STATUTORY PLANNING APPEAL PURSUANT TO SECTIONS 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990

AGAINST RUSHCLIFFE BOROUGH COUNCIL

APPEAL BY RENEWABLE ENERGY SYSTEMS (RES) LIMITED

LAND EAST OF HAWKSWORTH AND NORTHWEST OF THOROTON, NOTTINGHAMSHIRE NG13 9DB

Inquiry opening 10 June 2024

APPEAL REFERENCE: APP/P3040/W/23/3330045

LPA APPEAL REFERENCE: 22/02241/FUL

COUNCIL'S CLOSING SUBMISSIONS

Abbreviations used below

AC	Andrew Cook
ET	Emily Temple
NC	Nigel Cussen
NPPF	National Planning Policy Framework
PCPA	Planning and Compulsory Purchase Act 2004
PoE	Proof of Evidence
PPG	Planning Practice Guidance
SoCG	Statement of Common Ground
BMV	Best and Most Versatile Agricultural Land

Introduction

1. Sir, as with my opening submissions, these closings follow the main issues, save for dealing with the preliminary issue of Figures 12a and 12b.

Preliminary Matter: Figures 12a and 12b

2. The week before the inquiry the Action Party drew the parties' attention to plans Figures 12a and 12b showing the tower that is necessary for a grid connection.

3. It appears that prior to this the Action Party highlighting these plans, the Council and Appellant had not recognised the significance of these plans. Indeed, it does not appear that any witness for either the Council or Appellant had considered these plans prior to them being raised. It is an oversight on behalf of both principal parties.

4. The Appellant's primary position is that these plans are taken as being indicative. The Appellant's secondary position is that the plans ought to be amended to add a note to indicate that the tower structures are shown for illustrative purposes only.

5. By 'illustrative purposes', the Appellant is not saying that they will come forward with a reserved matter, akin to an outline scheme, as part and parcel of the grant of the permission before you Sir. Rather, they are essentially alluding to a different scheme being required to allow for this development to secure the grid connection (henceforth referred to as the 'DNO Scheme').

6. Nothing on the face of the original plans indicated that any part of them was illustrative. The PPG says:

> ***Can details of reserved matters be submitted with an outline application?***

> *An applicant can choose to submit details of any of the reserved matters as part of an outline application.* ***Unless the applicant has indicated that those details are submitted "for illustrative purposes only" (or has otherwise indicated that they are not formally part of the application), the local planning authority must treat them as part of the development in respect of which the application is being made****; the local planning authority cannot reserve that matter by condition for subsequent approval.*
>
> *Paragraph: 035 Reference ID: 14-035-20140306*
>
> *Revision date: 06 03 2014*

7. This part of the PPG is discussing outline schemes. But the principle derived from this remains relevant, namely that unless a plan is listed as being for illustrative purposes, it must be treated as part of the application. Applying that to the original plans, it means that these plans are treated as being for approval. If that were not the case the Appellant would not be seeking an amendment. Seeking to amend the scheme now to carve out parts of these plans to make them partly illustrative in respect to these towers does amount to a change to what was being applied for.

8. The Appellant's only response to this point is to seek to argue that the Council did not consider the towers to be part of the scheme. However, that is no answer to the point. The Council did not form a view either way, as no one considered the significance of these plans. Indeed, Ms Temple was quite frank about the fact that she did not consider the plans until the Action Party raised them. She can hardly be criticised for the Appellant for this, given Mr Cussen similarly conceded that he had done the same.

9. The Appellant has presented no argument to date as to why these plans are allegedly for illustrative purposes. Indeed, nothing on their face suggests that they are. Moreover, the planning statement refers to these plans as being part

of the application at paragraph 1.49[1], with no suggestion that the plans are for illustrative purposes.

10. The description of development makes no mention of the towers, however, that does not mean that they are not part of the application. Indeed, it is not uncommon that a description of development makes no reference to SUDs features for housing sites, despite the fact that permission is being sought for the engineering operations involved in creating an attenuating pond etc.

11. It might not have been the Appellant's intent to seek approval for these towers, but to achieve this result they would have needed to mark these plans as being for illustrative purposes at the outset. The Appellant has asked: well why did Mr Browne not treat them as being for approval? Frankly, he had not commented on these plans either way. The towers are not shown on the layout plans and thus Mr Browne had not rooted around for the elevation plans to discover Figures 12a and 12b. But now that this has been raised, it properly requires an objective consideration as to whether anything on these plans indicates that they are illustrative. The Council say that, taken at face value, they are not depicting anything in an illustrative form.

12. This results in the consequence that there are two plans for approval that cannot be reconciled. Indeed, any development proposal must be constructed in a manner whereby it materially adheres to the plans for approval. But, it is impossible to build out the scheme in accordance with these plans, given they show materially different schemes in respect to the towers.

