Land at Broom Hill / Brislington Meadows, Broomhill Road, Brislington, Bristol

APP/Z0116/W/22/3308537

CLOSING SUBMISSIONS ON BEHALF OF THE COUNCIL

[Abbreviations: JFL – Julian Forbes-Laird, TP – Tom Popplewell, FH – Francis Hesketh, CC – Charles Crawford, PC – Paul Connelly, AW – Antonia Whatmore, GC - Gary Collins, NB – Nitin Bhasin, RH -Rupert Higgins]

Introduction

1. In these submissions, following a brief overview of the case I address key matters of context and then turn to the main areas of evidence (design, ecology and trees) before concluding by addressing the issue of planning balance.

Overview

2. The Council submits that the appeal proposal requires the wholesale removal of important trees and hedgerows in direct conflict with the site allocation policy. It also fails to comply with the allocation policy in other regards as well as with a range of development plan and national policy. It is an unacceptable, unsustainable proposal.

3. This is a direct result of the design choice the Appellant has decided to make[1] that has been informed by a construction of the development plan policy which assumed all harm was '*priced in*'. That construction and approach to policy is plainly wrong and has been abandoned during this inquiry by the expert witnesses of the Appellant who were meant to support it.

4. In simple terms it is plain that the Appellant considered at the stage when it was making the application and appeal that such harms are 'priced in' to the allocation of the site. It was the foundation for the design it pursued. It has however become obvious that not only is such a proposal contrary to the development plan, but that the appellant could have promoted a sustainable scheme on the site involving retention of far more important trees and hedges whilst still delivering a substantial number of dwellings and assisting this area with housing. Such a proposal could (but has not) come forward in a way which would comply with policy and deliver a similar amount of benefits to that which the current scheme proposes whilst avoiding the extensive harm.

5. The position is however even worse for the Appellant. Despite numerous warnings and requests it has failed to identity a range of veteran trees on site. The Appellant designers were not informed of these irreplaceable habitats and so have ignored them in their design - which was already predicated on a misunderstanding of policy. This in turn has led to further about turns on the part of the Appellant and much late evidence that has necessitated additional work.

6. The position it seeks to adopt is untenable. The Appellant has conducted the inquiry with a myopic view of the development plan context that has ignored the clear policy wording and shifted regularly.

7. Faced with the veteran trees issues as a result of its own failures the Appellant has pursued a quite extraordinary series of arguments based largely on a position of desperation.

8. Many of the arguments raised in cross examination were not even supported by the appellant's own witnesses in their evidence.

[1] Accepted by Crawford in his proof at 3.1.4, p.11 and in xx

Context

Outline permission - approach

9. The Appellant sought to emphasise at various stages of the appeal that as the scheme was in outline it could change various matters now (such as the design code or the parameter plans) if it became necessary. Such an approach was entirely misguided.

10. As PC accepted, as the description of the development was for '**up to 260'** dwellings his client would be entitled to develop up to 260 if permission granted - a number that could be insisted upon at the reserved matters stage if a given developer wished to build that many.

11. Similarly, the parameter plans as fixed elements of the proposal indicate the extent of where things can go and for example what will be retained. Thus as PC also accepted in xx and GC explained in evidence the Landscape Parameter Plan identifies where areas of existing trees and hedgerow will be retained, and this Plan must be complied with at the reserved matters stage. It would not be open to the Council to require from a developer the retention of any more hedgerows and trees than as indicated on the parameter plan - because that is put forward for consideration and fixing at this stage. Similarly the Design code seeks to fix certain elements[2]. Consideration at the approval stage is obviously limited by the terms of the initial permission.

12. The Appellant chose to provide such fixed elements at this stage but GC and others confirmed that such detail would have been required at this stage in any event given the obviously sensitive nature of the site and the need to understand where development would go and what would be retained. Such fixes are important not only for the Council but for the range of persons consulted on such matters to enable them to make representations about the proposal at the stage when permission is being considered. Material matters cannot be changed at this late stage or left to be changed by the appellant post the grant of permission.

[2] Cd 1.14 at p.7 refers to ensuring important elements are fixed in this context

Allocation Policy and the alleged 'priced in approach'

13. In the end the much relied on '*priced i*n' approach pursued by the Appellant[3] came to nothing. During the cross examination ('xx') of PC and CC they both conceded that a proper construction and application of the site allocation policy revealed that the '*estimate*' of 300 in the policy was no more than a starting point to be considered in the context of and alongside the development considerations.

14. In relation to the Site Allocation Policy BSA1201[4] the Council makes the following submissions:

(i) The approach to construction of policy requires a common sense and practical approach that avoids overly legalistic constructions and which is informed where necessary by context.

(ii) The wording of introductory text to the policy[5]– makes it clear that the precise number of homes in the allocation is to be determined through the allocation process – emphasising yet again that the number '300' is not baked or priced in.

(iii) The wording of Policy SA1[6] emphasises the need to develop the site '*in accordance with the… development considerations'* and '*with all relevant development plan policies*'.

(iv) Whilst the allocation of the site for development with an '*estimate*' of 300 anticipates some level of harm and loss of land/ecology it does not identify a definitive level of harm in terms of numbers of dwellings (300) come what may. That is clear from the use of the word '*estimate*' and the clear wording of the development considerations viewed in context.

(v) The policy clearly indicates that development should retain or incorporate important trees and hedgerows within the development which will be identified by a tree

[3] Set out for example in opening and at 9.53 of the st of cg (as the appellant positions) and at various parts of the Appellant St of case
[4] CD5.3, pdf 162
[5] SA1 – C 5.3 at pdf p.3 at para 1.8
[6] CD5.2 at pdf 91

survey. The reference to '*incorporate*' does not refer to the planting of new trees or hedges in this context. The task is to identify 'important' elements of the landscape/ecology which must already exist[7]. As CC readily accepted in xx until such '*important trees and hedgerows'* have been identified and assessed one cannot know how many houses the site could take.

(vi) It is plain that the site should only accommodate a number of homes that can be developed whilst meeting the other objectives and considerations of the policy. Such policy requirements must be considered in the formulation of the design of the site (including the numbers of dwellings to be delivered) and the varied attempts by the Appellant to suggest that all harms associated with the proposal it puts forward were '*priced in'* to the allocation are hopeless on a simple reading of the policy.

15. Such a construction that the Council relies on whilst being evident on the face of the policy is also supported by the context. In particular:

(i) The Sustainability appraisal[8] that had informed the development plan far from providing support for the Appellant in fact further revealed its errors of approach. That document made clear that the development considerations were introduced requiring retention of '*existing trees and hedgerows'* so as to create the potential for positive effects on <u>existing</u> assets on the site in the context of a development[9]. It is plainly concerned with retaining what is already there of importance when the site is developed in supporting the delivery of a sound plan.

(ii) As GC explained and PC accepted in xx, there was no evidence of any detailed ecological assessment work identifying which trees of hedges were important at the plan making stage to inform numbers on site. That makes sense because the policy itself requires such work to be undertaken in assessing how many dwellings the site can accommodate whilst complying with the development considerations. The

[7] Other policies aimed at similar subject matter that fall to be applied alongside the allocation policy support this construction – for example DM27 - CD5.2 at pdf 63 and DM26 at pdf 58
[8] CD 8.3
[9] See CD 8.3, pdf 184 at 4.91.6

reference to an estimate of 300 was plainly only ever meant to be a broad, unassessed indication that was subject to change in light of the development considerations and further investigation.

