

**APP/Z0116/W/22/3308537 - Appeal by Homes England  
Land at Broom Hill / Brislington Meadows, Broomhill  
Road, Brislington, Bristol**

**Rule 6 Party closing submissions on behalf of:**

- I. Bristol Tree Forum**
- II. Greater Brislington Together**
- III. Save Brislington Meadows Group**

**09 March 2023**

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Save where our submissions contradict them, we adopt the Council's submissions.

## **1. The SNCI designation**

- 1.1. The first question is whether BSA1201 is designated as an SNCI. The entire appeal site, with the exception of a small area in the north-eastern corner, was designated as a Site of Nature Conservation Interest (SNCI) by, at least, January 1985 (CD1.21 a), Annex C, pdf. 72 & CD11.3 (b)). This designation was made in recognition of the ecological importance of the combination of species-rich grassland, damp grassland and hedges that it supports, which together form a combination of habitats that is of nature conservation value in a city-wide context. BCC's Ecology expert, Rupert Higgins, confirms in his Proof of Evidence 'that the ecological value of this site compares favourably with that of other SNCIs in the city' (Paragraph 2.3.1, CD13.3, p. 4, pdf. 4).
- 1.2. The ecological quality of the Brislington Meadows SNCI was confirmed by the (latest) 'SNCI Scorecard' dated 10th December 2010 (CD11.5). The scorecard confirmed the site as having the highest designation, 'strong', diversity of species and diversity of habitats, as well as 'strong' rarity of species and 'moderate' rarity of habitats. The scorecard also found 'strong' fragility and

irreplaceability as well as 'strong' age/continuity and community amenity. The scorecard notes that to qualify as an 'SNCI/Wildlife site', a site must 'demonstrate clearly that it is of substantive biodiversity interest'. Noting that cut-off points for criteria are not appropriate, the scorecard notes that 'to qualify as an SNCI the site must score strongly on at least one of criteria 1 – 11 (scientific criteria); in addition to the site having either 2 or more strong criteria'. The Brislington Meadows SNCI has ten 'strong' criteria.

- 1.3. SNCIs are designated by the Local Sites Partnership (LSP) in accordance with Government guidance (DEFRA, 2006, CD11.5 (a)). In Bristol, designation is – according to information published on the .GOV website<sup>1</sup> - undertaken by the LSP for the West of England, formed by ecologists from each of the four unitary authorities (the Council being one) as well as Avon Wildlife Trust, BRERC<sup>2</sup>, Natural England, Forestry Commission, Environment Agency as well as the local RIGS group.
- 1.4. In March 2011, the LSP adopted version 12 of the Designated Sites Protocol (Ecology and Geology) (PROTOCOL, 2011, CD11.5 (b)). This protocol still applies. It confirms that: 'The Local Sites Panel [LSP] are the determining body for decisions on new Local Sites<sup>3</sup>, and amendments or deletions to Local Sites, in accordance with the agreed criteria and procedure.' BRERC is responsible for maintaining a GIS data layer for each Authority showing new sites, amended sites, and sites for de-designation.
- 1.5. The DEFRA 2006 guidance notes that SNCIs can be de-selected 'if their nature conservation interest deteriorates to such an extent that they no longer qualify as Local Sites' (para. 36) i.e., on ecological

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<sup>1</sup> [https://www.data.gov.uk/dataset/60974c59-62d1-4539-94e9-6221cd117d83/sites-of-nature-conservation-interest-snci#:~:text=Sites%20of%20Nature%20Conservation%20Interest%20\(SNCIs\)%20are%20sites%20which%20contain,an%20agreed%20set%20of%20criteria](https://www.data.gov.uk/dataset/60974c59-62d1-4539-94e9-6221cd117d83/sites-of-nature-conservation-interest-snci#:~:text=Sites%20of%20Nature%20Conservation%20Interest%20(SNCIs)%20are%20sites%20which%20contain,an%20agreed%20set%20of%20criteria).

<sup>2</sup> Bristol Regional Environmental Records Centre

<sup>3</sup> As defined by DEFRA 2006.

grounds. This is confirmed in PROTOCOL 2011. These are the only grounds upon which an SNCI may be de-selected. The Brislington Meadows SNCI has not been de-selected by the LSP, nor has BSA1201 been removed from its ambit.