13. Sir, the Council raised the judgment of ***Choiceplate Properties Ltd v Secretary of State for Housing, Communities and Local Government*** [2021] EWHC 1070 (Admin) to the Appellant prior to the earlier adjournment. In this case, approval had been granted subject to plans that made the scheme impossible

[1] CD 1.3 digital page 1.49

to build out. Mr Justice Dove characterised the issue in the case succinctly at paragraph 22:

> *The issue in this application is essentially the same as that which was before the Inspector namely whether, notwithstanding the accepted error in drawing P.04, the development could nonetheless be carried out in accordance with the approved plans which were the subject of condition 1.*

14. At paragraphs 24 – 25 the Court addressed this point. The Court observed that there was no reason to assume that a plan was for illustrative purposes (which is relevant to the point above). Further, the Court accepted that the plans meant that the development was, *'not capable of being implemented in accordance with the approved drawings because it is not capable of being implemented in a manner which replicates the street elevation …'*. Essentially, the Court concluded that if the plans for approval render the scheme incapable of being implemented then so be it.

15. That is rather the situation here. The Appellant has submitted plans for approval which essentially do not work – as Figures 12A and 12B are not aligned. The consequence is that the scheme is not deliverable. It is obviously otious to grant permission for a scheme which is known now to be incapable of implementation. Thus, this speaks to why the scheme ought to be refused.

16. In the alternative, the Appellant seeks to amend these plans. This engages the Wheatcroft/Holborn tests. As you will be aware Sir, the PINs procedural guide has recently been updated to address such amendments. The guidance makes the point that:

    i. the two tests are whether the change will be substantive and separately whether the changes would give rise to procedural unfairness;

ii. the guidance makes the point at paragraph 16.4 that, *'In many instances accepting an amendment without it being subject to re-consultation would result in procedural unfairness'*; and

iii. at para 16.5 it notes that, *'Any proposed amendments should be submitted at the outset of the appeal, so as not to compromise the efficient running of the appeal. Exceptionally, Inspectors may accept amendments later in the process if it is responding to something that could not have been known about at the time of making the appeal, and accepting the amendment would adhere to the guidance on the substance of the change and procedural fairness outlined above.'*

17. The Council ultimately leave this matter to your discretion Sir. The Council note that this would involve making changes to the plans for approval on the first day of the inquiry, absent any consultation.

18. It ought to be acknowledged that the Appellant has sought to make 2 changes to the appeal scheme previously. The Council did not object to these changes, which were subject to proper consultation. Thus, the Council are not taking a difficult line against amendments in principle. However, this change, introduced on the first day of the inquiry, does cause a very real danger that this gives rise to procedural unfairness.

19. But, ultimately, the Council say that this raises concerns, whether you accept the changes to the plans or not.

20. If you do not accept the amendment and thus the towers form part of the plans for approval, there are three significant implications.

i. The Appellant's note on this matter acknowledges that the DNO have not conducted any tower surveys or had input on the design process of these. Thus, it is entirely conceivable that the DNO would find these towers to be unacceptable, which could conceivably render this

scheme as being undeliverable. Indeed, the fact that the Appellant is at pains to ensure that the towers are not part of the development proposal (through asking for late amendments) rather underscores the point that they know that these towers will not be appropriate and thus they are keen that they do not form part of the scheme for approval.

ii. There will be additional impacts associated with these towers.

iii. It renders the scheme undeliverable given the plans cannot be reconciled.

21. If, however, you do accept the amendments, this similarly raises different issues as discussed below.

i. Through examining these plans, it has become apparent that the scheme does not secure a grid connection. The Appellant suggests that this is a late point. But it is only through this point being raised through scrutiny of these plans that the Council has learnt of this point. No criticism can be made of the Council in this respect, given Mr Cussen conceded that he was in the same boat. This is not a case of the Council's case evolving. Rather, the Appellant has failed to acknowledge that their scheme in isolation does not secure a grid connection and thus the Council were similarly unaware of this point.

ii. Accordingly, to secure a grid connection, it will rely on some other development coming forward – namely the DNO Scheme. The Appellant has been remarkably vague as to what this will entail, but Mr Cussen ultimately acknowledged though that it will require an express grant of permission. The Council contend that express planning permission would need to be granted for anything over 15m high, as the construction of these towers undoubtedly amounts to

development, within the meaning of s.55 of the Town and Country Planning Act 1990, for which permission is required by virtue of s.57 of the Town and Country Planning Act 1990.

iii. It seems, therefore, that there would need to be another grant of permission to secure a grid connection. However, what this DNO Scheme would look like remains unclear.

iv. The Appellant seemingly invites you to close your mind to this DNO Scheme, given approval is not sought for this. But they cannot have their cake and eat it. The scheme you are being asked to approve Sir in and of itself does not secure any renewable energy. It is reliant on the DNO scheme for this. Whether the DNO are contractually obliged to provide the connection is a complete red herring. The issue is not that they are obliged to provide it, the question is what are the land use planning impacts associated with them providing the grid connection.

v. In asking you to ignore the DNO Scheme, the Appellant is inviting you Sir to ignore the adverse impacts associated with the DNO Scheme, whilst relying on the benefits of delivering renewable energy, which can only be secured through the DNO Scheme.

vi. The Appellant's arguments invite you to adopt an irrational approach. This is akin to the 'bridge to nowhere' case in the Court of Appeal, namely ***R.(oao Ashchurch Rural Parish Council) v Tewkesbury BC*** [2023] EWCA Civ 101. In that case, the LPA had regard for the benefits of a wider development (i.e. the bridge being permitted alongside the housing development it would lead to) but failed to have regard to the associated harms for this wider development. As the Court of Appeal held:

> *64. On a fair reading of the OR, the Planning Officer did place substantial weight on the contingent benefits that, in his assessment, would accrue from the development in Phase 1, and he invited the Committee to do the same. His overall approach was to invite the Committee to attribute substantial or significant weight to the prospective benefits of the wider development whilst directing them that they must leave out of account entirely any possible harms.* ***Whilst it was open to the decision maker to treat the prospective benefits of the wider development as material factors, and it is understandable why they did, it was irrational to do so without taking account of any adverse impact that the envisaged development might have****, to the extent that it was possible to do so, (which it was, albeit at a high level).* ***The two go hand in hand; you cannot have one without the other.*** *Ground 1 is therefore made out.*

vii. Thus, if the Appellant is hoping to have regard to the benefits of delivering renewable energy (which is contingent upon this other DNO scheme), it goes hand and hand with this to have regard to the harms associated with this DNO scheme.

viii. Further, it is unclear whether this other DNO scheme would be compatible with the proposed scheme, having regard to ***Hillside Parks Ltd v Snowdonia National Park Authority*** [2022] UKSC 30. Indeed, given that this DNO Scheme falls within the red line boundary of the appeal site, it raises a question concerning overlapping plans. In that case, the Court were contemplating overlapping permissions and the effect of implementing one permission on the other. The Court endorsed the physical incompatibility test from the *Pilkington* judgment. The Court held that it called for a planning judgment to be made as to whether two permissions were physically incompatible.

ix. The Appellant's suggestion that they have left a 'gap' in the site for the towers is no answer to the point. It does not follow that just because development is not physically shown on a plan, any overlapping permission is therefore compatible with this. A planning permission is interpreted both in terms of where it does and does not propose

development – i.e those areas where development is not shown do not suddenly mean that they are 'gaps' to be filled by overlapping permissions. Whether the DNO Scheme would be compatible with the appeal scheme cannot be assessed without knowing what this DNO Scheme is. But the evidence is simply not available on this. The simple point is that the Appellant is reliant on an overlapping permission to secure the grid connection, which we do not have the evidence in relation to make any assessment of whether this would be acceptable.

x. The Appellant has sought to refer to a number of other schemes where this scenario has seemingly been accepted. But we have no details of those schemes before us, they all pre-date the ***Hillside*** judgment and we have no idea whether this issue was considered with those schemes. Thus, they do not assist.

xi. The fact that the development proposal is reliant on the DNO Scheme to secure a grid connection significantly reduces the benefits of the proposal. Indeed, in and of itself, the development proposal does not provide any renewable energy to the grid – that will fall to the DNO Scheme to secure the connection and we cannot assess in this appeal whether that other permission would be acceptable, given how scarce the details are in respect to it.

The effect on the landscape character and appearance of the area

22. It is common ground between the Council and Appellant that the site is not subject to any landscape designations, nor is it a valued landscape within the meaning of paragraph 180(a) of the NPPF. However, the harms to the character and appearance of the area are such that the Council contend that they would significantly and demonstrably harm the landscape setting, character and appearance of the site, as well as the settlement edges of Hawksworth and Thoroton.

23. This issue will largely turn on subjective judgments that will have been resolved through your site visit. However, there are a number of points to consider.

24. Firstly, the Appellant has had two bites of the cherry in terms of discussing the impacts of the scheme. The first consideration from Neo through the LVIA identified a number of impacts. This is to be compared with Mr Cook's evidence, where he has sought to consistently differ from the Neo assessment. That difference is partly understood on the basis of the Wheatcroft amendments to the scheme. But that only affects two viewpoints. Elsewhere, Mr Cook has disagreed with Neo's assessment for reasons that remain opaque. Indeed, it is curious and somewhat unattractive that through this appeal the Appellant has sought to downgrade the harm it was conceding at the application stage through Mr Cook's evidence.

25. Secondly, Mr Cook arguments heavily rely on the Appeal Site being screened from development. But, there are a few issues with this:

- The notion of simply hiding development behind screening is an inherently 'old-fashioned' approach to landscape mitigation. Indeed, the modern ambition is to integrate development effectively into a landscape, as opposed to simply hiding it from view and thereby claiming it causes no harm. Furthermore, even if the Appeal Site is hidden from view, this still amounts to reducing the openness that the Appeal Site currently offers. Indeed, currently the Appeal Site offers long expansive views across open fields from the PROW, but these will be lost and turned into green corridors or 'tunnels'. Even if people walking the PROW will not be able to see built form, the open expansive views they previously experienced will be lost and thus this interferes with the experience of openness. As Mr Browne indicated, these tunnels and screening will be positively harmful.

- The screening will take time to be formed.

- Naturally any screening relies on trees and hedges being in leaf, which will be reduced during winter views.

- It is doubtful that any such screening will be capable of screening all aspects of the development in any event. Indeed, the substation plans show structures of some considerable height and thus will likely be visible above the proposed landscape screening along the PROW.

26. Thirdly, it ought to be acknowledged that the PPG[2] considers that with renewable schemes one can get to a state of zero zone of influence. However, on any view, this is not the case, given the impacts beyond the Site. Indeed, Mr Cook referred in evidence to being 'close to this' – albeit not achieving this. Thus, this underscores that the harms associated with the Appeal Site are not inherent to any solar development, as the PPG is explicitly contemplating less harmful schemes as being achievable.

