PINS Ref: APP/U1430/W/22/3304805

APPEAL BY GLADMAN DEVELOPMENTS LIMITED IN RESPECT OF THE PROPOSED RESIDENTIAL DEVELOPMENT OF LAND OFF FRYATTS WAY, BEXHILL.

CLOSING SUBMISSIONS OF THE APPELLANT

1. These submissions will deal with the eight main issues formerly identified by the Inspector in the CMC summary note. Although a number of those issues have fallen away as main issues, these closings will briefly address the position in relation to issues which have been resolved between the parties. Other issues are also addressed in order to explain the Appellant's position clearly.

Whether the appeal site is an appropriate location for the proposed development, with reference to the spatial strategy in the development plan.

2. There are two issues to be dealt with here:

    a. The role of Bexhill in the Development Plan strategy; and

    b. Whether the appeal site accords with that development strategy.

3. It is not in dispute that Rother is a constrained District. 82% of the District is within the High Weald AONB[1]. At least[2] a further 7% is protected by national or international environmental designations. Paragraphs 7.40 and 7.41 of the CS also explain that the District's other two main settlements, Battle and Rye are also affected by constraints: Battle is in the AONB, is constrained by its historic form and has traffic constraints. Rye is affected by the AONB, nature conservation designations and flood risk constraints. Bexhill is the largest settlement, where some 48% of the population of the District live[3]. It has some constraints, particularly on the eastern side, and so the part of Bexhill where the appeal site is located is relatively free from constraints. None of this is recognised, let alone addressed, by Miss Gibbons.

4. These factors informed the strategy of the Core Strategy. Bexhill was a focus for development, with paragraph 7.46 of the CS showing that 3,100 of the minimum 5,700 dwelling figure required to be provided between 2011 and 2028 being directed to Bexhill. The requirement figure in policy OSS1 is agreed to be out of date, with LHN being used instead, as the NPPF requires given that the CS was adopted more than five years ago. But there is no reason to think that Bexhill, as the largest settlement with the biggest range of services and facilities, should not continue to be the focus of development. Miss Gibbons alleges that the appeal scheme conflicts with part (a) of policy OSS1. That is incorrect. That part of the policy requires the focus of development to be "at Bexhill". Her interpretation reads those words as if they referred to land within the development boundary. It was a repeated theme of Ms Gibbons' evidence to treat policies of the Development Plan as though they say what she wants them to say, rather than interpreting

[1] ID22: Core Strategy page 12, para 3.5
[2] Para 3.5 gives the 7% figure, but paragraph 7.26 on page 34 gives the proportion as 14%, a discrepancy which Ms Gibbons could not explain. These submissions err on the side of caution.
[3] ID23: DaSA para 9.1

the words that the policies in fact use. Policy OSS1 does not define development boundaries, let alone provide the development management tests to be used either side of them.

5. Providing growth at Bexhill accords with the development strategy of the Development Plan.

6. Policy OSS2 approves the continued use of development boundaries to guide development and identifies the criteria which were to be used when they were reviewed, as was done by the DaSA. Part (iv) of the policy shows that the development boundaries were to be fixed by taking in to account development needs. Unsurprisingly, the development limits were fixed to enable the accommodation of the Core Strategy requirement.

7. The settlement limits were fixed by the DaSA. Being a plan which relied upon the CS, the DaSA set out to meet the CS requirement. Paragraph 7.12 of the DaSA makes it plain that the development boundaries are policy lines. Putting land within the "countryside" had nothing to do with landscape character, value, quality or susceptibility. Mr Dijkhuis is wrong to think that the contrary is the case. The settlement limits around Bexhill were tightly drawn, as paragraph 9.15 of the DaSA makes plain. This shows that the development limits have little flexibility to enable the development plan to respond to any failure in the plan strategy. Bexhill is severely constrained to its east[4], the new North Bexhill Access Road provides a firm boundary to the north, as Ms Gibbons accepted in XXm, and she also accepted that the reference in paragraph 9.18 of the DaSA to the

[4] DaSA paragraph 9.16

"unnecessary" erosion of the countryside to the west of the A269 in the west of Bexhill further shows that the plan was addressing itself to the CS requirement.

8. The combination of OSS2 and RA3 of the CS and policy DIM2 of the DaSA define the development boundaries and prescribe the restrictive approach to permitting development in the countryside. The appeal scheme does not accord with these policies and Mr Lee accepts that this amounts to a breach of the development plan taken as a whole, given their importance, but that is not, of course, the end of the matter. The question becomes whether there are material considerations which indicate taking a decision otherwise than in accordance with the Development Plan, a topic addressed later.

Whether the appeal site is an appropriate location for the proposed development, with reference to the accessibility of services and facilities.

9. The appeal site is suitably located.

10. The site is on the edge of the main urban area of Bexhill. Being the principal settlement, it has the largest range and number of services and facilities of any of the settlements in the District. It is much larger than Battle and Rye.

11. The NPPF recognises that there is a hierarchy of modes. Paragraph 112(a) of the NPPF sets out that priority should be given, in determining applications, to pedestrian and cycle movements. Facilitating access to public transport is the second priority and that priority is to be achieved "as far as possible". That must mean that a site with good pedestrian and

cycle links but relatively poor public transport access is to be preferred over a site with poorer pedestrian and cycle links but better public transport access, for example.

12. Further, the NPPF does not operate so as to mandate any particular mode share. It does not presume against car use. It does not even say that it is unacceptable to grant permission for schemes if the majority of movements would be by cars with an internal combustion engine. Rather, it operates by seeking the provision of genuine opportunities to choose a sustainable mode: see paragraphs 85, 104 and 110 of the NPPF. Paragraph 105, cited by the Council in its putative reason for refusal, is concerned with plan making, not decision taking. Even if a significant proportion of journeys were by car, the evidence is that journeys by residents of the Bexhill urban area have an average commuting distance by car than is shorter than the rest of the District, as shown by Mr Regan's table LDR4.2

Walking

13. There is common ground between the Appellant and Local Highway Authority as to the range and number of facilities in Bexhill within what the Appellant says is a reasonable walking distance of the site, along with their distance from the centre of the site[5]. The number and range of facilities is high, unsurprisingly so given Bexhill's role as the main settlement.