- 1.6. Consequently, as Bristol City Council confirm in their response to a Freedom of Information Request in May 2022, the entire site at Brislington Meadows, including BSA1201, is designated as an SNCI (CD11.7). Mr Gary Collins for the Council confirms that ‘... the site is still technically designated as a Site of Nature Conservation Importance (SNCI)’ (Para. 44, CD13.10, p. 14, pdf. 17).
- 1.7. The 2006 DEFRA guidance requires that ‘Local Development Frameworks [Development Plans] should identify all local nature conservation areas on the proposals map’ (by reference to PPS 12) (para. 5, CD11.5 (a), p.5, pdf. 11). This does not mean that LDFs or local plans designate SNCIs, rather that they identify the SNCIs designated by the LSP. Similarly, NPPF para. 179(a) states that ‘...plans should: identify, map and safeguard components of local wildlife-rich habitats and wider ecological networks ...’. Designation is the responsibility of the LSP, identification is the task of the LPA. They are two separate tasks.
- 1.8. Despite this wording, during the plan-making process, the Council mistakenly thought that the plan-making process designated SNCIs rather than identifying the LSP-designated SNCIs. The Policy Delivery section of BCS9 of the 2011 Core Strategy states that ‘The Site Allocations & Development Management DPD and Bristol Central Area Action Plan will designate important open spaces and Sites of Nature Conservation Interest’, and, under the heading Nature Conservation, adds ‘The Site Allocations & Development Management DPD and Bristol Central Area Action Plan will designate local Sites of Nature Conservation Interest. The Proposals Map will also show international, national and local biological and geological

conservation sites designated outside the development plan process' (CD5.5, p. 77, pdf. 83). This statement fundamentally misunderstands the designation process set out in government and NPPF guidance (DEFRA 2006 and NPPF para. 179(a)).

- 1.9. It is notable that the actual policy (p. 74, pdf. 80) is silent about this and that paragraph 4.9.9 states that 'In Bristol, Sites of Nature Conservation Interest are designated through the Development Plan process as local sites' (our emphasis) (p.76, pdf. 82). The term 'local sites' is the term adopted in the 2006 DEFRA guidance for sites such as SNCIs (Introduction at the 3<sup>rd</sup> paragraph, CD11.5, p. 3, pdf. 9).
- 1.10. Furthermore, the December 1997 Local Plan policy, NE5 (CD5.9, p. 44, pdf. 43) - which provided limited policy protection to SNCIs - was not replaced until the Site Allocations and Development Management Policies (SADM) was adopted in July 2014 (more than three years after the Core Strategy was adopted) when it was upgraded to the stronger SNCI protection set out in SADM19.
- 1.11. As DEFRA 2006 makes clear, the Council does not have, and has never had, the power to designate SNCIs. LPAs are required to identify sites designated as SNCIs taking the requisite steps to maintain and enhance the sites (NPPF para.175). As the Council confirms, Brislington Meadows, including BSA1201, remains a designated SNCI.

## **2. The Policies Map**

- 2.1. The second question is whether, although Brislington Meadows (including BSA1201) continues to be identified as an SNCI on the Council's "Pinpoint" map (ID15) (as well as on two other publicly-available maps maintained by the Council and the GIS data maintained by BRERC (CD11.3 (b))), the failure to show BSA1201 as part of the Brislington Meadows SNCI on the Policies Map (CD5.4, p. 32, pdf. 36) has planning consequences.

- 2.2. The NPPF (para. 23) states that 'Broad locations for development should be indicated on a key diagram, and land-use designations and allocations identified on a policies map.' This requires a policies map, a requirement also set out in the Town and Country Planning (Local Planning) (England) Regulations 2012, Regulation 9 which states that: 'The adopted policies map must ... illustrate geographically the application of the policies in the adopted development plan.'<sup>4</sup>
- 2.3. As Regulation 9 indicates, the adopted policies map is not itself a planning document, it is simply a geographical illustration of the 'adopted development plan'.
- 2.4. Neither SA1 nor SADM19 altered the SNCI designations (they could not do so as SNCI designations are the responsibility of LSPs). The policies map nevertheless represents BSA1201 as not being part of the Brislington Meadows SNCI. Does this illustration in the policies map have planning significance? It does not. Repeated caselaw has indicated that if mistakes are made on the policies map, the map can be changed to represent policy accurately.
- 2.5. The policies map is a geographic illustration of policies, it has no planning significance of its own. This was confirmed by the Court of Appeal in *Fox Land & Property v SSCLG* [2005] EWCA Civ 298, where Richards LJ held in relation to adopted policies maps: '28. ... *The Proposals Map is not itself policy, but it illustrates detailed policies, to use the term in section 36(6)(a) of the 1990 act. In particular, it identifies the geographical areas to which the detailed policies apply. Just as the supporting text is relevant to the interpretation of a policy, so the Proposals Map is relevant to the geographical scope of application of a policy and thus to a proper understanding of the policy. One looks at the supporting text and the Proposals Map not*