(iii) Consistent with that, the development plan which covers the period to 2026 did not require each allocated site to develop to their 'estimated number' to meet identified housing targets in the plan. Core Strategy Policy BCS1 (South Bristol) promotes development of around 8,000 homes. Policy BCS5 envisages the delivery of 30,600 homes in the city during the plan period to 2026 with a minimum target of 26,400 to 2026. The express aim of the site allocations and DM policies was to support the delivery of the Core Strategy[10] and the housing targets. As GC explained the minimum target has already been met and the larger target will easily be met before 2026 without reliance on many of the allocations. It was never the intention of the plan that the full extent of the estimated numbers in the allocations were required to be delivered to meet such targets – again emphasising their nature as 'estimates'[11].

16. In light of such matters the approach of the Appellant is at best troubling. As PC accepted his client had been fully aware well before it made the application and subsequent appeal of the Council's position (ie that important trees and hedgerows should be retained and that 300 was not 'priced in'). This was not only from consultation responses but also because it knew that an earlier pre-application proposal[12] for 300 homes (and which sought to remove the internal hedgerows whilst retaining some boundary hedging) had received a clear response[13] from the Council indicating:

"*The current proposal involves a significant loss of hedgerows including species-rich and ancient hedgerows and a number of TPO trees. It is advised that the layout is amended in order*

- [10] see at 1.2.1, pdf p,7 of CD 8.3. See too the explanatory test at pdf p.163 in CD 5.3 – site allocation *"It will contribute to meeting the Core Strategy minimum target of providing 26,400 new homes in the period 2006-2026*."

[11] As GCexplained - the allocations were never proposed to be the sole source of housing to achieve the targets. Capacity to deliver also derives from projected delivery from existing planning permissions, from windfalls, small sites delivery and the delivery of homes arising from permitted development rights

[12] Essentially item 1 in Crawford Annex 2, p.18

[13] January 2020 - CD7.1, top of second page

to retain and incorporate these features. Further Ecological, Arboricultural and Archaeological surveys will be required in order to inform the layout and design of the scheme."

17. In short it had been made crystal clear in the context of the allocation policy that an applicant needed to reduce numbers to incorporate what the Council considered to be the important internal hedges and trees. That letter had also flagged up the need to identify any veteran trees on site[14]. As both PC and CC also accepted in xx it was clear to the Appellant that it needed to undertake further survey work (trees and ecology) to inform the design of the scheme.

18. This is an approach that is entirely consistent with the position taken by the Council in the putative reasons for refusal.

19. In light of all this PC did not seek to support the proposition that the Appellant had relied on in opening which indicated that the estimate of 300 indicates the permissible extent of loss of features and landscape/townscape impacts. Nor did CC in his evidence. This backbone of the Appellants approach to the appeal has ceased to exist.

Trees and hedges of Importance and their proposed loss

20. The Council contend that the 'important' hedgerows and trees are the internal hedgerows (in essence H1-H5), the trees identified by the TPO[15] and the veteran trees identified by JFL. In relation to the veteran trees it has become clear that even the Appellant accepts they are now notable trees of merit and of importance even if they are not veterans[16].

[14] 3rd page, para 4
[15] TPO 1404 – CD8.7

[16] Evidence of TP

21. In relation to the TPO trees there has been no evidence produced to support the necessity of the loss of TPO trees ref 10 or 16[17]. Plainly a proposal that respects and accords with relevant development considerations could retain them.

22. The issue in relation to the veteran trees is discussed further in separate submissions below.

23. In relation to the internal hedges of importance the evidence that they are of considerable age is not disputed. Evidence from JFL[18] suggests that the hedges were probably established around 270 years ago – in the 18th century – probably predating 1750 (some trees in hedges are even earlier). FH concludes they have been there since at least 1791[19] as an integral part of the field system.

24. The evidence overwhelmingly suggests that it is the internal hedges that are of importance – for a number of reasons. They are of considerable importance in the context of ecology and biodiversity as well as being culturally important and for providing a value to the landscape as a key defining characteristic that is rare in the Bristol context. This is the consistent position the Council has taken for several years[20].

25. Indeed the Ecology Impact Assessment[21] relied on by the Appellant identifies those internal hedgerows as being important in the context of the hedgerow regulations (HR). In relation to such work the following submissions are made:

(i) It was an assessment done with direct reference to the word 'important' in the allocation policy and with the intention plainly to identify relevant hedges for the allocation policy[22].

[17] See table 4 in JFL proof at pdf 50. It is accepted TPO15 need removal for access. See TPO map at JFL figure 15, p.39
[18] CD13.1 at section 3
[19] See his appendix D
[20] As was evident in their response at CD7.1 in January 2020
[21] CD1.21
[22] – eg see 1.3 of CD 1.21c

(ii) In assessing habit loss (for present purposes hedgerows) – it correctly took a precautionary approach which looked at the parameter plans and assessed on the basis of a reasonable worst case[23].

(iii) As elements of that work made clear – it chose to exclude much of the field boundary vegetation – as it did not even consider them to constitute hedgerows under the HR criteria:

"*Although most field boundaries are vegetated, many have outgrown beyond the point of being classed 'hedgerow'. Six hedgerows are present in the site; five on internal boundaries (also very outgrown), the sixth on Broomhill Road. All are native and therefore are Habitat of Principal Importance (HPI) but are species poor. The five internal field boundary hedgerows are assessed as 'important'*[24]

(iv) In essence such assessments concluded that H1-5 were important[25]. This accorded with the assessment of RH. His evidence suggested that there was in fact greater species richness[26] than suggested by the Appellant and is to be preferred.

(v) As table 7 of CD1.21[27] makes clear the appeal proposal will result in the loss of approximately 74% (or 525 metres out of 710 metres) of important hedgerow on the site.

[23] see eg 3.12 & 6.5, line 2

[24] see summary table at 1.4 – hedgerows entry (pdf p.7)

[25] At 3.3, p.13 Five hedgerows H1a, H2, H3, H4 and H5 found to qualify as 'important' under the Hedgerows Regulations in terms of the wildlife and landscape criteria. See too at see 4.3 "*The Historic Environment Desk-based Assessment (Ref 7507.22.002) concludes all hedgerows and other outgrown vegetated boundaries, excluding H6 on Broomhill Road, are of historic cultural importance under the 'archaeology and history' criteria. Under these criteria, hedgerows H1-H5 are assessed as important due to their forming "an integral part of a field system pre-dating the Inclosure Acts*".

[26] His evidence addresses Birds, vegetation, invertebrates in particular.

[27] Pdf p.44

(vi) Although in various ways during the inquiry the Appellant tried to backtrack from this figure it could not do so based on any evidence. As FH conceded in xx his 'Drawing 2' (which purported to show a reduced % loss of hedgerow) in fact included the full range of hedges (and scrub) on the boundaries – much of which even FH did not consider to be important. As FH accepted 74% remained the correct figure adopting a precautionary worst case scenario if one adopted the findings of the ecology assessment as to importance[28].