14. The Appellant submits that it is perfectly appropriate to use 2km as a yardstick against which to assess walking distances. That is for the following four reasons:

[5] ID15, Appendix A

a. Mr Regan explained that it has consistently been the case that the National Travel Survey has shown that walking has the highest potential to replace car journeys of up to 2km in length;

b. Manual for Streets, at paragraph 4.4.1 refers to a walkable neighbourhood being one at up to around an 800m walking distance, but that is not an upper limit and then went on to address the 2km point Mr Regan drew upon. The fact that MfS refers to PPG13, now revoked, does not undermine the robustness of the contention that 2km can be seen as a distance below which walking has the greatest potential to replace car use;

c. The 2km distance has been used by Inspectors, notably the Inspector in the recent Halsted decision[6]; and

d. Not least, Mr Richardson told the Inspector that the 2km distance was appropriate to use to test walking accessibility.

15. The plans and table at Appendix A show the range and number of facilities within that 2km walking distance. There is a good range, including the northern fringe of the town centre itself. Walking routes are relatively level, lit and without unacceptable risk. They are pleasant, particularly so in the case of destinations for which a walk along Downs Road is the obvious route. Mr Richardson's point is to contend that people will not be willing to undertake journeys of that length on foot. But that point is entirely undermined by his own acceptance of the reasonableness of using the 2km figure. That is because the 2km figure

[6] ID18.

was devised taking into account people's propensity to walk. Their willingness is thus taken into account when using the 2km distance in the first place. Mr Regan accepted that willingness to walk a given distance will depend, in part, on journey purpose. For example, a person would be likely to be willing to walk a longer distance to their place of employment than they would to make an emergency purchase of a pint of milk or loaf of bread. However, the distances to facilities, the range of them within 2km and the qualities of the routes means that walking is a realistic option for a wide variety of journey purposes.

16. For some reason, Mr Richardson's written evidence ignored the range of facilities in Bexhill and focussed on nothing but the distance to shops in Little Common and walk distances to schools. To assist with assessing the school distance issue, Mr Regan collated all of the evidence on walking routes and distances to local schools into one table in his rebuttal. Contrary to the complaint made multiple times in XXm of Mr Regan, the Appellant does have permission to rely upon it, as it has been accepted by PINS and, so far as the Appellant is aware, without complaint by the Council. Also contrary to another complaint made in XXm of Mr Regan, the Council has had chance to address the rebuttal. If it had not, its remedy would have been to seek its exclusion or for an adjournment, to provide evidence in response itself, none of which it has asked to do.

17. The distances to local schools in table LDR2.1 in Mr Regan's rebuttal proof are not disputed. He has clearly indicated the routes he has used by a series of annotated aerial photographs appended to the rebuttal. None of them involve using the length of Ellerslie Lane which does not have a footway. Mr Richardson did not acknowledge in his written evidence that this point had been accepted by ESCC in its latest consultation response[7].

[7] CD8.02 under heading "Matter 2 Pedestrian Infrastructure".

Some of them do involve using passageways. The Council consider them to be unacceptable for use. Mr Regan does not. The Inspector is invited to walk them and make his own judgement on the issue. In closing, two points about the passages can be made:

a. When assessing the safety of walking routes for use by children of primary school age, it is assumed that such children will be accompanied by a responsible adult, rather than on their own; and

b. If the Inspector concludes that any of the passages are not appropriate to be use as routes to school, then alternative routes, around roads, are available (the east-west roads to the south of the passages) which would add about 150m to the journeys.

18. It is relevant to note that there are statutory walking distances to school – 2 miles (3.2km) or 3 miles (4.8km) depending on whether the pupil is below or above the age of 8. Whilst it is true that those distances relate to the education authority's duty to provide free transport, it can also be inferred that children are capable of walking those distances. All of the schools are easily within those statutory walk distances. Indeed, the longest route to a primary school is 2.3km and the distance to the one local secondary school is 1.6km. The closest primary school to the site is 1.44km, with 3 other schools at intermediate distances. Those are wholly acceptable walk distances. The Council considers that a car journey may be more attractive. It might. But, as Mr Regan pointed out, it is not unusual for parking near a school at the beginning and end of the day to be challenging. Such difficulties could encourage walking, to avoid the hassle involved in parking.

19. The Appellant has only been asked to provide a very limited improvement to pedestrian infrastructure, namely a dropped kerb at the junction of Concorde Close and Fryatts Way. That can be secured by condition.

20. The Appellant invites the conclusion that the appeal site would provide genuine opportunities to walk to a very good range of services and facilities.

Cycling

21. There is no dispute between the parties that 5km is a reasonable distance against which to test the range of facilities to which residents could cycle. The 5km cycle catchment is shown in plan 5 of the Transport Assessment[8]. Very considerable areas of activity are located within a convenient 5km cycle ride. The catchment includes no fewer than 3 railway stations. The local area is free from serious gradients. Lightly trafficked routes are available and there is no evidence that the need to cross the A259 would be off-putting to cycling and it is common ground that the appeal scheme raises no issues of highway safety.

22. Mr Richardson spent a long time in XC addressing a financial contribution towards providing an upgraded cycle route to Little Common. He did not seem to have appreciated that the planning obligation does not propose such a contribution and he accepted in XXm that such an obligation was not necessary to make the scheme acceptable in planning terms. No more need be said on that point.

[8] CD1.18.

23. The appeal site would provide genuine opportunities to use cycling as a mode of transport which would provide access to a wide range of services, facilities and activities.

Rail

24. The appeal site lies 2km from Collington station. Mr Richardson said that was about a 20 minute walk from the appeal site and an obviously quicker cycle ride. There was some debate in XXm of Mr Regan about how to describe the level of services at that station. The Inspector will decide what adjectives to use to describe the level of service, but the factual position during the AM peak is now clear. Westbound, there are 6 services from Collington between 7.09am and 10.42 am. Eastbound, there are 6 services between 7.28 and 10.21. Destinations served include London Victoria, Eastbourne, Hastings, Ore and Ashford International. Other connections will be available during the day. The fact that there is no roof at Collington station is not a strong disincentive to travel. As Mr Regan said, people carry umbrellas.

25. The appeal site's proximity to the station provides genuine opportunities for people living at the appeal site to travel regionally by a sustainable mode. Even if a person drove from the site to the station to catch a train, the great majority of the journey would be by a sustainable mode. The Council contended that if people have a car, they would choose to drive rather than travel by train, but that overlooks the quick journey times by train and the ability to avoid congestion and the other stresses of driving, by travelling by train.