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<sup>4</sup> <https://www.legislation.gov.uk/ukxi/2012/767/regulation/9/made>

*because they are themselves policy - they are not - but because of their relevance to a proper understanding of the policies properly so-called.'*

- 2.6. This geographic status was also confirmed by Waksman J in *Jopling v Richmond upon Thames LBC* [2019] EWHC 190 (Admin) who held that the proper scope of an AP map is as follows: *'14. By Regulation 2 (1) and (9) of the 2012 Regulations, an "adopted policies map" is a map which, among other things, illustrates geographically the application of the policies in the adopted development plan. It follows that the adopted policies map itself is not a DPD. 15. The reason for this is clear, in my view. The map is simply a geographical illustration or representation of policies themselves contained in the local plan upon which it is parasitic.'*
- 2.7. Most recently, the geographic nature of the AP map was confirmed by Lang J. in *Bond v Vale of White Horse District Council* [2019] EWHC 3080 (Admin), holding that: *'the AP Map does not form part of the Local Plan'*. Lang J confirmed that the policies map can be altered without following the statutory procedure for changing the development plan.
- 2.8. Both the Council and the Appellant suggest that, for the purposes of Section 38(6) of the Planning and Compulsory Purchase Act 2004<sup>5</sup> (PCPA 2004), BSA1201 is not within the Brislington Meadows SNCI as evidenced by the development plan Policies Map (CD5.4). This approach is flatly contradicted by the caselaw. The policies map does not have this significance.
- 2.9. The policies in the Bristol development plan did not change the SNCI designation of BSA1201. They could not do so, as this is a task for the LSP rather than the LPA (DEFRA 2006 & PROTOCOL 2011). The geographical representation of BSA1201 on the policies map is

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<sup>5</sup> <https://www.legislation.gov.uk/ukpga/2004/5/section/38>

consequently faulty in so far that it does not show the site as part of an ongoing SNCI.

- 2.10. While this mistake should certainly be rectified (and can be corrected without engaging the statutory procedures, per Lang J in *Bond v Vale of the White Horse District Council* [2019] EWHC 3080 (Admin), para. 58), even as the faulty map stands, it merely provides a geographic representation of the plan's policies, both SADM19 and SA1. No policy in the development plan de-designated the site (they could not do so as de-designation is solely a task for the LSP on ecological grounds only (DEFRA 2006, para. 36 & PROTOCOL 2011)) and the adopted policies map has no planning consequence of its own as is confirmed by caselaw.

### **3. *Planning consequences of SNCI Designation & "Pricing In"***

- 3.1. The third question considers the planning consequence of designating the site both as an SNCI and allocating it for development. This 'dual allocation' means that both SA1 and the SADM policies identified by it apply in full to BSA1201. Development Plan policy SADM19 also states that: 'Development which would have a harmful impact on the nature conservation value of a Site of Nature Conservation Interest will not be permitted.'
- 3.2. Can the site allocation negate the SNCI designation? There is no Development Plan provision which allows for one policy to 'trump' another or for planning harm to be 'priced in' at the time of designation. A conflict between contemporary policies must be determined as a question of planning balance.
- 3.3. Where there is a conflict between development plan policies, Section 38(5) PCPA 2004 requires that 'If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the



development plan'. Both the SADM19 and SA1 policies were adopted into the development plan at the same time.

- 3.4. DLUHC Guidance - Determining a planning application (para. 012) adds that: 'Conflicts between development plan policies adopted, approved or published at the same time must be considered in the light of all material considerations, including local priorities and needs, as guided by the National Planning Policy Framework'.<sup>6</sup>
- 3.5. The balancing of policies remains a question of planning judgement, a point confirmed by Eyre J in *TV Harrison CIC v Leeds City Council* [2022] EWHC 1675 (Admin) (06 July 2022), who held that: *'the assessment as to whether different policies in the development plan are in conflict is a matter of planning judgement. Section 38(5) makes provision as to the way in which such a conflict is to be resolved but it does not operate without more to effect the supersession of policies in earlier documents nor, more significantly, does it remove the requirement to have regard to the terms of the development plan and to consider whether particular parts of that plan are or are not in conflict.'*
- 3.6. In *TV Harrison CIC*, the LPA's barrister had attempted to argue that 'the tension' between a structural allocation policy and playing fields policy 'had already been resolved in favour of the SAP' (in other words it had been 'priced in'). The judge, Eyre J., held that *'in his oral submissions Mr Tucker [the barrister] moved away from that position and disavowed reliance on that provision. In my judgement he was right to do so.'*
- 3.7. Section 38(5) requires policies agreed at the same time to be balanced. In *TV Harrison CIC*, Eyre J. held that when two policies applied, the Council had to 'grapple' with the consequences of the competing policies. In this case, this would mean 'grappling' with