(vii) FH sought in his evidence to the inquiry to shift position, claiming that more hedges should be considered important than just the internal ones[29]. He also sought to downgrade the importance of some internal hedgerows – in particular H4. This was a hopeless and muddled exercise on his part which contradicted his own earlier work and the evidence as to biodiversity before the inquiry. It also ignored the existence of veteran trees in such hedges and/or the existence of important and notable trees in H4 which the team FH led had failed to identify in surveys. In relation to H4 the evidence of RH is clearly to be preferred. In the end even FH conceded that much of the boundary hedges/scrub should not be considered important (including HH1, HH8, H6, HH9) so that even if his approach was adopted the extent of loss of important hedgerows he had identified would be much greater than his drawing 2 had assessed.

26. The evidence overwhelmingly indicates that 74% of 'important' hedgerows on site will be lost if the appeal proposal is allowed. Replanting of hedgerows will not compensate for such loss as much of the rich and important biodiversity inherent in them would take decades to recreate[30]. Their loss will cause significant harm to biodiversity as well as to the landscape of which the hedges are a distinctive and valued part. Their loss would be contrary to development plan and national policy.

[28] See FH proof at 3.46, p.16 and his rebuttal at 2.2-2.3

[29] He felt that H1, HH2, H2, H3, H5, HH7 are important (so differs from his own survey work and Higgins re H4 by excluding it even though important under the assessment at Cd1.27 and adds in HH2, and HH7 (NB agreed that HH1, HH8, H6, HH9 not of importance)

[30] As RH explained in evidence

27. At a stage when the Appellant pursued an argument that the site allocation had priced in/already allowed for such harm this (presumably) appeared acceptable to it. Given the abandonment of the priced in argument by any witness at the inquiry the extent of such loss is on any view unacceptable and without any policy support.

Design and Landscape

28. As CC accepted and NB explained, the site is plainly a sensitive one with obvious development constraints. CC also agreed that:

(i) knowledge of such constraints and details (eg what is in part 'important') is critical on a site such as this at the stage when the issue of whether permission is granted or not is decided. In light of that the suggestion that a further design code could be provided by way of condition is non sensical. The reliance on the CD 6.4 appeal was also misplaced[31].

(ii) It was agreed that the Inspector needed to consider as fixed elements the application description, the parameter plans and elements of the design code when assessing whether the proposal complies with the development plan as a starting point and in the context of whether or not permission should be granted. Such matters could not be put off for further amendment and conditions on a site with a context such as this.

29. In relation to the important internal hedgerows the Council submit that as both AW and NB explained in evidence:

[31] In that case there had not been a design code submitted initially with the 'hybrid' applications But there was a DAS that set out design principles before the Inspector (AD 43-44) and it was those that formed the basis of the condition to submit a Design Code. Ie the design code was to be based on such principles (AD 108). So – in fact that case provides a good example of where such principles were required up front in the context of an outline application.CD 6.4 does not provide a basis for saying that an entirely new design code with new or different principles and the suggestion in the CC annex 2, p.15 of appendices or p 4 of doc in annex 2 is erroneous.

(i) They have a landscape value - particularly because they partially define historic field boundaries and have cultural as well ecological significance.

(ii) They help break up the land and create a distinct landscape character on the site.

30. In relation to landscape value the Council contend that the site is to be considered a valued one for the purposes of NPPF para 174. In that regard, the fact that a site is not designated (either nationally or locally) does not mean that it lacks value as CC accepted in xx or that it cannot be a valued landscape.

31. In this case the allocation policy clearly indicates that 'important trees and hedges' should be retained. It is in terms highlighting they are considered to have value as elements of the landscape.

32. The issue as to whether the site is to be considered a valued one requires judgment. The difference as between AW and CC[32] came down to whether various elements of the site context were to be considered of local or community value. The Council considers that the AW assessment is to be preferred, In particular:

(i) the landform affords city wide views. The existing internal field boundary Important Hedgerows – in terms of ecological and historical assessments are plainly not everyday features and are highly valued

(ii) The historic field pattern provides a site characteristic of a strong landscape structure.

(iii) If there are veteran trees (the CC assessment assumed only 1) this would further add to value

(iv) In terms of condition – there was agreement that the site is of good ecological quality and there was undisputed evidence from RH that such hedgerows (in terms

[32] Compare CC table at p.60 ff in his proof with assessment by AW in her rebuttal

of age and biodiversity value) were unusual in a Bristol context – with only 2 or 3 similar examples in the whole of Bristol.

(v) In terms of distinctiveness – site plainly contrasts with the immediate area – the historic field pattern is highly distinctive and of value. In that regard CC was wrong to conclude there were 'no distinctive features' (*rare or unusual)* that confer a stronger sense of place or identity than in surrounding areas. AW by contrast was correct to conclude that the field pattern was of city wide importance.

(vi) The site does have features which elevate it above an everyday landscape.

Design approach

33. The development plan policy context – especially the allocation policy requires a judgment to be made as to which trees and hedges are important and so to be retained if the policy is to be complied with.

34. As NB explained and CC appeared to accept the development of the site must be design/constraint led and not numbers led. Indeed the Appellant's own DAS had indicated that[33]:

The design process has demonstrated that it is not possible to achieve the 300 homes indicated in policy whilst delivering a mix of housing that meets local needs and working within site constraints"

35. CC accepted in xx that it was not possible to achieve 300 homes on site as the DAS had indicated whilst according with development plan policy. Pausing there this is of course totally contrary to the way the case was put in opening[34] and was a further example of the wholesale abandonment of the 'priced in' approach which has underpinned the Appellant's case when it made the appeal.

[33] CD1.13 DAS at 1.7, p.16
[34] See ID7 at para 32

36. Indeed it left the Appellant's case in disarray for several reasons:

(i) The Appellant in cross examination of Council witnesses put forward the case that the reference to an 'estimate' of 300 homes in policy meant that it had to be '*about*' that figure. But on the Appellants own case 260 homes was apparently the correct allocation policy compliant figure. It is plain that 260 is not 'about' 300 and that even the Appellant in truth does not accept anything like 300 can be developed on the site. Indeed its latest 'fallback' for veteran trees proposes 240 homes which is also not 'about' 300.

(ii) On this issue PC was forced to accept in xx that the position in the statement of case of his client and his contention in written evidence that 260 was '*materially below*'[35] 300 (whilst at the same time claiming it was also 'about' 300) was simply not consistent. Nor was his position on numbers consistent with the way his own advocate had put the case to GC in xx[36].

(iii) In light of the assessed loss of 74% of the important hedgerows as an inevitable reasonable assessment of developing up to 260 homes the abandonment of the 'priced in' approach mean that any argument that such a loss could be compliant with policy has gone. Previously the Appellant's response to the extent of loss of hedgerow being as high as 74% was not to question that amount but rather (as recently as October 2022) to assert that such loss was '*inescapable when c 300 home are to be delivered as per the site allocation'*[37]. That position is simply untenable.