27. In any event, the Council contend that irrespective of whether you agree with the Council or Appellant on the extent of harm to the character and appearance of the area, there is still associated policy conflict that weighs against the proposal, which is addressed below.

The effect on heritage assets, including the Thoroton and Hawksworth Conservation Areas and associated listed buildings

28. The Council contend that there would be less than substantial harm to 6 designated heritage assets, namely:

    i. Hawksworth Conservation Area;
    ii. Thoroton Conservation Area;
    iii. Thoroton St Helena – a Grade 1 listed building;

[2] Paragraph 013 of the renewable energy section of the PPG

iv. Hawksworth St Mary and All Saints – a Grade 2* listed building;

v. Hawksworth Manor and Pigeoncote – a Grade 2 listed building; and

vi. Top Farm – Model Farm Buildings – a Grade 2 listed building.

29. The Council contend that the extent of harms gives rise to a consideration as to whether the same benefits could be achieved via alternative means, including through development on alternative sites. Moreover, they engage the statutory presumptions against development by virtue of ss.62 and 72 of the Listed Buildings Act.

30. The difference between the Council and Appellant as to the extent of harm to these assets is a matter of planning judgment, which again will largely have been settled through your Site visits Sir.

31. It is notable that the Appellant has again used this appeal as an opportunity to disagree with their own evidence submitted through the application. Indeed, the Appellant has sought to argue for a lesser degree of harm than the Neo Cultural Heritage Impact Assessment found.[3] That assessment was produced by a competent professional, with Ms Garcia accepting that there was nothing deficient with his approach.

32. The Appellant claims that restoring hedgerows would be a benefit. But they are a benefit that could be realised absent the development proposal.

33. The Appellant sought to argue that there is no relationship between either Thoroton and Hawkesworth, such that introducing development that visually severs the two settlements is not problematic. But they grew as settlements at the same time. Ms Garcia accepted it was likely that agricultural workers from the appeal site would have likely been employed from either settlement. There is a visual relationship between the two settlements.

[3] CD 1.23

34. Ultimately, it is a matter for your planning judgment Sir, but the Council say that the views expressed by Mr Bates are correct.

The effect of the proposal on Best and Most Versatile Agricultural Land

35. The Appellant seems intent on making heavy weather over the fact that this issue was not raised within the Council's reasons for refusal. That is correct. The Council hold their hands up to the fact that they were not aware of the specific parts of national policy relating to BMV and solar farms at the point of determination. However, having become aware of this, the Council have done the responsible thing and sought to apply national policy properly. Indeed, it would obviously be a mistake for the Council to perpetuate their mistake by seeking to ignore national policy simply because there was no associated reason for refusal.

36. Moreover, it is hard not to ask: so what? Ultimately, the issue was flagged up in the Council's Statement of Case, the Appellant has had sufficient time to deal with it and it is addressed in their evidence. You plainly have to grapple with the point Sir in light of national policy so, despite it not being within the reasons for refusal, it is a rightly a main issue for the appeal.

37. The Council contend that 38% of the site constitutes BMV in grade 2 and 3a classification – 35.4Ha. The development proposal would result in the loss of this agricultural land for the 40 year duration of the development. The PPG says that, *'where a proposal involves greenfield land, whether (i) the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land …'*.

38. Thus, this necessitates consideration of whether there are sites of poorer quality. The Council contend that the Appellant's attempts to demonstrate that there are no such sites is insufficiently evidenced.

39. In any event, even if you were satisfied Sir that the Appellant has demonstrated that there are no poorer quality sites, the loss of such a large area of BMV for 40 years still weighs against the proposal.

Whether the flood risks have been adequately addressed

40. The Appellant sought to make heavy weather about the issue of the sequential test being raised absent a reason for refusal and contrary to the Council's officer report. However, as Mr Cussen accepted in XX, it was an error for the officer report to note that the sequential test was passed. He also sensibly accepted that it was reasonable for the Council to ultimately raise this point to ensure adherence with national policy.

41. The Site is within flood zones 1, 2 and 3. Mr Cussen accepted that this engages the sequential test, which involves needing to compare the site to reasonably available alternatives at a lower risk of flooding.

42. Given it is common ground that the sequential test applies, the next question is what the appropriate area of search is for applying the sequential test. The Appellant relies on an area of search within 2km of the identified network.

43. The PPG says[4] that:

> *The planning authority will need to determine an appropriate area of search, based on the development type proposed and relevant spatial policies.*

44. Thus, it is for the Council to set the area of search and they regard it to be the borough. There are a few factors in favour of this.

[4] Para 029 of the PPG on Flood Risk

45. Firstly, the Appellant relies on the proposal being 'a fraction below' the NSIP threshold. For NSIP proposals, the area of search would be beyond the Council's boundary, per the PPG[5]:

> *For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary.*

46. Thus, it cannot be right that the area of search be so narrowly focused in this appeal, in circumstances where if the development was for fractionally more energy output it would result in a significantly larger area of search. That disparity in approach seems illogical.

47. Secondly, the proposal does not serve a local or regional need, meaning it does not have to go in this specific location.