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<sup>6</sup> <https://www.gov.uk/guidance/determining-a-planning-application>

both the status as BSA12011 and the effect of SADM19. Rather than engaging with this balancing process, both the Appellant and the Council have asserted that the site allocation supersedes the SNCI designation and consequently SADM19. However, as both s38(5) and TV Harrison CIC confirm, one policy does not trump the other, an allocation cannot be 'priced in'. Balancing the policies is a matter of planning judgement.

#### **4. The 'tilted balance' test**

- 4.1. NPPF para 11(d) (CD5.5, p. 6, pdf. 6) requires the decision-maker to grant permission where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, unless the site contains, inter alia, 'irreplaceable habitats' (NPPF, footnote 7).
- 4.2. Irreplaceable habitats are defined in NPPF Annex 2 (p. 68, pdf. 68) as those '*Habitats which would be technically very difficult (or take a very significant time) to restore, recreate or replace once destroyed, taking into account their age, uniqueness, species diversity or rarity. They include ancient woodland, ancient and veteran trees, blanket bog, limestone pavement, sand dunes, salt marsh and lowland fen.*' This definition is open-ended (or 'not exhaustive' in DEFRA's words in its January 2022 Consultation on Biodiversity Net Gain Regulations and Implementation <sup>7</sup> (DEFRA 2022)). If some of the hedgerows growing on the appeal site are irreplaceable, then these too fall within this definition.
- 4.3. We maintain that the appeal site contains irreplaceable habitat due to the number and extent of veteran trees and hedgerows, as well as the SNCI scorecard finding of 'strong' fragility and irreplaceability as well as 'strong' age/continuity and community amenity.

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<sup>7</sup> P.30 - [https://consult.defra.gov.uk/defra-net-gain-consultation-team/consultation-on-biodiversity-net-gain-regulations/supporting\\_documents/Consultation%20on%20Biodiversity%20Net%20Gain%20Regulations%20and%20Implementation\\_January2022.pdf](https://consult.defra.gov.uk/defra-net-gain-consultation-team/consultation-on-biodiversity-net-gain-regulations/supporting_documents/Consultation%20on%20Biodiversity%20Net%20Gain%20Regulations%20and%20Implementation_January2022.pdf)

Consequently, NPPF para 180(c) is engaged so that *'Development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists'*.

- 4.4. The current formulation of para 180(c) has been much strengthened in recent years. While in 2012 it was ancient or veteran trees that had to be exceptional, today it is the development proposal that must identify 'wholly exceptional reasons' as well as a suitable compensation strategy. The NPPF defines exceptional reasons in footnote 63: *'For example, infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or deterioration of habitat.'* It is quite clear that the proposed development at Brislington Meadows does not fall within this category. It is not exceptional and permission should not be given as it causes irreversible harm to an irreplaceable habitat.
- 4.5. In relation to a 'suitable compensation strategy' (required by NPPF 180c), DEFRA 2022 noted that: 'Irreplaceable habitat has such a high value in biodiversity terms, and its creation is so difficult, that meeting the biodiversity gain objective could be impossible, or extremely difficult, for any development resulting in its loss.' As we explain below, the proposals here would not be sufficient to counter the harm to the irreplaceable habitat.
- 4.6. When applying the 'titled balance' test under NPPF11(d), a decision-maker must consider 180(c) and other provisions in the NPPF as well as development plan policies. Decision-makers are not required to take these questions in any particular order. In *Gladman v Corby* [2021] EWCA Civ 104, the Court of Appeal recognised a *'realism ... of a holistic approach to the performance of the duty in section*

*38(6). There is no prescribed method to adopt.’ Sir Keith Lindblohm set out the requirement as follows [at para 67]: ‘the maker of the decision must keep in mind the statutory primacy of the development plan and the statutory requirement to have regard to other material considerations, including the policies of the NPPF and specifically the policy for the “tilted balance” under paragraph 11d)ii, and must make the decision, as section 38(6) requires, in accordance with the development plan unless material considerations indicate otherwise.’*

## **5. Complying with the BSA1201 development considerations**

- 5.1. The Appellant submits that the Appeal Scheme complies with the BSA1201 development considerations in all respects. We disagree. Adopting the headings used by the Appellant in their Statement of Case, we challenge three of them: suitable access (2); ecological considerations (3); trees and hedgerows (4).