(iv) CC was at great pains to tell the inquiry that the extent of tree and hedge loss (the 74%) was all to do with the design of the scheme[38]. It was clear that the scheme

[35] PC proof at 9.14
[36] Where it appeared to be being suggested that there could only be a marginal movement away from 300 – presumably to accord with a priced in argument – although PC subsequently abandoned it as a position.
[37] Se Cd 2.7 at p.2. second box
[38] In xx and see his proof at 4.1.1

designers had assumed that 74% loss was acceptable – presumably having been advised that all such matters were priced in. It was further clear that the proposal before the inquiry had been designed in a way that was primarily numbers led and had assumed that such a loss was acceptable. This was in fact evident from the Annex 2 exercise produced by CC[39]. The designers had not of course even been made aware of the additional veteran trees (or even the existence of such trees whether veteran or not).

(v) At the same time CC confirmed[40] (as NB and AW had already suggested and demonstrated in his evidence) that the site could be developed in a way that retained a much greater extent of the important trees and hedges whilst delivering material amounts of housing. This provides - as it were - the final nail in the coffin for the Appellant's case. It leaves it entirely unable to say that the allocation policy requires the removal of anything like the extent of internal hedgerow it claims is necessary.

(vi) In xx CC accepted that this could be done and that in excess of 200 homes could be delivered. He further accepted (as AW had explained) that if the important internal hedgerows were retained they could be utilised to provide a setting for development areas on the site and that there would be an obvious benefit for biodiversity. AW considered that such a scheme would have benefits for visual amenity and in general landscape terms (a point that CC did not agree with). RH explained in evidence that retention of such hedgerows would have obvious biodiversity benefits and would allow some species to be retained on site that might otherwise be lost. It would also avoid significant biodiversity harm as required by 180 a NPPF – something the proposal before the inquiry fails to do.

(vii) In relation to an alternative scheme PC accepted that the evidence that such a scheme could come forward demonstrated that much of the alleged harm to

[39] As put to CC in xx it was plain by May 2021 (see pps50-51 in his Annex 2) that the appellant had fixed upon 260 homes as a 'driver' on the basis of the 'priced in' construction of policy.
[40] In xx and see his rebuttal at 4.3 pps 16/17 and at his 4.5.11 bullet 1

hedgerows and trees could be avoided and was relevant for the Inspector to consider in the context of judging the acceptability of this proposal[41].

37. Accordingly the position in evidence was reached where it was agreed that a material number of homes could be delivered on the site if a scheme with less housing had been proposed whilst also retaining the important internal hedgerows and so avoiding anything like a 74% loss of them.

38. In terms of the current proposal as a result of the numbers proposed there will an inevitable range of unacceptable landscape and townscape harms which have been set out in the evidence of NB and AW. Most of these derive from the overdevelopment of the site and the evidence from such witnesses is relied on in that regard. These include unnecessary and extensive earthworks, a failure to provide a sufficient green infrastructure link to the north east[42] and an unnecessarily extensive and harmful SUDS design[43] - all with resulting unacceptable impacts as set out by AW.

39. As NB explained in evidence the proposal will also be contrary to a range of policy at national and development plan level[44] as a result of setting out design principles which are plainly not policy compliant. The Council relies on such evidence[45] as further demonstrating the unacceptability of the proposals in relation to height, scale and massing. Significant reprofiling of the sloping site would be required which would result in an over engineered character and an unduly prominent level of housing to the south of the site.

40. All this is before the issue of veteran trees is considered which provides a discrete further basis to dismiss the appeal.

[41] The suggestion by the Appellant – it appears in the context of 180a NPPF – that the inquiry could not look at implications of a smaller scheme on the basis of the Yatton appeal (Cd12.2) is wrong. Yatton does not preclude a decision maker from considering whether in a case such as this a smaller scheme would be policy compliant in terms of the allocation policy and /or with para 180a NPPF.
[42] This failing was also explained from an ecological perspective by RH in evidence
[43] See as discussed in AW proof at CD13.4
[44] Including DM26, DM27 and DM28 – see proof at CD13.13
[45] See NB proof at CD13.13 where matters are set out in detail

Ecology

41. There was considerable discussion in relation to ecology at the inquiry. It is not disputed that the proposal will cause significant harm to biodiversity. As RH explained in evidence:

(i) the application has not avoided or minimised impacts on biodiversity as it should and could have done. As stated in putative reason for refusal 1, it would result in "significant harm to biodiversity", which includes the loss of a large proportion of the native hedgerows on the appeal site. These hedgerows are known to support species that are locally uncommon and that have experienced substantial population declines over recent decades as the evidence from RH explained[46].

(ii) Further, the proposal is not able to suitably compensate for such loss: the feasibility of habitat compensation schemes has not been established, in terms of the need to replicate the structural and species diversity of the existing habitats, and the inevitability that notable species will be lost from the area owing to the delay between habitat loss and new habitats maturing sufficiently to support these species, even if this can be achieved. Whilst is accepted that BNG can be achieved to a policy complaint level the proposal fails to accord with the mitigation hierarchy in NPPF para 180 (a) and fails to minimise impacts contrary to 174 (d).

(iii) The applicant acknowledges that there would be substantial loss of hedgerows. These include the most diverse hedgerows on the site, which are known to support a range of uncommon species and are known to be of cultural and historic importance. At the same time the Appellant has now accepted that much of this could be retained while still delivering material amounts of housing if an alternative scheme came forward.

(iv) This proposal involves loss of hedgerows that are Habitats of Principal importance (as well as veteran trees which are irreplaceable) habitats, as recognised in

[46] For example the Willow Warbler (evidence of use of H4), the maple pug moth (which required the H4 habitat) and the uncommon Lesne's earwig- which as RH explained is nationally scarce

government policy and development plan policy which the proposal contravenes as RH explained in evidence. These include conflict with DM15, DM17, DM19, BCS9 and paragraphs 174, 179 and 180a of the NPPF. It will also result in an inadequate access from an ecological point of view in the north eastern part of the site contrary to development considerations in the allocation policy requiring a green infrastructure link for the reasons explained by RH in evidence[47].

(v) These losses and harms are over and above those that would be inevitable given the appeal site's allocation as has been plainly established in evidence.

Veteran Trees

The Failure by the Appellant to identify Veteran and/or Important Trees

42. The failure by the appellant to identify the Veteran trees or to even acknowledge such trees existed as important and notable individual trees of merit[48] was quite remarkable.

43. A tree survey and an arboricultural impact assessment[49] informed the application and design of the proposal and was relied on in the appeal by the Appellant.

44. The policy and factual context underscore the importance of a comprehensive tree survey being undertaken on such a sensitive site as this. In particular:

(i) The site allocation policy BSA1201[50] requires - as a key '*development consideration'* - the retention of important trees and hedgerows and requires the Appellant to undertake a tree survey to identify them.

[47] See his section 6 in CD13.3
[48] Which is what TP reported them to be in his evidence
[49] AIA – CD1.19 April 2022 and see also an AIA at CD 2.2 – March 2022, submitted in May 2022
[50] CD5.3 at pdf p162

(ii) The Appellant had been made aware though pre-application advice[51] that an earlier proposal which removed all of the important internal hedgerows that:

"*The existing site layout as proposed has not adequately considered the site history, current green infrastructure, the ancient hedgerow network or the ancient and veteran trees on site*."