Bus travel

26. The appeal site's accessibility to bus services is set out in table LDR4.1 in Mr Regan's main proof. The facts in that table are not disputed. Mr Regan explicitly recognises, in paragraph 4.2.20 of his proof, the limitations of the services. But there is an opportunity to use buses to get to the town centre, Eastbourne and Hastings, although, for the latter two, train travel might well be more attractive.

27. The County Council has a plan to improve access to bus travel, through the Bus Service Improvement Plan ("BSIP")[9]. Mr Richardson's written evidence did not address the funding for that scheme at all. The impression left by paragraph 4.2.1 of his evidence is that the only funding that exists for that scheme is the £300k set out in the Appellant's planning obligation. His written evidence fails to provide anything like a fair or comprehensive picture of the County's proposals and success in attracting funding.

28. A key part of the BSIP is a Digital Demand Responsive Transport ("DDRT") service. The summary in the BSIP sets out the objectives at page 24, section 1.4. The very first objective is:

> *"To launch new Digital Demand Responsive Transport (DDRT) schemes for all communities outside Hastings and Eastbourne, to help ensure no resident is further than 800 metres from an available bus services ..."*

29. The accessibility targets for the BSIP are set out at page 89. They include a target to provide 80% fulfilment within 1 hour of requested departure time during the daytime on weekdays and a 70% target during weekends and evenings. This was drawn attention to

[9] CD8.3

by Mr Vanderman in XC of Mr Richardson, but for what purpose was not clear. That is not an indicator of a substandard proposed service.

30. The BSIP describes the overarching strategy of the BSIP, including DDRT, as highly ambitious and bold and sees the DDRT as addressing one of the most serious transport problems facing rural communities[10]. Section 106 contributions are expressly referred to as one of the means of local funding that will continue to be needed to deliver the plan[11], along with CIL and operator investment, plainly indicating that the County Council never expected Central Government to fund the whole BSIP.

31. For Bexhill, the whole strategy for improving Town Bus Networks is the provision of a DDRT service, as set out in the box on page 106 of the BSIP. The DDRT in Bexhill is intended to replace the 96 and 97 services. The DDRT would be intended to integrate with train and bus services, including improvements to services 95, 98 and 99. It is intended to operate peak time, daytime and evening, seven days per week.

32. Pages 146 to 148 of the BSIP helpfully explain what the DDRT service would involve. The National Bus Strategy recognises the important role for DDRT. The service's key attribute is its flexibility to respond to user requests as regards pick up and destination points as well as timings. A key aspect of *Digital* DRT is the ability to change routes in real time to respond to recent requests which may only have been made minutes before. It also means that services only need run when needed[12], meaning empty vehicles do not add to traffic. The BSIP envisages "*very extensive*" application of DDRT in the County, to

[10] Top page 97.
[11] Middle page 97, immediately after the bullet points.
[12] Page 148, fourth paragraph

provide a "*step change in mobility opportunities in our smaller towns and rural areas*"[13]. Bexhill is listed as one of the 15 proposed schemes[14] and the map of the proposed area of coverage[15] shows the appeal site as very well located within that area. The DDRT is to be delivered in partnership with West Sussex CC and bus operators.

33. The overview delivery table on page 175 of the BSIP shows that ESCC is committed to early delivery of the DDRT. The implementation of the DDRT is described in that table as "*a key policy*" of the BSIP with consultation and implementation "*at the earliest opportunity*".

34. All of this key material is simply ignored by Mr Richardson's written proof. When he finally turned his mind to it in XC, he painted a gloomy picture of hopes destroyed by a miserly funding settlement from HMG. But that is not correct. The press release from ESCC issued on 21st September 2022, in appendix LDR1 shows that the County has secured £41.4m of funding. Far from spelling doom for the BSIP, the County intends to forge ahead with it. The press release sets out that the BSIP's plans will be put into place, with the £41.4m being treated as a funding settlement for the first 2.5 years of the BSIP period. The press release shows that ESCC secured the highest per capita funding of any rural authority. The fact that £41.4m falls short of the full £100m cost of implementing everything in the BSIP is clearly not going to stop ESCC from bringing forward their proposals. That is what they tell us. Mr Richardson does not accept that and believes that the BSIP and, with it, the DDRT, is bound to fail. But he has no evidence to support that contention. Oddly, he never set out who he was and where he was from either in his written

[13] Section 15.8.2, page 147.
[14] Page 148
[15] Page 161

proof or XC. It was left to XXm to establish that he is not an officer of ESCC, but an external consultant with Mott McDonald with little experience of working in East Sussex and none (before this inquiry) in Rother. Even more oddly, he was content to offer an opinion on what ESCC would choose or be forced to do without even asking anyone in ESCC whether his views represented theirs or were correct. His evidence of his clients' intentions fails to be backed up by even the most cursory enquiry and deserves no weight whatever.

35. Nor is Mr Richardson's evidence easy to reconcile with the documentary material. The sum of £300k in the planning obligation as the contribution for the DDRT was not plucked from thin air by the Appellant. It was the sum which ESCC sought. ESCC provided a consultation response on 26th October 2021[16]. In it, ESCC addressed what it thought were the shortcomings of the accessibility of the appeal site then sought a "sizeable contribution" to a new DDRT service[17]. The letter then sought a contribution of £300k, saying this would run the scheme for three years, albeit that there was a concern about ongoing viability.

36. It is important to note that this letter was written and the contribution sought before confirmation of the £41.4m funding. That additional funding can only assist with providing and maintaining the DDRT service.

37. The Council makes the point that the delivery of the DDRT is not certain. Five points are made in response:

[16] CD3.06, on page 25 of the core document
[17] Page 28

a. A decision can only be made on the evidence. The evidence is that ESCC is committed to the BSIP and the important role of DDRT within it, and the Appellant proposes a contribution to greatly assist with a DDRT scheme directly related to the site;

b. A lack of certainty could be made about any situation anywhere. No doubt if the appeal site had a fantastic range of bus services at the site entrance, Mr Richardson would still be pointing out that the services might be withdrawn during the life of the scheme. Nothing is certain;

c. There are bus services, albeit with limitations, presently available;

d. Bus services are but one aspect of public transport and the site has good access to train services; and

e. Public transport provision is a secondary consideration after walking and cycling, as NPPF paragraph 122(a) makes clear.