### **Suitable access (2)**

- 5.2. We repeat the issues raised in our Statement of Case (CD11.0) (set out below) and invite the Inspector to weigh this evidence against that which the Appellant has presented.
- 5.2.1. “The area around the Appeal site has become relatively more deprived than it was in 2015 (R6.8.4)<sup>8</sup> with nearby ‘Hicks Gate’ in Brislington West ward moving into the most deprived 10% in England since then.
- 5.2.2. The Ward Profile Report (September 2022) (R6.8.1) for Brislington East shows that 20.6% of households do not own a car or van and that only 24.7% own two cars or vans. The only proposed vehicle access point to this site will be off Broomhill Road with all other access points being accessible only on foot or by bicycle off School Rd, Allison Rd and

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<sup>8</sup> Figure 3.

Bonville Rd (only during the initial construction phase).

- 5.2.3. The nature of this site means that those without access to a car, especially families with children, are unlikely to be able to have 'suitable access' to this site.
- 5.2.4. Brislington East, West and the surrounding areas are some of the most poorly served wards when it comes to access to public transport – this was acknowledged by the Council and WECA in its 2021 submission to government for funds to help reopen St Anne's railway station (R6.8.2). The report states:
- 5.2.5. '2.60 Despite its relative proximity to the Bristol's city centre, a high proportion of St Anne's and Brislington residents drive frequently, especially for commuting purposes. Data collected from the 2011 census indicates the strong bias for driving to work shown across the Brislington East ward (as outlined within Figure 0-13). Forty-three percent of residents were shown to drive to work either using a car or van (with an additional <1% using a motorcycle, scooter or moped). It should be noted that the data displayed includes the 28% of Brislington East residents who were not in employment as of the 2011 census, as well as 3% of residents working predominantly from home. With these non-working or static residents removed from the dataset, percentage use of cars or vans across total journeys to work increases to 62%. ...
- 5.2.6. 2.61 In turn, usage of public transport for commuting journeys is low across Brislington East. With non-working residents and those working from home again excluded, a mere 1% of existing journeys to work are made by train, with 11% of residents using a bus, minibus or coach. Whilst 18% of journeys are made via active travel means (c.6%

by bicycle, and 12% by foot), there appears to be a significant opportunity for increasing public transport usage across the area, if appropriate and efficient options are implemented.

5.2.7. This situation has been further exacerbated following the recent withdrawal of many First Bus West of England services serving the ward.<sup>9</sup> Whilst the A4, Bath Road has a reasonable bus service, it can only be accessed from the site by walking through an industrial estate, with all the inherent dangers from HGV traffic and empty streets etc. The alternative is to walk the long way around via Broomhill Road. Either way it is between a 14 to 18 minute walk.

5.2.8. We also note that the Appellant's traffic surveys (CD1.15) were undertaken during or in the aftermath of the COVID lockdowns, so they can hardly be considered representative of the true state of transport use in the area."

### **Ecological considerations (3)**

5.3. The development considerations of BSA1201 (CD5.3 – p. 154, pdf. 162) require, amongst other matters, that the development should *'be informed by an ecological survey of the site and make provision for mitigation and compensation measures, including enhancement to the grazing land adjacent to Victory Park and compensation for the loss of semi-improved neutral grassland and damp grassland (the site currently has city-wide importance for nature conservation due to the presence and condition of particular species, habitats and / or features)'*. We address each of the following elements:

5.4. It is our submission that the Appellant's proposal fails to *'make provision for mitigation and compensation measures'*.