45. Despite such clear signposts[52] to the likely existence of veteran trees on site the work undertaken to identify such trees was, as JFL explained, a direct result of insufficient professional endeavour and a '*patent failure*[53]*'* to report matters of critical importance to any development of the site pursuant to policy BSA1201.

46. The following submissions are made about the inadequate tree survey work:

(i) The survey work[54] failed to identify individually any of the 11 hawthorns that JFL reported to be veterans and is not compliant with the relevant British Standard.

(ii) As the evidence of TP[55] accepted that such trees – even if not veterans – were on any view important and notable trees of considerable age and with some veteran characteristics – they should have been identified in the survey work.

(iii) As JFL explained, the survey work classified the hedgerows as 'tree groups' rather than hedgerows[56] and failed to comply with BS5837/2021 by not identifying the trees[57] that were plainly of a significantly different character[58] from the other parts of the hedgerow (whether veterans or not).

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[51] CD7.1, letter Jan 2020

[52] As well as the January 2020 letter further consultation responses had clearly flagged up the need to consider if veteran trees existed – see CD3.10 (p. 4 of 12) in September 2021 which flagged the potential for veterans.

[53] CD13.1 at 4.3.

[54] CD2.2 – but also same failures at CD1.19

[55] Accepted by TP in xx

[56] By contrast the ecology survey work listed them (more accurately) as hedgerows

[57] See CD 8.9 at 4.4.28 (p.7)

"Hedgerows and substantial internal or boundary hedges (including evergreen screens) should be recorded in a similar fashion to groups, with the lateral spread and average (or maximum and minimum) height and stem diameter ranges recorded, to allow the potential constraints associated with the features to be fully assessed. All woody species present should be recorded. ***Where woody plants are present within a hedgerow that are significantly different in character from the remainder of it, these should be identified and recorded separately, especially where they comprise distinct trees"***

[58] CD17.7 JFL rebuttal at 2.1.2

(iv) Even on the basis of the 'tree group' basis of assessment the veteran hawthorns should have been picked out and assessed as individuals but they were not[59].

(v) As JFL explained the trees in issue were much larger and older than those reported in the group descriptions in the tree survey work as was demonstrated by comparing CD2.2 (Appendix A data sheets[60]) with the tree dimensions and characteristics recorded by JFL and TP in evidence[61]. For example, VH5 – a 'maiden' veteran tree with a single stem at relevant measuring heights[62] which had a recorded diameter of between 410-510 mm and was agreed to be well over 130 years of age[63] was not identified by the survey work at all in group 26[64]. That 'group' referred to '*young to middle aged trees'* with stem diameters ranging from 50-200 mm. FH had no answer to this point when cross examined on it. His suggestion that it was to do with where the trees had been measured was hopeless and ignored the numerous other characteristics that this and the various other individual trees possessed – none of which were identified. There were many similar examples[65].

(vi) The Appellant did not rely on any evidence from the person who had actually undertaken the survey work[66] and TP did not feel able[67] to answer any questions on the nature of the survey work. FH was left to defend the indefensible and had no credible answer to such points.

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[59] CD 8.9 at 4.4.2.3: *4.4.2.3 "Trees growing as groups or woodland should be identified and assessed as such where the arboriculturist determines that this is appropriate. However,* ***an assessment of individuals within any group should still be undertaken if there is a need to differentiate between them, e.g. in order to highlight significant variation in attributes (including physiological or structural condition***)"

[60] At pdf 27-28

[61] See especially the site photos of trees and measurements at ID1 and the record of stem diameters at TP table 2 in CD16.4, pdf p22

[62] See ID1 at pdf5

[63] Even by TP – see his table 9 in CD16.4. Indeed it can be recalled that TP accepted the trees in issue met the age test for veteran status – they were all easily old enough to be veteran trees.

[64] See at CD 2.2, appendix A at pd f28

[65] See JFL proof at CD13.1 at 43.ff where specific examples are discussed. Eg compare VH1 (over 150 yrs old with a 457-650 diameter not identified in the survey at group 24; VH3 in group 27; VH 4 & 5 in group 26; VH6 in group 20; VHs 2, 7, 8, 9, 10 and 11 in group 10. VH2 is a classic example of a large tree that would find its way into any competent tree survey and which the descriptive text in the tree survey makes no mention of at all. Indeed the reference to ranges of stem diameters in that group (80-220) bears no resemblance to the tree diameters at all.

[66] A Mr Blankenstein – who was not available to be questioned at the inquiry

[67] When asked in xx

(vii) As JFL explained[68], the work he has had to do to enable access to such trees was not complicated. Had the work been done properly and at a suitable stage (so as to inform the design of the proposal etc) the veteran trees (or in any event very large and old hawthorns even on the Appellant's case) would have been identified.

(viii) It has become plain that those designing the proposal were unaware of the existence of such important trees. FH accepted in oral evidence that the purpose of the tree survey was ' *to identify individual trees to inform the deign process*'. The work produced by the Appellant has singularly failed to do that. Indeed the first time it appears to have even measured such trees is through the last minute work undertaken by TP.

Overview - Veteran Trees on the site

47. The Council through the evidence of JFL[69] has identified in evidence 13 veteran trees – of which the appellant had failed entirely to identify 12. In fact the Appellant had failed even to identify them as individual trees of note.

48. If permission is granted for the proposal four of the veteran trees would be lost (VH1, VH4, VH5 and VH6) and a further eight would suffer deterioration (T6, VH8, VH11, T5, VH2, VH3, VH7 and VH9)[70].

49. The initial issue in evidence in relation to these trees was whether the ones the Appellant had failed to identify were in fact veterans.

[68] CD13.1 at 4.3.13
[69] CD13.1
[70] JFL proof at Cd13.1. 5.5.1 & 2

50. The Council relies on the evidence of JFL who is one of the country's leading experts on arboriculture and the identification of veteran trees[71]. He was in no doubt at all that the trees in issue were veterans. Some represented the largest and finest examples of hawthorns he had come across.

51. Even TP considered such trees to be 'notable' trees [72] that gave them a status above the ordinary. He also considered them to have emerging veteran characteristics[73] and to have a collective biodiversity value requiring any loss to be justified under the mitigation hierarchy[74].

Approach to veterans -policy

52. The key source of policy for veteran trees is found in the NPPF 2021[75] . NPPF Paragraph 180 (c) identifies veteran trees as 'irreplaceable habitats'.

53. If development results in either loss or deterioration of just one veteran tree the appeal should be refused unless there are '*wholly exceptional reasons **and** a suitable compensation strategy exists.*'

54. The NPPF accordingly creates a very strong policy presumption against the grant of planning permission[76].

55. The definition of veteran tree is found Annex 2 of the NPPF

"*Ancient or veteran tree: A tree which, because of its age, size*

and condition, is of exceptional biodiversity, cultural or heritage

[71] See CD13.2 at JFL 1 for his background and experience. It I of note that he was the technical editor of BS5837:2012 (responsible for clauses relating to tree surveys) and has created a recognition method (RAVEN) to identify Veteran trees.
[72] His para 3.63 in his rebuttal - CD16.4
[73] At his rebuttal 3.68
[74] At his para 7.6
[75] CD5.1
[76] Which these submissions address further below.