The Car Club

38. As a further measure to improve opportunities for sustainable travel, the Appellant proposes a car club. A contribution would be made that would fund a 7 car scheme for three years. The basis for the figure was explained by Mr Regan and the Council has produced no robust evidence to dispute that figure. The company who provided the figure

is confident that the scheme would be viable on a continuing basis, but viability in this case is not a binary matter, as the car club could be amended to reduce the number of cars if viability was marginal at the end of the funding period.

39. There is no reason to think that the car club would be unattractive to appeal scheme and existing residents. It might mean people do not have a car of their own, or it might mean that people choose to own one car and use the car club instead of incurring the considerable expense of buying and running a second car. It would provide a further valuable opportunity for sustainable travel.

40. Mr Richardson's evidence on this point is seriously undermined by his opinion that electric vehicles are not a sustainable mode. That is a dispute with the Secretary of State, because he clearly includes zero and ultra-low emission vehicles within the definition of "sustainable transport modes" within the NPPF glossary.

Conclusion on accessibility

41. Taking a metaphorical step back from the detail of the evidence, there is something counter-intuitive about the Council's objection to the appeal scheme on accessibility grounds, given that the appeal site is located on the edge of the District's main settlement. It has been no part of the Council's case to point out how other parts of the periphery of Bexhill are better located for sustainable travel, in order to illustrate its case about the appeal site. The Council's case is also characterised by a reluctance to recognise that the planning system can only provide genuine opportunities as to modal choice and time and again Mr Richardson resorted to arguing that the appeal site was within a particular

guideline distance of a trip attractor by sustainable mode but that people just wouldn't make the choice not to use a car. He even resorted to arguing that the issue is behavioural and if someone has a car, they will use it. If that is the test (it isn't) then not many sites would ever be able to meet it. A car trip is very often going to be quicker than a bus journey or trip on foot or by cycle.

42. The degree to which the Council's stance at this appeal is detached from the reality of Planning Policy was illustrated by the fact in XXm it was put to Mr Lee that the scheme created these issues by providing parking for each dwelling. As Mr Lee rightly replied, this is what the Council itself requires to be provide by development plan policy.

43. The key point is that the appeal scheme would provide residents with genuine opportunities to use a choice of sustainable modes, whether walking, cycling, bus or train travel, or to drive by electric vehicle from the car club or using the charging infrastructure which each house would have. The Travel Plan, which could be refined by a final version submitted under the requirements of a condition, would provide a valuable means of publicising and encouraging sustainable modes of travel, as paragraph 113 of the NPPF envisages.

44. The appeal scheme would not breach the transport-related policies of the development plan. Ms Gibbon's reference to policy SRM1 of the Core Strategy is misplaced. For this proposal, only criterion (vii) is relevant and all that does is cross-refer to policy TR2 and adds nothing to it. The scheme accords with policies TR2 and TR3, in the light of Mr Regan's evidence.

The effect of the proposed development on the character and appearance of the area.

45. The appeal scheme would have a wholly acceptable impact upon the character and appearance of the area, and there is no cogent evidence from the Council which comes close to establishing the contrary position. The Council's landscape and visual evidence is weak in the extreme, for the following reasons.

46. Mr Jackson's firm produced a Landscape and Visual Appraisal ("LVA") at application stage. His claim that the assessment follows guidance in the third edition of the Landscape Institute's Guidelines for Landscape and Visual Impact Assessment ("GLVIA3") was not challenged by the County Landscape Officer at application stage and has not been challenged at the inquiry, unsurprisingly perhaps, given what Mr Dijkhuis volunteered in XC about his expertise, or lack of it, in writing or assessing landscape and visual appraisals and impact assessments.

47. On landscape character, the LVA and Mr Jackson's evidence addresses the current character of the site and its surroundings, and relates the site to its context, drawing, as appropriate, on past landscape character assessments. As he explained, such higher level assessments are not a substitute for a careful site specific assessment. He has carried out such an assessment. The main points are the following.

48. The site has no landscape designation and no intervisibility with any such landscape. Mr Dijkhuis' contention that the site's designation as part of the countryside is relevant to landscape character and quality is simply wrong: the designation is a policy tool to apply

different development management tests either side of the settlement boundary, a point which he and Ms Gibbons accepted in XXm.

49. The site is free from the landscape and environmental constraints that many other parts of the District face, given that 82% of the District is within the High Weald AONB, with parts of the rest of the District being constrained by its status as a SAC and is thus in the least constrained part of the District, a point not addressed by Mr Dijkhuis or Ms Gibbons until XXm.

50. The site is placed within the Bexhill Urban Area in the East Sussex Landscape Character Assessment. Mr Dijkhuis' application of the South Slopes on the High Weald area in that Assessment is wrong. One cannot treat a site in one character area as if it is in another, as Mr Dijkhuis expressly tells us he has done in paragraphs 2.18 and 2.26 of his proof. As explained by Mr Jackson, the boundary between the Bexhill Urban Area LCA and the South Slopes LCA is logically and defensibly drawn at Turkey Road. Mr Dijkhuis' contention that the appeal site forms part of an area that can simply be described as countryside in landscape terms is contradicted by his own evidence at the end of his XC when he said that "slowly but surely" the landscape south of Turkey Road "blends into the urban landscape" and also by his acceptance that the East Sussex LCA found that the appeal site formed part of the urban area in landscape terms. That is an explicit, albeit unwitting, acknowledgement of the urban influence over the appeal site and its immediate context. The site is influenced by the urban edge adjacent and the development close to it. Mr Dijkhuis' evidence suffers from his approach of referring to and relying upon only those aspects of local character that suit his case. When asked about why he had ignored

the urban influence on the appeal site when describing the area, the effect of his answer was to acknowledge that he had provided a partial assessment to suit his case.

51. The landscape has a medium value, as assessed by the exercise recommended by GLVIA3 and the recent Technical Note that updates the recommended assessment methodology. Mr Dijkhuis presents no competing assessment, other than a wholly unsatisfactory attempt to use the Green Infrastructure Background Paper as though it identifies landscape value. It does not. It identifies valuable uses and resources within the District but does not purport to equate that with an exercise in assessing landscape value. The Appellant's contention that the appeal site does not form part of a "valued landscape" for the purposes of the NPPF is not disputed.