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<sup>9</sup> <https://www.firstbus.co.uk/bristol-bath-and-west/news-and-service-updates/news/temporary-journey-cancellations-due-ongoing>

- 5.5. The Appellant has provided a range of arboricultural surveys (AIA) (CD1.19, CD2.2 & LD18[?], ecological surveys (CD1.21, CD1.21 a) to j) and biodiversity reports (CD1.22 & CD2.1). All this informs the assessment of the biodiversity value, as set out in the Natural England's Biodiversity Metric 3.0 tool (BNG 3.0).
- 5.6. NPPF 179b, states that plans should '... identify and pursue opportunities for securing measurable net gains for biodiversity' (our emphasis) (CD5.1, p. 51, pdf. 51).
- 5.7. Whether or not the Council has a development policy relating to biodiversity net gain, NPPF 179b is engaged in any event. The use of the word 'measurable' makes it clear that a tool such as the Natural England biodiversity metric (in this case BNG 3.0) needs to be deployed to establish whether or not the development proposal achieves 'net gain'. On the basis of the current BNG 3.0 calculation (setting aside the various speculative offsite mitigation scenarios offered), it does not.

### ***BNG 3.0 - Strategic significance***

- 5.8. Strategic significance is a key element in any BNG 3.0 calculation; the higher its significance, the greater is its effect.
- 5.9. Whether or not this Appeal accepts our case that BSA1201 remains part of Brislington Meadows SNCI<sup>10</sup>, Table 5-4: *Strategic significance categories and scores* and section 5.19 of BNG 3.0 User Guide state that 'Strategic significance will be high if the habitat location is identified in Local Plans, strategies or policies' (CD11.6 (g), p. 49, pdf. 51). The appeal site is specifically identified in SA1 Site Allocations as BSA1201 (CD5.2, p. 89, pdf. 95) and so falls within this definition. On this basis alone, the strategic significance of all onsite habitats should be set to High (a multiplier of 1.15).

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<sup>10</sup> See also Hesketh's revised strategic significance approach which adopts the 'premise' that the 'Whole SNCI' area remains in force (CD 12.5 para. 2.5 (p. 43, pdf. 43)).

### ***Measuring tree canopy and habitat area***

- 5.10. The late corrections to the AIA evidence (LD18[?]) and our analysis of the consequences of these changes (LD19) have exposed a significant difference between our calculation of the cumulative canopy of those individual trees which do not form part of a woodland, which are not part of hedgerow habitats or trees not in groups which can properly be classified as *Heathland and shrub* habitats. The Appellant has calculated their combined canopies at 0.3760 hectares<sup>11</sup> (Table 3 Existing canopy coverage, CD2.2, p. 9, pdf. 12), whereas we calculate their canopies at 0.4876 hectares. Consequently, the Applicant has significantly under-calculated the canopies required.
- 5.11. It transpires that under-calculation is a consequence of the Appellant's use of CAD software to calculate tree canopy, whilst we have used the average of the four Cardinal Crown Spread data, as reported in the various tree surveys provided, as the radius (r) in the canopy calculation formula –  $\pi r^2$ . BS5837:2012 uses this approach for calculating the overall extent of the canopy when undertaking a tree survey (CD8.9, para. 4.2.4 e), p. 5, pdf. 11).
- 5.12. Given that the Appellant has not published the CAD file upon which its calculations are based and, given that very few of those considering this appeal are likely to have either access to professional CAD software or to the training needed to use it, we submit that our approved and verifiable methodology is the correct approach.
- 5.13. In any event, we submit that, in this context, canopy area is immaterial because these trees should have been categorised as *Urban Tree* habitat, as defined by the Biodiversity Metric 3.0 User Guide (CD11.6 (g), p. 67, pdf. 69). Chapter 7 of the BNG User Guide

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<sup>11</sup> It is unclear if the Appellant has excluded those trees growing within hedgerow habitats.



set out the particular considerations and methodologies which apply to *Urban Tree* habitat which are materially different from those which apply to other area habitats (CD11.6 (g), p. 67, pdf. 69).

- 5.14. Furthermore, these individual trees are not part of the Appellant's BNG 3.0 calculations. We discuss this below.

***Biodiversity Metric 3.0 - measuring the baseline habitat***

Urban Tree habitat

- 5.15. Accurate recording and measurement of baseline onsite habitat is the cornerstone of the measurement of biodiversity net gain (BNG). Without this, it will be impossible to have confidence that the conclusions drawn from it can be relied on.
- 5.16. Paragraph 3.2 of the User Guide (CD11.6 (g), p.20, pdf. 22) makes it clear that data must be obtained for all existing habitat parcels. The Appellant has failed to take account of any of the Urban tree habitat present on the appeal site in its baseline calculations.
- 5.17. Whilst we have excluded all the trees growing within hedgerows habitats H1 to H6 (including their sub-categories) from our calculations, the Appellant only accepts that hedgerow habitats H1, H2 and H3 (including their sub-categories) have trees growing within them. Furthermore, the Appellant does not accept that the boundary hedgerows HH1, HH2, HH7, HH8 and HH9 are even hedgerows. It has classified them as either *Woodland and forest* or *Heathland and shrub* habitat.
- 5.18. This means that only six individual trees, T09, T15, T16, T17, T19 and T20, of the 34 individual surveyed are accounted for in the Appellant's BNG calculation. The remaining 28 trees have been subsumed into the broad habitat, *Heathland and shrub* (see the Baseline Habitats plan G7507.20.011 at CD1.22, pdf. 59). For