48. Thirdly, the Appellant's justification for their preferred area of search is misconceived.

49. The Appellant relies solely on the identified network, on the basis that they have a grid connection here. However, it is worth noting that in the Barton in Fabis[6] appeal decision, the inspector criticised a different appellant for the focus on just this single network at paragraph 27:

> *The limitation to the number of alternatives sites available on the Nottingham-East and Ratcliffe-on-Soar 132kV network are acknowledged as are the reasons for discounting the Ratcliffe on Soar Power Station. It is clear that a viable grid connection is a determinative factor in the filtering of feasible sites, and I recognise that the scale of land necessary to provide such infrastructure often necessitates a countryside location. Nevertheless, as the assessment focuses solely on the Nottingham-East and Ratcliffe-on-Soar 132kV network as the agreed point of connection and in the absence*

[5] Para 027 of the PPG on Flood Risk
[6] CD 5.10

of any substantive evidence to indicate why any other sites in the operational area of the provider where discounted, I cannot be certain that there are no alternative sites located in other areas of the district, outside of the Green Belt. Consequently, whilst having had regard to the Alternative Sites Assessment, and mindful that this is not a policy requirement, the evidence does not persuade me that the proposed BESS could not be provided in a less harmful location elsewhere in the locality.

50. Thus, the inspector was critical of the focus on a single network. There is no reason to take a different view here, particularly having regard for the need for consistency in decision taking. Indeed, whilst it is not doubted that this network has capacity, the point is that other networks might similarly have capacity and thus there might be other available sites that could connect to other networks that are at a lower risk of flooding. But, in only considering a single network, the Appellant has erroneously closed their minds to such sites for no proper reason.

51. Mr Cussen's only explanation as to why you ought to take a different view to this appeal is that the opportunity to connect to the network exists here. However, that ignores the point that there is no evidence that the same opportunities might exist elsewhere at a lower risk of flooding.

52. Further, the consideration of the range of 2km from this network is similarly unjustified. The Appellant's sequential test evidence[7] argues at para 4.4 that cable trenching costs and thermal power losses limit the distance to 2km. But there is no evidence, at all, to justify these assertions.

53. It is not doubted that at a certain distance from a network it may become unrealistic to have a site owing to how it would affect the viability of a scheme. But there is no proper objective evidence to explain why 2km is where that

[7] Appendix 2 to Mr Cussen's evidence

distance is, as opposed to 2.5km, 4km or otherwise. The figure of 2km is entirely arbitrary.

54. Further, it is also highly suspect that the distance of 2km is also, 'coincidentally', the distance at which the Appellant says the scheme would become an NSIP. Indeed, Mr Smart frankly conceded that his focus on 2km was entirely owing to this being the NSIP threshold.

55. As it happens, it is incorrect to suggest that exceeding 2km from the network would make the permission for this an NSIP. Indeed, as Mr Smart conceded, that is only if the entirety of the 2km involves overhead lines, as subterranean lines are permissible through permitted development rights. Further, it is difficult not to ask: so what? If a proper site search (i.e. extending beyond 2km) means that the proposal would need to be considered as an NSIP rather than under the Town and Country Planning Act, that is not a reason to discount sites. Indeed, it would be entirely inconsistent with the NSIP regime for developers to be artificially constraining the application of the sequential test in flood risk terms to simply avoid having to proceed down the NSIP route.

56. Moreover, in the Stocking Lane appeal, the inspector was similarly critical of this area of search in respect to alternatives, saying as follows at paragraph 67:

> *The search area was limited to land within 2km of the 132kV line as the appellant have stated that economically and electrically a scheme would not be viable beyond this distance. However, no evidence has been provided to support this assertion and the Council pointed to other appeal decisions where the proposals used larger search areas. The fact that an overhead connection of more than 2km might make the proposal a National Significant Infrastructure Project, does not justify restricting the search area to this distance.*

57. There is no good reason to reach a different view. Thus, given that the area of search chosen by the Appellant is not justified, it follows that the sequential test is not robust and thus the test is not passed.

58. But even if you disagreed with this Sir, the actual application of the sequential test to identify alternative sites has not been conducted in a robust manner in any event.

59. Indeed, the Appellant tells us that they found 11 sites within 2km of the network. However, they have provided no proper evidence, at all, as to the process they undertook to identify those 11 sites. Indeed, it remains entirely unknown as to:

   i. what the sources of alternatives are;
   ii. how the Appellant determined that these were the 11 available sites (and presumably how other sites were therefore unavailable);
   iii. whether the Appellant solely looked at sites in single ownership or multiple ownership;
   iv. why the Appellant discounted other sites within this area of search.

60. In the Stocking Lane decision the Appellant at least set out their methodology for choosing alternative sites. However, the inspector was critical of this at methodology at paragraph 68. But, in this appeal before you Sir, there has been no proper evidence as to the methodology or otherwise for identifying these sites and on this point alone the sequential test is not passed, given the assessment of alternatives lacks any evidential basis as to how it narrowed down what those alternatives allegedly are.

61. The Appellant’s attempts to shoe-horn in some submissions as to what methodology the Appellant adopted during the recent roundtable ought to be rejected. Mr Cussen unequivocally accepted that the Appellant had not provided any evidence on methodology in XX. It would have been too late to

tell us what methodology was followed even during EiC. But to try and introduce this so late in the day is plainly procedurally unfair for the Council, who has been afforded no opportunity to XX on this.