52. The appeal scheme would enable up to 210 dwellings to be built whilst using about 39% of the site as Green Infrastructure and open space of various kinds. Mr Dijkhuis does not address that aspect of the scheme at all, choosing to focus upon the built development only. The scheme would require only the removal of two mature trees and minimal lengths of hedgerow for access within the site and the scheme would allow for a net increase in tree cover and hedgerow planting, as Mr Dijkhuis accepted when asked to address that issue in XXm.

53. The overall landscape effects are recorded in Appendix B to the LVA. The scheme would have a negligible effect on the High Weald NCA during construction, on completion or with 15 years of landscape maturation. The effects on the South Slopes of the High Weald LCA would be minor adverse, minor adverse/negligible and negligible respectively. For the site and its immediate context, the character effects would be major/moderate adverse

during construction and on completion, falling to moderate adverse after 15 years. Mr Dijkhuis did not contest any of that assessment, stating when asked by the Inspector "*I have to keep quiet about the conclusions of the LVA*", given his acknowledged lack of expertise.

54. Mr Dijkhuis pursued a series of unhelpful and erroneous criticisms of Mr Jackson's evidence and of the LVA. His willingness to do so is odd, given his acknowledged lack of expertise. In addition to misapplying the key characteristics of one LCA to another, treating the countryside policy designation as a landscape designation and wrongly implying that the GI Background Paper addressed landscape value, Mr Dijkhuis took the following points:

    a. That the LVA failed to address topography. This point was withdrawn in XXm;

    b. That the LVA wrongly treated the appeal site as two separate entities: trees and hedgerows and then green fields and also treated the site in isolation. The first point is incomprehensible and the second is plainly wrong. When asked to identify where the LVA treated the appeal site as two separate components, he could not do so. In XXm of Mr Jackson, he was taken to paragraphs in his proof (but not the LVA) to show that there are locations where, in the Box 5.1 exercise of addressing value, there are paragraphs which refer to trees/hedgerows without referring to the fields and vice versa. Such cherry picking is completely unhelpful to reasonable assessment or decision making. When the totality of the LVA and Mr Jackson's proof are read, it is abundantly clear that Mr Jackson and his firm have not inexplicably ignored the fields, trees or hedgerows for the

purpose of assessing character or the scheme's impact upon it. Nor is it fair or correct to contend that the appeal site is treated in isolation. The LVA and evidence does address the appeal site in its context. That is what Appendix B of the LVA was doing. The appeal site and the effect of the scheme is properly addressed in context;

c. Mr Jackson was asked about certain aspects of certain attributes of the character assessment for the High Weald NCA. Quite apart from the fact that this high level document, which relates to a very large area, is no substitute for a site specific assessment, it is simply of no assistance to seize upon references to hedgerows and trees in the assessment and somehow assert that tells one anything about the degree to which the appeal site and its surroundings meet the Key Characteristics of the High Weald. That is because there are lots of other key characteristics that combine to provide the High Weald's distinctive character. It is a pointless exercise; and

d. Mr Dijkhuis sought, in his proof, to derive some assistance from the SHLAA's assessment of sites BX36 and BX8. But the SHLAA maps[18] show that BX36 is some way from the site, and within Broadoak Park and that BX8 is larger than the appeal site, including fields to its north and south. In any event, Mr Dijkhuis proceeded to undermine his own reliance on the SHLAA by pointing out that its assessment of site BX8 involved no expert landscape and visual input into its judgements. If that is correct, the SHLAA assessment carries no material weight.

[18] Page 3 of CD6.12

55. Then there is the Council's case on the gap. The Bexhill Inset diagram in the Core Strategy shows that strategic open space. It is an odd feature of that plan that that notation in the inset diagram has no policy which applies to it whatsoever. The fact that the appeal site falls within that green notation[19] is of absolutely no consequence whatsoever. There is no policy protection in the Core Strategy for that area. Nor did the DaSA make any provision which relates to that area. Whilst there is a strategic gap policy[20], it does not apply to the appeal site or any land within that green coloured area. Moreover, the Development Plan does not treat Little Common and Bexhill as separate settlements for any purposes, let alone as ones to be keep apart.

56. If that were not enough, the appeal scheme would not close the gap, as shown by the notations on the aerial photograph at CD2.05c. When that was put to Mr Dijkhuis, his case on this issue pivoted to become that the degree of closure of the gap was not even a material consideration. In effect, he reverted to an assertion that the scheme would unacceptably encroach into countryside.

57. None of the Council's criticisms of Mr Jackson's evidence or the LVA provide any basis for preferring the Council's evidence over that of the Appellant. But even if they did, the Council's case would not be advanced at all. That is because the Council's case does no more than show that the appeal scheme would cause adverse effects upon the landscape. Mr Jackson and FPCR have never claimed that would not be the case. Mr Dijkhuis' characterisation of harm is set out in paragraph 2.22(a) to (d) of his proof. The point at (d),

[19] Which may or may not resemble Italy.
[20] DaSA policy DEN3

asserting ecological harm contradicts the SoCG and Mr Dijkhuis rightly withdrew that contention in XXm. Points (a) to (c) do no more than state in different words, that the scheme would cause some harm. The contentions that the appeal scheme's effects would be irreversible and that they would be effects on the landscape setting and green fields are hardly revelatory. Nor do they provide a basis for ascribing any particular level of harm to the impact. Indeed, in his written evidence, the only place where he ascribes any descriptor to the level of harm is paragraph 2.32 where he calls the harm "significant". He was given every opportunity in XXm to explain what he meant, and clearly stated that, for him, significant meant relevant. There was no misunderstanding. In RX, Mr Dijkhuis was invited to go back on that answer and "significant" was suddenly transformed into an assertion that the harm would be "major". That evidence was unsatisfactorily elicited and ought to be ignored, but it is quite impossible to evaluate the contention anyway. It was never explained in any way. Even such basic matters as whether the allegedly major effect would occur on the site, the site plus its context or over a wider area were entirely absent from the evidence. Simply labelling the harm as "major" is wholly inadequate. Given that the basis for the assertion of harm is that which, when analysed, could be said about any greenfield development anywhere that is designated as countryside, the Council's character case is wholly devoid of merit and inadequately expressed.