example, the veteran Oaks, T05<sup>12</sup> & T06, amongst other nearby trees, have been incorrectly classified and reduced to part of a *Bramble scrub* Habitat thereby significantly underestimating their biodiversity value.

- 5.19. These trees, whether individuals or in groups, which cannot properly be classified as broad *Heathland and shrub* habitats, should have been included in the baseline habitat calculation as *Urban tree* habitat. On the basis of the information available, we calculate that this habitat has an area of at least 0.6295 hectares<sup>13</sup> and is worth at least 5.79 Habitat Units.<sup>14</sup>
- 5.20. The habitat area of Urban Tree habitat is based on the sum of each tree's root protection area (RPA), where RPA radius is based on the formula set out at section 4.6 in BS5837:2002 (CD8.9, p.10, pdf. 16).<sup>15</sup>
- 5.21. In arriving at our baseline habitat area for these trees we have been obliged to adopt the RPA calculation methodology used in BNG 3.1. This metric adopts the approach required in BS5837:2012 described above. All our other calculations use BNG 3.0.
- 5.22. This is because the methodology set out at *Table 7-2: Urban tree size by girth and their area equivalent* of the BNG 3.0 User Guide (CD11.6 (g), p. 69, pdf. 71), is unworkable because it is both:
- 5.22.1. error-strewn - the heading to the first column should read 'Girth' not 'Diameter at Breast Height' and the 'Area equivalent' value for a Large category tree is out by a factor of 10 - it should read 0.0133 ha, not 0.133 ha; and,
- 5.22.2. impossible to apply on a tree-by-tree basis using the stem

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<sup>12</sup> We accept the Council's case that this is a veteran tree.

<sup>13</sup> It is impossible to calculate area of the tree groups in this *Urban tree* habitat.

<sup>14</sup> On the assumption that they are in Moderate condition and have High strategic significance.

<sup>15</sup> In the case of veteran trees, RPA radius is based on stem diameter x 15, or half the tree's crown spread plus five metres, whichever is the greater.

diameter values provided in the AIA. It can only be applied by introducing an extra step inferring the transition points between Small, Medium and Large category trees. In our experience this additional step can be interpreted in a number of ways and so lacks any consistent methodology.

5.23. This approach has been abandoned with the publication of BNG 3.1.

5.24. Mr Hesketh, at para. 2.6 & 2.7 of his Ecology Rebuttal to R6 Party (CD16.7, p.3, pdf. 5), states that our use of *Urban tree* habitat in our site habitat baseline and site habitat creation calculations is inaccurate. We refute this: we have been careful in our calculations to exclude both trees in hedgerows and those shown as outside the development boundary.

5.25. Furthermore, BNG 3.0 allows for overlap of *Urban tree* habitats with other habitats, so that there is no duplication of those habitats that the trees may oversail. Paragraph 7.13 of the BNG 3.0 User Guide advises that '[t]heir [*Urban tree* habitat] area does not need to be deducted from the total area of other habitats within the site boundary. It will not generate a total area error.' (CD11.6 (g), p.69, pdf. 71).

5.26. Mr Hesketh's statement that the 'delivery of tree planting under the Bristol Tree Replacement Standard [BTRS], provides sufficient "insurance" to address any concerns that urban trees may not [be] properly dealt with through the parameters of Metric 3.0' (para. 27) is wrong:

5.26.1. The methodology used for calculating BTRS compensation under SADM17 is different from the methodology used in the BNG *Urban tree* habitat area calculation methodology, so cannot be translated across to BNG 3.0 in any meaningful way.

5.26.2. BTRS only relates to tree loss compensation. It does not

relate to the baseline habitat calculation upon which all further calculations are based and from which the calculation of percentage biodiversity net gain is derived.