*value. All ancient trees are veteran trees. Not all veteran trees are old enough to be ancient, but are old relative to other trees of the same species. Very few trees of any species reach the ancient life-stage***."**

56. Much time was spent at the inquiry on the construction and approach to such a definition. That was almost entirely due to the differing and often contradictory arguments which the Appellant sought to pursue either through TP or in cross examination. In essence it amounted to an exercise in obfuscation which revealed a largely nonsensical approach to the issue was being pursued by the Appellant.

57. The Council submit the following in relation to the policy definition:

(i) Like all such policy, the interpretation of it is a matter of law and the application of it is a matter for the decision maker alone. A practical (and not overly legalistic) approach should be taken to discerning the meaning of such policy looking at the meaning of the policy viewed in context and with the aim to discern from the language the sensible meaning of it so as to allow for coherent and reasonably predictable decision making in the public interest[77].

(ii) The policy definition establishes three tests.

(a) The tree must exhibit specific characteristics of age, and size, and condition;
(b) The tree must be old relative to other trees of the same species;
(c) The tree must therefore have a *relatively* large stem size for its kind (age and stem size are indelibly linked at the biological level as JFL explained).

[77] See for example Gladman Developments Ltd v Canterbury City Council [2019] PTSR 1714 at para 22

(iii) Applying such principles here, in order for a tree to have the quality of a veteran, it needs to be '*old relative to other trees of the same species*'. If a tree does not meet this criterion, it cannot be said to have sufficient age or size to satisfy those two additional components of the definition (size and condition) and is therefore not a veteran tree, regardless of its condition.

(iv) Once a tree has cleared the gateway hurdle of relative age (and as JFL explained, via biological linkage, attained substantial size for its species), its condition can be taken into consideration. All such matters require expert judgments to be made. It is not an exact science. There exists a range of well known guidance material which can assist in relation to issues.

(v) Once age, size and condition have been considered an overall judgment should be made – in light of findings on such issues – as to whether the tree in issue if of '*exceptional biodiversity, cultural or heritage value*'. This is not intended to be a separate test but is a judgment which derives from consideration of the issues of age, size and condition. Trees meeting these tests are held to have exceptional value under at least one heading from biodiversity, culture, or heritage.

(vi) This is clear not least because the NPPF Annex 2 definition uses the word "*because*" as a link to such a judgment – that is, it is '*because*' of age, size and condition they have '*exceptional value'*. It also represents a practical way to apply and inform a decision.

(vii) To apply such policy in a practical way informed by expert judgment, JFL uses a recognition method ('RAVEN') which he explained in his evidence[78]. It has become widely adopted as a method to identify veteran trees and is in fact the only method for in field identification of ancient, veteran and notable trees. It has also

[78] CD13.1 at 2.2.4 & 4.2 pdf 34 ff

been confirmed as according with the NPPF veteran tree definition by two planning Inspectors at Inquiry[79]. The findings are recorded at JFL4.

58. In relation to the definition in policy the approach of the Appellant was to say the least strange. At one stage (in xx of JFL) it appeared to be suggested that there was an additional policy hurdle (beyond age size and condition) to be considered as a stand alone test - that of 'exceptional biodiversity'.

59. JFL confirmed this made no practical sense at all and did not accord with the policy wording. Whilst TP appeared to support the proposition in his written evidence[80] he abandoned such a line in his oral evidence accepting in xx that the answer to such an issue lay in the findings on age, size and condition rather than in a separate stand alone test[81] or in the method suggested in his 'table 1' (which the Council contend was obviously wrong).

Age, size and condition

60. In relation to the age of the trees there was in fact no issue but that the relevant trees were of sufficient age and so '*old relative to other trees of the same species*'.

61. TP accepted[82] that even on his assessment of age the trees were '*broadly in contention for veteran age*'.

[79] CD6.6 and CD6.17 at DL66:" I find that RAVEN accords with the Framework definition and has provided a detailed assessment for identifying veteran trees on age, size, and condition in respect of their values"
[80] For example at his 2.13
[81] The TP 'table 1' at CD16.4, pdf16 was essentially back to front as JFL explained and in any event appeared to entirely misunderstand how the NPPF tests should be applied. As a suggested method of approach it lacked any authority and TP could not point to any guidance in support of it. Table 1 also appeared to add a further hurdle as to the 'irreplaceability of the habitat' before 180c was engaged – which was without basis as JFL explained.
[82] See CD16.4 at 5.14

62. JFL's evidence demonstrated that in fact 3 are of sufficient age to be considered ancient and all 11 are veteran[83] . The detailed work that JFL had undertaken to date the hedges[84] further supported his contentions by providing landscape features (the hedgerows) within which very old plants could be present.

63. In relation to size, JFL explained that age and stem size are indelibly linked at the biological level. However, it is plain, as he explained, that as a result of, for example, growing conditions trees can be older than their size might suggest. Once this is understood, the issue of size is a to a considerable extent a secondary matter of judgment. In relation to the issue of size the evidence of TP was in many ways bizarre and revealed a fundamental lack of understanding of the issue. The following submissions are made in that regard:

(i) TP sought to suggest in evidence that the former management of a tree should not be taken into account in the context of 'size'[85]. Indeed in xx when it was put to him that there are well known ancient yew trees growing on limestone cliffs in Wales which have been carbon dated to be in excess of two thousand years old but because of their location have remained very small in size – TP put forward the view that they would not be classed as veteran trees. This was of course an entirely incorrect answer as by definition '*all ancient trees are veteran trees*' (NPPF annex 2 definition). It revealed at best a lack of judgment and understanding of the approach to identifying veteran trees in national policy.

(ii) Further, relevant guidance in Lonsdale[86] highlighted the relevance of taking into account the management effects on trees in relation to assessing their size. Not only was the approach of TP in direct conflict with that guidance it also ignored the White Method[87].

[83] JPL evidence was that three trees are estimated to an age prior to 1750: VH2 1748; VH3 1711; VH10 1718 - see JPL4. By contrast with JPL4 see TP - estimates aged about 140-180 years old in his 5.43

[84] See at JPL proof section 3 of CD13.1

[85] See for example at his 2.2.1 line 4-6 when the 'circumstances' not considered to be relevant in TPs world

[86] CD 8.20 at 1.2.4 and see at p.34 in the context of stems being torn away

[87] See at CD8.8, table 1 a which suggest conditions be taken into account in the context of assessing size.

(iii) The insistence by TP that size should be reported in absolute terms[88] revealed a fundamental misunderstanding of veteran tree assessments and was an approach that conflicted with guidance as JFL explained. At one stage TP even sought to rely on the relative size and characteristics of hawthorns he managed at Hulton Park. However in xx he accepted that they were growing under entirely different management conditions. He was not in fact even able to tell the inquiry whether the Hulton Park trees he had produced photographs of were veterans or not.