62. Indeed, Ms Tafur sought to argue that the Appellant looked at sites in single ownership. But there is no evidence, at all, that this occurred. You were referred to para 4.16 of the sequential test document in support of this, where it refers to parcels on the land registry. However, that tells us literally nothing about whether sites are in single or multiple land ownership – it just says they are on the land registry. The land registry includes sites in both single and multiple ownership. Further, the table[8] you were referred to tells us nothing about land ownership. Moreover, why would the Appellant have adopted this approach in looking at sites in single ownership in this appeal before you, whilst not having done the same in the Kingston appeal?

63. But, even having regard to the alternatives that were considered, the Appellant's justification for discounting sites as being too small does not withstand proper scrutiny. Indeed, it relies on huge assumptions about constraints on these alternative sites. There are 193 acres of Site K that are unconstrained by flood risk or otherwise according to the Appellant's sequential test. The Appellant claims that this site will be too small to accommodate a 163 acre scheme (i.e. the size required for the Appeal scheme). Thus, the Appellant is inviting you Sir to make the assumption that over 30 acres of this site K can be assumed as needing to be further discounted to account for some unknown other constraint on site, such that it could not accommodate the development proposal. But there is no evidence to justify such a conclusion. Indeed, it can hardly be an assumption in the planning industry that over 30 acres can be assumed to be constrained on sites.

64. The Appellant sought to draw an analogy with the Appeal Site to justify this point, arguing that huge swathes of the appeal site needed to be discounted

[8] Cussen Appendices digital page 123

and thus it can be assumed that this will apply universally to other sites like Site K. There are two points to make about this:

i. this point actually speaks to the highly sensitive nature of the Appeal Site (in heritage and landscape terms), as opposed to anything else;

ii. it cannot be assumed that because the Appeal Site was constrained, other sites will similarly be so absent any proper basis.

65. The Council are not suggesting that the Appellant need to spend £1 million in costs considering each and every alternative as was fancifully suggested by the Appellant. The Council are making the obvious point that a site that is well in excess of the development footprint of this scheme (such as Site K) cannot be assumed to be unable to accommodate that development absent some proper justification.

66. In the Stocking Lane appeal decision, the inspector was similarly critical of this approach, saying as follows at DL/70:

> *Once various known constraints have been applied to sites F and G, the assessment indicates that 155 acres and 160 acres remain respectively. Given the appeal site is 200 acres in total and requires 100 acres to accommodate the solar panels, **the conclusion that these sites are too small, having already removed large amounts of the sites for various known constraints, appears inappropriate**.*

67. There is no good reason to reach a different conclusion here.

68. Thus, even though the sequential test is entirely lacking in its robustness, it actually demonstrates that there are sequentially preferential sites. Indeed, Site K is such a candidate.

69. It follows that on every front the evidence submitted to prove that the sequential test is passed is not robust. In summary, it fails on the basis that:

    i. the area of search is not justified;
    ii. there is no proper evidence as to what methodology was used to select alternative sites;
    iii. the alternatives that were considered have been discounted for reasons that are not justified.

70. In likely anticipation that this is an inevitable conclusion, given the paucity of the Appellant's evidence concerning the sequential test, the Appellant has sought to overcome this point by arguing that there is no harm in respect to flood risk, seeking to emphasise that this is a solar farm development.

71. However, this argument serves to undermine national policy.

72. The SoS has given specific consideration to solar farms in the formation of flood risk policy. Indeed, solar farms are 1 of only 4 'essential infrastructure' developments within Annexe 3 of the NPPF. The application of the exception test is relaxed in respect to such developments, compared with many other types of development. But the requirement to apply the sequential test still applies. The sequential test does not apply universally to all forms of development. Indeed, footnote 60 of the NPPF lists types of development which are exempt from it. Thus, it would have been open to the SoS to indicate that the sequential test need not be applied to essential infrastructure like solar farms as they have done with other types of development – but they did not. Thus, the sequential test continues to apply and its importance as a policy test cannot be diluted owing to the nature of the development. The proposed changes to the NPPF does not propose to change this.

73. Further, the Appellant's reliance on seeking to argue that the scheme will be safe for its lifetime owing to mitigation is an improper attempt to rely on the exception test here.

74. Paragraph 169 of the NPPF makes clear that the exception test comes after the application of the sequential test:

> *If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied ..*

75. The PPG makes this point more forcefully. Indeed, the PPG[9] says that: *'The Exception Test **<u>should only be applied</u>** as set out in Table 2 and only if the Sequential Test has shown that there are no reasonably available, lower-risk sites, suitable for the proposed development, to which the development could be steered.'*

76. Given that the sequential test is not passed here, it would be improper to consider matters pertinent to the exception test (i.e. whether the scheme can be made safe for its lifetime). This is consistent with para 031 of the PPG which says:

> *The Exception Test is not a tool to justify development in flood risk areas when the Sequential Test has already shown that there are reasonably available, lower risk sites, appropriate for the proposed development. **<u>It would only be appropriate to move onto the Exception Test in these cases where</u>**, accounting for wider sustainable development objectives, application of relevant local and national policies would provide a clear reason for refusing development in any alternative locations identified.*

77. Indeed, this part of the PPG is saying that it is not just that the exception test comes after the sequential test, but that it is inappropriate to consider it if the sequential test has not been passed.