58. The position on visual impact is starker still. Mr Dijkhuis produces absolutely no evidence on visual impact. He addresses no viewpoints, no receptors, no impacts of any kind. Mr Jackson's evidence is entirely unchallenged. That appears to be because Mr Dijkhuis accepts it, given that he was at pains to point out that the visual enclosure of the landscape is an aspect of it which apparently presents problems for the Council in the AONB where developers apparently seek permission on the basis that the enclosure of the landscape

means development is not highly visible. Mr Dijkhuis has put his case, such as it is, solely on the basis of character, and not visual, effects. The appeal site is visually well enclosed and its visibility is limited by the combination of vegetation, topography and existing development.

59. There is no robust case on character and visual effects against the scheme. Mr Dijkhuis' evidence contains no assessment of:

    a. The quality of the landscape around the appeal site;

    b. The green network created by the site along with Broad Oak Park and the golf course;

    c. The impact of the scheme upon the gap with Little Common (given he thinks that issue is immaterial anyway);

    d. No assessment of visual impact at all, still less any evidence that the appeal site is "highly visible" from public viewpoints.

60. There has been a serious failure to provide cogent evidence to substantiate putative RfR1.

61. In addition, where he does address points, he does so in a way which carries no weight or which do not advance the Council's case to any degree. Boiled down to its essentials, the Council's case is that the appeal scheme will cause the loss of a greenfield site, that that produces some harm and that harm is irreversible.

62. Policy OSS3 of the CS prescribed a list of factors to consider. It refers to the effect of a scheme on character and appearance but prescribes no pass or fail development management test. It is a policy that cannot be breached. Ms Gibbons wrongly treats the policy as giving her permission to imply such a test. That is a misinterpretation and misapplication of the policy. CS policy OSS4, criterion (iii), policy EN1 and DEN1 do not mean that any adverse effect on the appeal site means that those policies are breached. It requires the more considered assessment that Mr Jackson provides. In addition:

    a. CS policy EN1, criterion (v) refers to clearly defined separate settlements. That does not apply to Little Common and Bexhill. They are part of the same settlement. No part of the CS or DaSA suggest, let alone show, that Little Common is to be treated as a clearly defined separate settlement which has to be kept separate from Bexhill. The two have merged already. The appeal scheme would not cause harm to the landscape features listed in criterion (viii). It would cause the loss of open fields but would lead to a net increase in hedgerow and tree cover. If the loss of green fields is automatically unacceptable, then it is hard to see how greenfield development would ever be permissible;

    b. Policy EN3 is a design quality policy, primarily of relevance to reserved matters or full applications. The same is true of DaSA policy DEN1 which expressly refers to siting, layout and design, none of which are for determination now; and

c. The idea that the appeal site forms part of an important green network is not supported by any development plan policy. Policy DEN4 of the DaSA does refer to mutli-functional green spaces. The appeal site is not such a space. It has no public access and has no function other than being undeveloped greenfield land. The existence of Broadoak Park, allotments and the golf course provides no reason to resist development of the appeal site through policy DEN4. Developing the appeal site would have no effect on any multi-functional green space.

63. Further, Ms Gibbons' approach is infected by a plainly wrong interpretation of paragraph 174 of the NPPF. Part (a) seeks the protection of "valued landscapes". Paragraph (b) seeks the recognition of the intrinsic character and beauty of the countryside. Protection and recognition of something are not synonymous, as Mr Lee stated.

The effect of the proposed development on the safety and operational efficiency of the strategic road network, with reference to the A259.

64. National Highways raised a number of concerns about the effect of the appeal scheme upon junctions between the A259 and certain other highways joining it through Bexhill. It is fair to say that the concerns of National Highways were something of a moveable feast, with new concerns being added after Mr Regan tackled various issues in Technical Notes during the consideration of the application.

65. National Highways is now content that the appeal scheme would not have an unacceptable effect on the strategic highway network. The agreement is recorded in the SoCG between

the Appellant and National Highways[21]. The parties agree that unacceptable effects on the A259 can be avoided by the imposition of the three conditions listed at paragraph 2.1(i) of that SoCG, relating to the three junctions of the A259 and (i) the Little Common Roundabout, (ii) the A269 near Bexhill Leisure Centre and (iii) Broadoak Lane. All three conditions refer to works by reference to identified plans which are appended to the SoCG.

The effect on the living conditions of the occupants of 11 and 15 Fryatts Way, with reference to noise and disturbance.

66. This issue has also been resolved. Indeed, the Council's Environmental Health Officers never expressed an objection which amounted to a reason for refusal and always sought the imposition of a condition for a noise mitigation scheme to be submitted.

67. The Council now accepts that the assessment presented within Mr Lee's evidence demonstrates that noise impacts can be suitably controlled by the erection of a 1.8m high structure between the access road and the boundaries of numbers 11 and 15 Fryatts Way. The agreement is recorded in paragraph 4.9.1 of the Addendum SoCG[22] and a suitable condition is proposed in the draft conditions list.

The effect of the proposal on the Pevensey Levels SAC and Ramsar site.

68. This issue is also capable of resolution and, whilst obviously important given the relevant legal obligations, it was never a putative reason for refusal proposed by the Council. The

[21] ID6
[22] ID07.

Pevensey Levels SAC depends, for its integrity, upon being supplied with fresh water that is sufficiently free from pollutants, including particulate matter. That means that the surface water drainage from the appeal scheme would have to include measures to ensure that surface water reaching the SAC would be of an appropriately high quality.

69. The Appellant has had prepared an updated shadow Habitats regulations Assessment[23]. In the absence of mitigation, there is the likelihood of (i.e. potential for) significant effects upon the SAC/Ramsar site. However, orthodox, tried and tested mitigation techniques exist which mean that there can be scientific certainty that they would succeed in removing that likely significant effect. Those measures comprise SuDS with at least two stages of water treatment. Those measures can be provided as part of the appeal scheme, to be secured at reserved matters stage. Boundary swales and attenuation basins would intercept surface water and detain it so that particulates are settled out. Those swales and basins could be located either with sufficient elevation above groundwater levels or, if not, with impermeable linings to prevent premature release of surface drainage into the environment. Permeable paving would be used on all hard surfaces and driveways. The use of oil interceptors, if required, could also be secured at reserved matters stage.

70. Those types of measures accord with what is required by policy DEN5 of the DaSA and was found to be appropriate in the HRA of the residential allocations in the DaSA that would drain into the SAC/Ramsar site. They would be secured by the suggested planning conditions.