(iv) In this case it is agreed that the hawthorns on site were managed within the hedges at least until around the 1940s and so are inevitably smaller overall than they might have otherwise been. Knowledge of such history as JFL explained is key to informing a judgment as to size for the purposes of the NPPF definition. To adopt the approach of TP would be to fundamentally misunderstand the correct approach to assessment (as the two thousand year old yew tree example demonstrates)

(v) The approach in evidence of JFL is to be preferred. His approach accords with guidance[89] and is based on his extensive experience in the field.

64. The flawed approach adopted by TP was made worse still by his approach to the measurements he took of the trees. In that regard the following submissions are made from the evidence:

(i) The Council submit that – as JFL explained - In the context of hawthorns on the site one needs to measure below the crown break, especially where this is created by pruning**.** On a topped hawthorn, you would never measure the new wood and expect to be able to relate this to anything relevant. This approach is clear from relevant guidance[90].

[88] Eg at his para 2.21
[89] For example figure 2 in White at CD 8.8
[90] See CD 8.8 figure 3 from White (reproduced at top of p.16 in TP proof) - see the key detail in Fig.3 is the second sketch from left

(ii) Relevant measurements at correct places requires judgment, experience and knowledge. Regrettably it appeared that in many cases TP has measured in the wrong place – assessing sizes of relatively new wood that has regrown after past management.

(iii) JPL further explained that in many ways this approach used by TP had precisely zero bearing on the size (or indeed age) of the tree for purposes of a veteran assessment[91]. As JFL demonstrated by comparing his ID1 (which showed relevant heights on the trees) with the evidence of TP (which claimed to have measured at 1.3 m above ground level[92]) it is plain that many of the TP measurements were totally irrelevant and taken in the wrong place[93].

65. In any event, as JFL explained, the NPPF makes no link between size and species. Rather it links age and species (see annex 2 glossary). TP was simply wrong to consider that in terms of size a given tree "*must therefore be in a small percentile at the upper end of what is possible for the species to achieve"*[94]

66. The approach put forward and used by JFL accords with guidance and reflects the definition in the NPPF allowing for practical decision making based on expert judgment. The trees in issue are plainly of sufficient age and size to be veterans.

Condition

67. The approach adopted by TP to the issue of condition lacked any credible basis. In essence he relied upon tests derived from the NE Biodiversity metric 3.1[95] which has

[91] Thus and by way of example,See TP at 3.64, p.32 - where he make points about the nature of some of the hawthorns being multi stemmed with 'between 3 and 11 stems at the point of measurement'
It **is for precisely this reason** that as JFL explained they should be measured lower down where this would more accurately reflect the size (and age) of the tree.

[92] See eg at TP proof 3.64 and NB in his survey data at TP rebuttal appendix C in CD16.5 where no alternative measuring heights were recorded

[93] In oral evidence JFL explained by way of example in relation VH9 and VH4 where his measurements were plainly incorrect.

[94] His para 3.34

[95] CD 11.6 (f) at pps 20/21

never been relied on before as far as the Council is aware in the context of the NPPF definition. In relation to that the following submissions are made:

(i) The NE metric is, as JFL explained in his oral evidence, a shorthand method and is not a comprehensive veteran tree identification system, instead being designed as a quick tool for confirming the presence of veteran trees in woodland, as part of woodland condition assessment. In short it is a different method for a different purpose.

(ii) The five criteria it lists are woefully incomplete as a list of relevant features. As JFL explained, by comparison Lonsdale[96] provided a comprehensive account of veteran characteristics which RAVEN has broadly followed.

(iii) The approach in the metric is entirely at odds with the approach required by the NPPF. The NE metric purports in terms to be a one stop shop to determine if a tree is a veteran but makes no reference at all to the size or age criteria either at all or relative to other species. It does not accord with the NPPF test.

(iv) The 'bar' which TP relied on (4 out of 5 of the criteria need to be met) to assess condition is not the NPPF bar. In fact if it were ever used (thankfully no decision maker ever has as yet) it would set an extremely high bar that as JFL explained would exclude many trees currently accepted to be veterans.

(v) Use of such criteria for the NPPF condition tests was not only not the intended purpose of the NE metric it would also not make any practical sense. Many features (eg fungal fruit bodies) might only exist for a few days and would be impossible to find at other times. Others might require very invasive testing that would harm the trees. Accordingly many veteran trees might be excluded and lost if such a stringent test were used. Moreover, As RH subsequently confirmed to the inquiry (despite TP erroneously thinking the contrary was true) the Appellant's survey work had not involved any invertebrate surveys of the veteran trees and did not include specialist

[96] CD 8.20 at p.27

saproxylic techniques. No fungus surveys were carried out. So even the Appellant has not undertaken their own (non compliant) testing which they claimed necessary.

(vi) By contrast the RAVEN condition assessment has been considered and tested on appeal. It relies on criteria which accord with guidance and in practice has not led to numerous trees being identified as veterans – far from it as JLF explained in oral evidence. RAVEN is a consistent, transparent, repeatable and straightforward assessment that, used fairly, is unlikely to yield false positives.

Impact on Veteran Trees

68. Based on the information submitted at the outline application stage and the fixed elements of the proposal – which the appellant has not applied to amend there would be a loss of 4 trees VH1, 4, 5 & 6 . Their retention would conflict with parameter plans and with the number of houses proposed in the application.

69. Further for the reasons set out in evidence by JFL all the other trees would suffer deterioration to varying degrees[97].

70. This would plainly engage the wholly exceptional test in NPPF para 180c.

71. In relation to that the following submissions are made:

(i) The paragraph 180 c test provides a very high hurdle which the Appellant has come no where near to crossing. The footnote 63 NPPF examples indicate that the kind of matters that would be required go well beyond those relied upon by PC.

[97] Re T5, VH2, VH3, Vh7, VH9 – JFL thinks they will suffer deterioration and it does not seem possible to design theses out; re T6, VH8, VH11 – JFL accepts might be possible to design out the impacts and VH10 will have no impact.

(ii) PC in essence relies[98] on the housing need in Bristol and the fact that his client was unaware of the existence of veteran trees until recently. Neither provide a basis to meet the test in 180c and the latter is entirely as a result of the lack of diligence on the part of the Appellant.

(iii) Quite apart from that, as JFL explained the evidence he saw in relation to a compensation strategy in the TP evidence was entirely inadequate. It would at best take many decades for similar conditions to be created elsewhere.

72. By way of response the appellant suggested – in rebuttal evidence served just a few days before the start of the inquiry- that the proposal could be amended by condition to keep the trees if they are veteran. It appears from the evidence of CC and PC that there would be – on the case of the appellant a need for:

(i) a reduction in circa 20 units[99] In short this would constitute a material changes in the numbers of the proposal. The proposal would not be 'up to 260 units any more[100]'

(ii) CC confirmed there would be a change in housing mix. Again the Council submit such changes are material.

(iii) CC also confirmed that incidental green spaces would change in character (so that they are more linear in character and of less amenity value) – see p.8 of Crawford rebuttal. This would also constitute a material change

(iv) There would inevitably be required changes to the parameter plans as GC explained (a fixed element of the proposal) to identify the further and substantial changes of land use – such changes would plainly be material.