[9] Para 032 of the PPG on flood risk

78. Moreover, seeking to rely on the scheme being safe as an argument for overcoming the sequential test not being passed would run contrary to paragraph 023 of the PPG, which says:

> *Avoiding flood risk through the sequential test is the most effective way of addressing flood risk because it places the least reliance on measures like flood defences, flood warnings and property level resilience features. Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied.*

79. Thus, the Appellant's attempts to argue that there would be no associated harm with failing the sequential test ignores the point that failing the sequential test itself is inherently harmful, as this is the first line of defence against flood risk. Indeed, the Government's policy is not to try and make schemes safe, rather it is to avoid sites such as the Appeal Site altogether if there are sequentially preferential sites available (which there are here).

80. It is also notable that paragraph 171 of the NPPF says that, *'Both elements of the exception test should be satisfied for development to be allocated or permitted'*. Thus, the NPPF is clear that a failure to pass the sequential test is required for permission to be permitted here – meaning the failure to pass it ought to result in a refusal.

81. Consistent with this is the point that the Appellant provides no examples of appeal decisions where the sequential test has not been passed and permission has still been granted on appeal. Indeed, as far as Mr Cussen and the Council are aware, such an appeal decision would be unprecedented. It is notable that since this point was made in XX, the Appellant has not provided any appeal decision in respect to this.

82. The prominence afforded to flood risk policy is underscored by the fact that footnote 7 of the NPPF indicates that flood risk policy can provide a clear

reason to refuse development. There is no suggestion that the plan is out of date and thus this does not specifically apply. But it rather underscores the significance of the failure to pass the sequential test. Namely that even if a plan was out of date, the failure to pass the sequential test would be sufficient in and of itself to provide a clear reason to refuse development - such that the tilted balance would not even apply.

83. Thus, the Council say that the failure to pass the sequential test, in and of itself, provides sufficient justification for the refusal of planning permission.

Planning policy and the planning balance

84. The Council do not deny that renewable energy developments can provide significant benefits. However, despite those benefits, this is insufficient to justify the grant of permission in this instance.

85. The proposal is contrary to the development plan as a whole. The Appellant does not appear to argue that the development plan is out of date and thus the presumption within paragraph 12 of the NPPF ought to apply, namely that, *'Where a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part of the development plan), permission should not usually be granted ...'*. Mr Cussen accepted that it formed no part of his case to suggest that the development plan was out of date.

Policy

86. During the roundtable I made the point that the draft NPPF ought to be afforded no weight. I have since had the judgment in ***Cala Homes (South) Limited v SoS*** brought to my attention, which makes the point that draft changes to national policy can be a material consideration in planning decisions. Thus, my previous submissions on this were incorrect. The Council still say that the proposed changes do not materially change this appeal. Indeed, the sequential test still applies to renewable schemes.

87. Most of the policy discussion was common ground, including the discussion of Policy 11. Part 2 of this policy says:

> *The elements of Rushcliffe's historic environment which contribute towards the unique identity of areas and help create a sense of place will be conserved and, where possible, enhanced with further detail set out in later Local Development Documents. Elements of particular importance include:*
>
> > *a) industrial and commercial heritage such as the textile heritage and the Grantham Canal;*
> >
> > *b) Registered Parks and Gardens including the grounds of Flintham Hall, Holme Pierrepont Hall, Kingston Hall and Stanford Hall; and*
> >
> > *c) prominent listed buildings.*

88. Mr Cussen accepted that the Grade 1 listed church is a prominent listed building and thus the policy was engaged in respect to the Church. Conserve means to do no harm. It is common ground that the church will be harmed by the development proposal and thus it was common ground that the policy is breached.

89. There was a suggestion to Ms Temple in XX that policy 11 is inconsistent with the NPPF owing to it not having an internal balancing exercise in the same manner as the NPPF. This argument was not foreshadowed in any of the Appellant's evidence. But paragraphs 87 – 90 of the Court of Appeal's judgment in ***Bramshill*** provides a complete answer to this point.

Benefits

90. The Council say that the Appellant's approach to benefits is significantly overstated.

91. The Appellant relies on landscaping remaining after the 40 year period. However, in the recent Secretary of State called in appeal in Graveley Lane,

the inspector[10] and Secretary of State[11] did not regard landscaping remaining after the solar farm being removed as a benefit of the proposal. Indeed, there is no condition that requires the maintenance of such landscaping here (nor could there sensibly be one for after the development has been removed). Thus, there is no reason to regard this as a benefit of the proposal and disagree with the Graveley Lane decision in this respect.

92. The Appellant sought to argue for moderate weight to farm diversification, in accordance with paragraph 88(d) of the NPPF. This policy says that decisions, *'should enable the development and diversification of agricultural and other land-based rural businesses'*. The Appellant argues that the income generated by the farmer from the solar farm will allow for agricultural diversification. However, that would be tantamount to suggesting that the solar farm itself will become part of the business.