[23] Appendix 4 to Mr Lee's evidence. Please note, whilst that document has the date April 2021 on the front cover, it was updated on 8th November 2022, as the revision list at the very beginning of the document makes clear. It is thus a different document from CD2.02.

Whether the proposed development would make adequate provision for affordable housing, public open space, drainage infrastructure, off site highway works, a modal shift in/improvement to pedestrian connectivity, employment and skills and s106 monitoring

71. This issue has also fallen away. There is a completed planning obligation which secures all of the provisions required by the District and County Councils.

If there is a conflict with the development plan, whether other considerations indicate that the proposal should be determined otherwise than in accordance with the development plan.

72. As set out earlier, it is accepted that the breach of the policies relating to the development boundaries and the restrictive approach to be taken outside them amounts to a breach of the development plan. But those policies, and the breach of them, deserve very limited weight. That is because of the Council's dire performance when it comes to the delivery of housing, both in the past and as projected in the future.

73. Since September 2019 LHN is to be used to test supply. The Council is also required to apply a 20% buffer, given the Housing Delivery Test results. On that basis, it is agreed that the Council has a 2.79 year housing land supply. As set out in Mr Lee's evidence, the shortfall against requirement can fairly be described as huge and chronic.

74. Ms Gibbons demonstrated a serious misunderstanding of what has caused the shortfall in supply. In XC, she claimed that the worsening position between the 2021 supply

calculation and that recently produced with the 2022 base date was the increase in the requirement figure. That is simply wrong, as she accepted in XXm. The 2021 assessment is CD6.01. Figure 16 on page 19 shows that the five year requirement, including the buffer, was then 4,440 units (or 888 per annum over five years). The deliverable supply then stood at 2,569 units.

75. Comparison with figure 16 in the 2022 assessment[24] shows that the five year requirement, including buffer has reduced, albeit to a modest degree, to 4,422 units (884 units per annum). The supply has fallen to 2,467 units. It is the falling supply which has triggered the reduction in the five year supply from 2.89 to 2.79 years and nothing to do with an increasing requirement. Ms Gibbons misunderstood the cause of the worsening supply position.

76. The Council point to what it claims are improvements in the position on supply. The point was repeatedly made, especially by Ms Gibbons in XXm. But Miss Gibbons and the Council's case simply fails to grapple with one essential fact. All of the improvements it claims simply combine to mean that the supply is now 2.79 years. They take the Council nowhere. All this evidence does is to point out that without these measures, the forward supply would be even more dire than it currently is. All of the sites pointed to in the trajectories in the appendices to ID05 are taken into account when arriving at the 2.79 year figure. The trajectory on page 28 does show a significant increase in forecast supply, but the projected completions still fall very far short of what is needed, hence the 2.79 year supply. Why the Council thinks it helps its cause to highlight these matters is not at all obvious. All it really does is to highlight how awful its position is.

[24] ID05

77. The lack of the five year supply is not a new problem for the Council. The last time it even claimed to have a five year supply was 2015/16[25].

78. Its delivery of housing has been very poor indeed. It has failed the HDT to such a degree that paragraph 11(d) of the NPPF is triggered. Remarkably, this point was not addressed in Ms Gibbons' written evidence or even in her oral XC. In XXm, she somewhat surprisingly said that she did not know why she had not addressed the HDT test results. The HDT trigger for paragraph 11(d) of the NPPF is key. There are two housing related triggers into paragraph 11(d): the lack of forward supply and the requisite degree of failure of the HDT. They are separate triggers. If the Council had amply more than a five year supply, paragraph 11(d) of the NPPF would still be triggered by the HDT failure. It is a serious deficiency in the Council's case to not even try to grapple with the HDT trigger and its consequences. The Secretary of State plainly thinks it important that there is a backward looking past delivery trigger into paragraph 11(d) as well as a forward looking one relating to forecast supply. It is very important to note that the Council faces paragraph 11(d) of the NPPF for both of these reasons.

79. The HDT is one way of looking at past delivery. Another is to look at delivery compared to the CS requirement. Figure 1 on page 5 of the 2021 supply assessment[26] provides data over a longer period than the equivalent table in the 2022 assessment. The table shows that since the base date of the CS the Council has never hit the 335 requirement figure used in that plan. Its average delivery over the plan period has been just 200 dwellings per annum.

[25] Mr Lee's proof page 46, bar chart below para 7.6.4.
[26] CD6.01

So even the claimed five year supply in 2015/16 did not actually translate into sufficient delivery over the years that followed. The performance of the CS in delivering sufficient housing is also of some importance in decision making. Regrettably, it is yet another issue completely ignored by Ms Gibbons and the Council's case.

80. The HDT failure means that the Council is obliged to produce an Action Plan. It has done so. It does not provide any cause for optimism. Paragraph 3.37 of the Action Plan states that there are likely to be poor HDT results over the next three years. Appendix 1 of the Action Plan summarises the actions which the Council proposes to take. The following observations can be made about them:

    a. The granting of permissions for the DaSA allocations in not going to assist greatly because (i) the DaSA allocations were designed to meet the CS requirement and not the much larger LHN-derived requirement, (ii) those permissions have been allowed for in arriving at the 2.79 year figure in any event and (iii) the Appellant has experience of the delivery of allocated sites potentially being impeded by ESCC objecting to the accessibility of an allocated site;

    b. The Local Housing Company has not delivered any units as yet, is only aiming to deliver 1000 units over 15 years and the 200 permitted units at Battle already feature in the 2.79 year supply figure;

    c. The new Local Plan timetable has slipped even since the publication of the 2022 Action Plan in July and that holds out no early hope of increasing delivery; and

d. The Landowners' Forum does not yet exist.

81. When the Council's past delivery, whether looked at through the lens of the HDT or the CS requirement, and the longstanding failure to secure a sufficient five year supply are considered, it can properly be concluded that when it comes to providing sufficient housing, the Development Plan has failed, is failing and will fail for the foreseeable future. Whilst the introduction of LHN has made matters worse, it is critical to note that the plan has failed to provide enough housing even looking at the far lower CS figure. Ms Gibbons could not explain why it would be wrong to say that plan had failed and is failing.