[98] His rebuttal at p.10, para 2.22
[99] CD 16.6 -see Crawford rebuttal at 2.9, p. f ff
[100] Note the current description of dev is "Outline planning application for development of up to 260 new residential dwellings (Class C3 use) together with pedestrian, cycle and vehicular access, cycle and car parking, public open space and associated infrastructure. All matters reserved apart from access."

73. The proposals to amend are desperate, too late and unjustified. The following submissions are made:

(i) Even if the scheme could be so amended at this stage JFL and RH confirmed that in their view the veterans are likely to still suffer deterioration as much of the surrounding hedgerow will be removed. Accordingly, even on such a scenario the 'wholly exceptional test' would be engaged – a test that the Appellant has not seriously addressed or begun to meet in evidence. Nor has it provided a suitable compensation strategy.

(ii) JFL does not in any event accept that the buffer areas are of sufficient size. JFL address such matters in his oral and rebuttal evidence by reference to Standing Advice[101] and relevant approaches established on appeal[102] requiring a precautionary approach. It has not in fact been demonstrated that it would be feasible to retain the trees and still develop out as the Appellants intend even on an amended basis.

(iii) Even putting those matters aside it would not be lawful to amend the proposal at this late stage.

74. The Council submit that it would be inappropriate to allow such changes at this stage on both a substantive basis and on a procedural basis[103].

75. Substantively the proposal would be for a development that would be significantly different in its context from that which the application envisaged. Numbers and mix and amenity are all impacted upon. For the first time the very important issue of veteran

[101] CD 8.10
[102] See CD 6.6 Oakhurst Rise 1 at AD 65 & 66
[103] The two issues are separate as discussed in *R (Holborn Studios Limited) v LB Hackney [2017] EWHC 2823 (Admin)*

trees will have been grappled with and in context this is highly material. Changes will be required to fixed elements. In context the changes are significant.

76. Procedurally such changes need to be notified to consultees and publicised with any resulting representations to be taken into account in determining the application. It is quite possible persons may have strong views in relation to such matters. To follow the course relied on by the appellant would deprive relevant persons of a chance to make representations and in the circumstances would be so unfair as to be unlawful. The suggestion in cross examination that the Council should have done this consultation when receiving the rebuttal evidence a few days before the inquiry at a time when it was not the decision making body and when the appellant had not even raised such an issue is simply desperate and nonsensical and not a position supported in evidence or law.

77. In both regards to allow such a proposed set of amendments would be so unfair in context as to be unlawful. If the Appellant wants or needs to change the proposal in such a way it will need to do so by way of a fresh application.

Planning Balance

78. GC conducted a careful planning balance and his evidence is relied upon in that regard[104].

79. In relation to the issue of housing need and supply an agreed range of 2.24 -2.45 years supply was put to the inquiry in the statement of common ground. Both PC and GC agreed this should attract very significant weight in any balance.

80. Whilst the level of weight was agreed it is of note that the Appellant overplayed the issue in evidence and in the way it put the case. In that regard the following submissions are made:

[104] See especially rebuttal CD 17.1 at par 73 and table

(i) The need for housing is accepted as being serious but other matters (as reflected in national policy and development plan policy) relating to biodiversity and ecology are equally pressing. For example the need to protect irreplaceable habitats as reflected in para 180c of the NPPF is rightly given great importance. As is the requirement to avoid significant harm to biodiversity in paragraph 180a.The appeal proposal conflicts with such matters and causes undue harm to matters of great importance.

(ii) As Mr Roberts accepted in xx, the housing position in Bristol can be characterised as being '*no better or worse*' than it is in many parts of the country. Lack of 5 year supplies however regrettable are not an uncommon position. It is not to be remedied by allowing plainly unacceptable and unsustainable proposals such as this.

(iii) Moreover, the Council is taking numerous steps to remedy the housing shortfall as GC explained and as set out in the recent Housing Action Plan[105]. It is not treating the matter lightly.

(iv) In truth as the evidence revealed there are in fact currently over 13,000 homes with planning permission in Bristol[106] . This demonstrates that the Council has continued to grant planning permissions – which are at their highest level since 2008. There is a healthy supply of permissions but the housing sector is not able to deliver such homes as explained in evidence[107].

(v) The emerging local plan is at too early a stage to afford material weight but together with a range of other matters it demonstrates that serious action is being pursued.

(vi) It is quite clear that the housing position does not constitute a basis for there being a 'wholly exceptional' reason to justify the harm to veteran trees.

[105] Cd 8.13
[106] CD 17.2 at pdf p.5 fig 3
[107] Cd 8.13 pdf p4

81. In relation to affordable housing again there was no dispute as to the weight to be afforded to such matters. Both planners afforded it very significant weight in the balances undertaken. However the Appellant was in error in reporting that the 'target' in the development plan was 1500 homes per year. As GC explained it was not. The policy target is 6,650 (or 333 homes per year)[108]. PC had not correctly understood policy in that regard.

82. As GC explained - it would not have been possible to deliver the total need requirement without increasing the supply of market housing to a level significantly in excess of the housing demand estimated at that time or, increasing the level of affordable housing required to a percentage that was not viable.

83. To date the Council has delivered some 5,257 affordable homes – some 79% of the affordable housing target. While the need remains great it does need to be seen in context.

84. As discussed above the proposal fails to accord with the site allocation policy. It also fails to accord with the range of other development plan policy and national policy set out in the putative reasons for refusal as explained in evidence by GC and other witnesses. I do not set out each policy here but rely on the discussion and analysis of them in the proofs of evidence[109].

85. PC accepted that the Inspector would be entitled to refuse the appeal if he felt that there was a conflict with the allocation policy on the basis that the proposal had failed to retain sufficient important trees and hedges. It is inevitable that if there is conflict with the allocation policy many of the other relevant development plan policies will also be in conflict with the proposal.

86. In light of the evidence as to 74% loss of important hedgerows there is clear conflict with the development plan for the reasons set out and explained in the putative reasons for refusal.

[108] See BCS17 at 5.5 pdf 115

[109] The policies are those in the r f r and include the site allocation policy, BCS9, DM15, 17, 26, 27, 19 as well as various parts of the NPPF including paragraphs 174, 179 and 180

87. Moreover the Appellant now accepts that a different scheme could be produced which would deliver a material number of homes and comply with the allocation policy. Frankly that is what should be done. It would enable the delivery of a similar level of benefits to that which the current proposal provides but avoid excessive and unnecessary harm.

88. GC carefully assessed all the material considerations in his evidence in coming to a planning balance. He assessed correctly that in light of the veteran tree issue the proposal falls to be refused and there is a clear basis for doing so. In any event, the proposal falls to be refused as GC also assessed even when the tilted balance is applied and in light of the relevant statutory tests.

89. It is regrettable that the Appellant felt the need to suggest that the evidence produced by the Council was in some way politically motivated. It was not. As GC confirmed he and others had approach the matters applying planning judgment and have acted in accordance with their understanding of relevant legal and policy tests.

90. In truth the position of the Council has been consistent. Any U turns at this inquiry have come from the Appellant. The appeal proposals are a wasted opportunity to deliver sustainable development at the site. They are not in accordance with the development plan and material considerations do no indicate they should be allowed.

91. The appeal should be dismissed.

Tom Cosgrove KC 9th March 2023

Counsel for BCC