93. The solar farm is entirely divorced from the agricultural business. Indeed, the solar farm will be operated by the developer, not the farmer. The solar farm does not 'enable' the farmer to do anything additional with their land that they could not otherwise do, rather they are restricted with what they can do with this land. The fact that they are generating an additional revenue stream does not lead to diversification of the farmer's business. Indeed, the analogy would be the farmer renting out the site to gypsy and travellers and claiming that the income generated is part of the diversification of their agricultural business. The Council say that this misreads what paragraph 88(b) of the NPPF is directed towards and thus no weight ought to be given to this claimed benefit.

94. The Appellant claims moderate weight to the use of best available technology. However, as Mr Urbani accepted during XX, the proposal does not secure any technology at all. Rather, the most that can be said is that the Appellant has the intention to use the best technology if permission is granted. But the

[10] CD 5.20 digital page 5.20 para 12.24
[11] CD 5.20 digital page 4 para 21

weight to be afforded to public benefits can only relate to what the permission secures, as opposed to the subjective good intentions of the Appellant. In the Stocking Lane decision, the inspector afforded this no weight (at paragraph 83) and there is no good reason to reach a different conclusion here.

95. The Appellant claims moderate weight to ‘good design’. However, good design is a minimum expectation, not a positive of the scheme. The fact that the scheme has been designed to reduce harm speaks to the extent of harm, rather than a positive of a scheme.

96. The Appellant sought to draw an analogy between good design being an expectation of policy and affordable housing equally being an expectation of policy for housing schemes. It is a bad point and rather underscores why the Appellant is misconceived on this. The Council do not claim, as was suggested, that simply being an expectation of policy means that something cannot be a positive of a scheme. Indeed, delivering affordable housing will generally be a positive of any housing scheme, notwithstanding it being an expectation of policy.

97. But the comparison fails because if an affordable house is constructed, that delivers a public benefit. In other words, with that housing scheme built out, people in need of affordable housing can occupy that house. That is inherently a good thing and deserves positive weight in a planning balance consequently.

98. But ‘good design’ is not a positive public benefit of this scheme in the same way. Put another way, if this scheme was built out, no member of the public will visit the appeal site and have a positive experience in enjoying the design of the scheme. There are schemes which are so well designed that this is a public benefit for others to experience. Paragraph 139(b) of the NPPF recognises that significant weight should be given to such schemes:

> *outstanding or innovative designs which promote high levels of sustainability, or help raise the standard of design more generally in*

> *an area, so long as they fit in with the overall form and layout of their surroundings.*

99. But Mr Cussen rightly accepted in XX that this did not apply. Thus, this is not the case where with the development any member of the public will be able to experience ‘good design’ as a public benefit of the scheme. Any experience of the scheme will remain inherently harmful (in light of the acknowledged landscape and heritage harm). All the design of the proposal has done is reduce the extent of that harm, as opposed to being a positive of the scheme that weighs in favour of the grant of permission.

100. Ultimately, the design approach has not mitigated the harm to zero – there still remains harm in landscape and visual terms and to the GB. Thus, the design is not a positive of the scheme, but rather a minimum requirement that should not generate any positive weight. Thus, this ought to be afforded no weight, in accordance with the Stocking Lane decision at paragraph 84.

101. It is also notable that Mr Cussen has sought to sub-divide renewable energy, climate emergency and energy security into 3 separate ‘substantial weights’. They are all parts of the same benefit and should not be sub-divided. Indeed, the fact that there is a climate emergency is not a positive in and of itself – it is plainly undesirable. Rather, the fact that there is an emergency speaks to why a renewable energy development is a positive.

102. The Appellant relies on farm diversification as a moderate benefit of the proposal. But the development proposal does not give rise to anything that could not otherwise be done on the Site. It simply restricts the use of the Site. Indeed, at paragraphs 33 and 81 - 82 of the decision letter, the inspector dealt with this point and afforded this minimal weight. There is no reason not to reach the same decision here.

103. The claimed benefit of the permissive path is denied as a benefit, as it does not lead anywhere and therefore does not add to the connectivity.

104. Finally, the Appellant invites you Sir to afford the lack of alternatives significant weight. However, to evidence this, the Appellant simply relies on their sequential test alternatives sites search. For the reasons discussed above, this evidence is not robust given the methodology used to find and consider alternative sites is opaque. Thus, there is insufficient evidence to conclude that there are a lack of alternatives sites (the Council say the evidence shows that there are such alternatives eg. Site K).

105. The Appellant argues that there is difficulty with securing a grid connection. However, Mr Smart conceded that recent changes, which remove zombie sites, will make the process easier to secure in the future.

Harms

106. Further, other factors which weigh against the proposal are:

i. there is a clear reason to refuse permission in respect to the sequential test not having been passed;
ii. there is a statutory presumption against development through the harm to designated heritage assets;
iii. the fact that the Appellant has failed to demonstrate that there are sites with poorer quality;
iv. the use of the site as BMV is significantly constrained;
v. the harm to the character and appearance of the area;
vi. the conflict with the development plan.

107. In summary, the Council will respectfully invite you Sir to dismiss the appeal at the conclusion of the inquiry. The proposal is contrary to the development plan and there are no material considerations that justify a departure from the up to date development plan, thus the default position within paragraph 12 of the NPPF applies.

Killian Garvey

Kings Chambers

5 August 2024