82. In those circumstances, to attach any more than very limited weight to the policies of the plan that relate to the development boundaries and the development management policies for development within the countryside is a recipe for continued failure. The Council has no convincing answer to this point. It is not as though the Council has only recently failed to deliver sufficient completions. It is not as though the forward supply has only recently slightly dipped under five years. The problem in Rother is serious and long standing. The Council's failure properly to acknowledge, let alone tackle what has gone wrong with its plan in its evidence strongly suggests an inability or unwillingness to recognise how serious its problems are. Instead, it has raised weak objections to the scheme which, in the case of the character and appearance case amount to no more than saying there will be some harm and which, in its accessibility case, are infected by Mr Richardson's ill-disguised dispute with the thrust of the NPPF's policies on providing opportunities to use sustainable modes of transport. And all of that in relation to a site in the small proportion of the District that does not face serious environmental constraints. Nothing has happened

during the inquiry to undermine the point made at the beginning of the inquiry: if the Council is going to object to schemes like this, then it has no chance of providing enough housing. There is no evidence that adhering the development boundaries of the plan will allow for sufficient growth to be delivered. All of Ms Gibbons' attempts to argue the point led to proposals whose effect is modest and which have already been allowed for in getting to the 2.79 year supply.

83. The lack of sufficient past delivery and forward supply engages paragraph 11(d) of the NPPF by reason of footnote 8. That is important as it deems the most important policies for determining the appeal to be out of date. Whilst there is still an obligation to determine how much weight to afford to those policies, to ignore the serious failure of the plan would be to perpetuate the problem. The weight they are given must be considerably reduced.

84. The issue relating to the Pevensey Levels SAC means that there is a policy listed in footnote 7 of the NPPF which requires consideration. However, the agreed position on the ability to ensure no harm to the integrity of the SAC means that that issue does not provide a "clear reason" for refusing permission. Paragraph 11(d)(ii) is thus engaged.

85. On the negative side of the balance is the breach of the development plan and the limited landscape and visual harm, addressed above.

86. On the positive side, there are many varied benefits. Ms Gibbons acknowledged many of them in XXm, despite having ignored them in her evidence.

87. Most obviously, there would be the provision of housing. The market housing would make a valuable contribution to increasing housing delivery and supply in the District. In one of the few issues actually tackled with Mr Lee in XXm, a point was taken about the amount of delivery to be expected from the appeal scheme. There is no reason to think that, whatever the precise numbers, the appeal scheme would not make a valuable contribution to increasing supply in the short term. The section 52 agreement provides no serious impediment to delivery. The covenants in that old agreement are not regulated by section 106 and 106A of the Town and Country Planning Act 1990, but under the pre-existing law. The restrictive covenant in that old agreement was not entered into by the County Council as landowner, but as planning authority. There is no evidence of the development plan or national policy climate at play then. If the appeal were to fail, no issue about the s52 agreement arises. If the appeal were to succeed, then the grant of planning permission for the scheme would, in essence, be a determination that the development should go ahead in the public interest, which would be a key test in deciding whether to adhere to the covenant. Further, the Council has accepted that it would not unreasonably adhere to the covenant if permission was granted: see ID13 and the email it contains from the Council's Director of Place and Climate Change. It is also noteworthy that the s52 agreement has not featured in the Council's case at all and not in the XXm of Mr Lee on the question of the deliverability of the site. His case that the s52 agreement should carry limited weight in decision making was not challenged in any way.

88. The delivery of market housing, in the context of the Council's delivery and supply position, deserves very significant weight.

89. The same amount of weight should be afforded to affordable housing delivery. Again, the relevant facts on affordable housing delivery, supply and affordability in Rother are completely ignored by Ms Gibbons in her written evidence and she did not dispute any of the factual points put to her in XXm. The delivery is failing to keep up with need, meaning there is a serious backlog in provision which is getting worse. Even if all of the sites in the 2.79 year supply provided the full 30% affordable housing, which is not a realistic assumption, then there would still be a worsening problem. An alarming number of people on the housing register are in category A need, the most severe level of need, including where that means that a person's present accommodation poses an imminent risk to life. Affordability ratios are very bad and worse than the county and the rest of the south east.

90. The appeal scheme could deliver biodiversity gain. That is common ground[27]. That is not a neutral matter, or a matter of mitigation. Nor does the fact that it is a policy requirement mean that it is not a benefit. Its proper characterisation is that it is policy compliance which can secure net benefit. It is a benefit deserving of weight, but Ms Gibbons omits it.

91. The same is true of the open space provision. The fact that the play area is not a requirement of policy means, if anything, that it is a bonus. That is a benefit. It too deserves weight, but Ms Gibbons ignores it. Nor does Ms Gibbons contend that the ability to use 39% of the site as Green Infrastructure is required by policy. The ability of the scheme to deliver such a proportion of the site as green infrastructure is also a benefit of the scheme which Miss Gibbons overlooks.

[27] Planning SoCG paragraph 4.4.1

92. Ms Gibbons accepts she has not weighed the DDRT and electric car club contributions in the balance. She ought to have done. They would not be restricted to scheme residents but would be available to people already living in the area. In the case of the DDRT, that area is extensive.

93. The scheme would bring economic benefits. Mr Lee acknowledges that the construction spend is temporary. That is obvious. Ms Gibbons' surprisingly asserted that the spending power of residents was unsupported by any evidence. That contention is wrong, as the evidence is in CD1.05.

94. Mr Lee's assessment of what are the positives to put into the planning balance and what weight to afford to them is commended to the Inspector. His weightings are sensible and not overegged.

95. As to the outcome of the tilted balance, Ms Gibbons eventually accepted in XXm that she had merely asserted that the adverse effects of the scheme would significantly and demonstrably outweigh the benefits. She initially said she had set the matter out earlier in her evidence. She has not. She also claimed the exercise was in the SoCG, which is an unusual claim, given the nature of such a document. Her planning balance is unsupported by reasoning. It is partial because some benefits are left out of account. Her weighting of policies was done for the first time orally in examination in chief, demonstrating the lack of thought previously given to the issue, including when the Council reached its view on how to respond to the appeal in the putative reasons for refusal. And her evidence is so riddled with omissions and failures to address matters relevant to a decision in this case that the assistance to be derived from her evidence overall is minimal.

96. Mr Lee has explained his position. It is submitted that is it plain and obvious that the adverse effects of the appeal scheme would not significantly and demonstrably outweigh the benefits and the Appellant asks for the appeal to be allowed.

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14th December 2022

Kings Chambers

Manchester – Leeds – Birmingham.