Put simply, the mitigation strategy had not been identified or explained. In that context there was not sufficient certainty that the mitigation strategy would be effective to avoid an adverse

effect. This was the particular point that the Secretary of State raised[68] - the particular uncertainty was not with the Grampian condition but with the fact that the mitigation strategy itself had not, for the above, reasons identified how sufficient and suitable SANG could be provided. This is not a statement of principle, but simply a case specific conclusion that the mitigation strategy had not been sufficiently identified at the time of the decision to give the decision-maker sufficient certainty. That lack of certainty could not be addressed by condition (15.8.30). The reliance of the Council on CD8.12 is misplaced as it has nothing to do with a Grampian condition, being a written representations appeal in which the Inspector could only comment on the mechanism offered in that case which was a deficient s106.

91. The circumstances of this case face none of those complexities or deficiencies. There are two off-site strategies which all parties agree are sufficient and entirely effective. The relevant SANGs are identified. The only issue is not certainty as to whether the SANG options are effective, but when they will come forward[69]. That is the result of the evidence in this case. There is no lack of scientific certainty, no evidential deficiency, and the SAMMs element is secured by the obligation. The case is analogous to CD8.1 and it is wrong not to impose a condition simply because there is a degree of uncertainty as to when the Westbrook Hay SANG will come forward[70]. All of these cases are evidence specific. Where a suitable SANG strategy has been identified in evidence and confirmed by NE and the Council to be effective, and the relevant funding is secured, there is no reason to refuse to impose a Grampian condition. The Grampian provides absolute certainty that there will be no harm unless and until the identified strategy is delivered. The Council's suggestion[71] that the condition <u>is</u> the mitigation ignores all of the evidence before the inquiry. The Council simply ignores that <u>both</u> the options are suitable and identified SANG. There is no uncertainty as to the effectiveness

[68] CD8.18A at 24
[69] Although the Council led SANGs are fully operational – there is no uncertainty as to the effectiveness of the Council SANGs.
[70] As set out in the above submissions – the evidence shows the Westbrook Hay to be coming forward, works are being undertaken on the ground pursuant to the permission, it is approved by NE and DBC, the Board has approval to sell credits and is releasing the full 3000+ credits, and the only issue is one of the final legal formalities.
[71] Closing para 16

of the mitigation. If, in the highly unlikely event that neither of those identified and suitable SANG solutions, then the development will not take place and there will be no harm to the SAC. The Council's closing submissions – despite the invitation to do so in opening and in the RTS – fail to identify any scenario at all where harm could possibly be caused to the SAC.

Conclusion on Issue 2

92. For the above reasons the Appellant respectfully ask the Inspector to:
    (1) Agree that a Grampian condition may be imposed (either of conditions 28). This is a short solution. It has been done in many other cases. It enables sustainable development to be granted permission in a borough that desperately needs it.
    (2) If the Inspector is not minded to do so, to issue a minded-to letter or defer his decision until the matter is resolved and a further section 106 agreement is completed.

93. For the avoidance of doubt, the Appellant submits that there is absolutely no reason why option 1 should not be the outcome as it permits development that accords with all relevant policy and guidance and includes a policy and guidance compliant condition, and accords with paragraph 11(c) NPPF to permit development that accords with the development plan without delay. Accordingly, the Appellant's strong preference is Option 1.

94. The Appellant is surprised by the suggestion at 27 of the Closing that permission should be refused. That is entirely at odds with the position expressed as the Council's position yesterday during the round-table session when it was said that the Council's preferred position was for the Council to take a "resolution to grant" approach. This underscores the unreasonableness of the Council's position given that the key to unlock this sustainable development is – as Mr Freeman said – entirely in the Council's gift. At no time during the inquiry in fact has the Council said that permission should be refused.

Indeed, the Council's opening submissions said that the issue could and should be resolved[72].

Overall Conclusion

95. For the above reasons the proposals subject to the proposed conditions and planning obligations comply with both the development plan and the policies in the NPPF that protect habitats sites and the Green Belt. As such, planning permission should be granted applying both section 38(6) of the Planning and Compulsory Purchase Act 2004 and paragraph 11 of the NPPF.

Landmark Chambers, **GUY WILLIAMS KC**

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13th April 2024

[72] Opening para 6