- 5.27. Whilst we accept that the 250 replacement trees required under SADM17 (CD5.2, p.36, pdf. 42) should be credited to any appropriate BNG mitigation required, this does not absolve the Appellant of its obligation properly to record all the onsite baseline habitats, including the *Urban tree* habitat present.
- 5.28. In any event, the proposed loss of trees T18 & T28, and of those tree groups that should not have been categorised as *Heathland and shrub* habitat, engages the BNG3.0 requirements relating to *Urban tree* habitat. This includes guidance that lost habitat should be replaced on a like-for-like basis - para. 7.14, advises that: '... where possible 'like for like' compensation is the preferred approach' (CD11.6 (g), p.70, pdf. 72).
- 5.29. The omission of this important habitat means that the quantum of the baseline habitat is undervalued, as are all the consequences that flow from this. Whether or not it makes any difference to the eventual calculation of biodiversity net gain is beside the point (though it does).
- 5.30. Accurate baseline habitat calculation is the foundation of the Biodiversity Metric and must be correct. To omit any *Urban tree* habitat from this calculation, whether it is the Appellant's 0.3760 hectares or our 0.6295 hectares, is unacceptable and strikes at the very foundations of this proposal.

### ***Hedgerow habitats***

- 5.31. We do not agree with the Appellant's hedgerow habitat classifications.
- 5.32. It is accepted that:
- 5.32.1. Hedgerows H1 to H6 fall within the definition of hedgerows

as set out Defra Hedgerow Survey Handbook (Box 1, CD11.6 (c), p. 8, pdf. 10).

- 5.32.2. The hedgerows on the appeal site are Habitats of Principal Importance as defined by Section 41 of the Natural Environment and Rural Communities Act 2006<sup>16</sup> (NERC 2006) thereby engaging SADM19 (CD5.9, para. 2.19.8, p. 41, pdf. 47).
- 5.32.3. Under section 41 of the Hedgerow Regulations 1997<sup>17</sup>, hedgerows H1 to H5 and HH1 to HH8 meet the archaeological and history criteria.
- 5.32.4. Under the same regulations, hedgerows H1 to H5 and HH7 & HH8 also meet the wildlife and landscape criteria.
- 5.33. We also adopt the Council's position that there are 11 veteran Hawthorn trees growing onsite within hedgerows H1, H2, H3 and H4 and that they are, in their own right, irreplaceable habitat thereby engaging NPPF 180c (CD5.1, p. 52, pdf. 52). As a result, we say, the hedgerows of which they are an integral part are also thereby irreplaceable habitat. To separate these trees from their hedgerow context would result in the unacceptable 'loss or deterioration of irreplaceable habitats'.<sup>18</sup>
- 5.34. We also say that all of these hedgerows are *Native Species Rich Hedgerow with trees* habitats. In addition, hedgerows H2, H3, H4 and H5, being associated with a bank, should be classified as *Native Species Rich Hedgerow with trees - Associated with bank or ditch* habitats under BNG 3.0. This habitat has the highest hedgerow Distinctiveness possible, thereby making these hedgerows irreplaceable habitats in their own right as defined by NPPF 180c.
- 5.35. Rule 3 of the BNG 3.0 User Guide recognises that 'Losses of

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<sup>16</sup> <https://www.legislation.gov.uk/ukpga/2006/16/section/41>.

<sup>17</sup> <https://www.legislation.gov.uk/uksi/1997/1160/contents/made>

<sup>18</sup> NPPF 180c

irreplaceable or very high distinctiveness habitat cannot adequately be accounted for through the metric' (CD11.6 (g), p. 17, pdf. 19). See also para. 2.27 on the same page. It is hard to imagine any circumstance in which it would be possible to create such a habitat either on or off site.

5.36. There is compelling evidence that these hedges are associated with a bank:

5.36.1. The statement of RJ Higgins at Appendix 2: Hedgerow Survey, 25th November 2022, RJ Higgins (CD13.3, p. 24, pdf. 24);

5.36.2. The LiDAR images (CD11.6 (k) & (l));

5.36.3. The updated TOPO surveys (CD8.24 – 1A to 1D); and

5.36.4. The Brislington Community Museum - Hedges and lynchets paper (CD11.4 (c)).

5.37. The Appellant's evidence contradicting this is not convincing when weighed in the balance as it comprises, largely, only bare denials.

### ***Offsite biodiversity mitigation***

5.38. It is hard to understand how the Appellant is justified in saying that 'there is high confidence that the target 10% net gain commitment can be readily delivered ...' (para. 4.5 - CD16.8, Annex D, p. 6, pdf. 99). All the evidence suggests the opposite.

5.39. The development considerations of BSA1201 (CD5.3 – p. 154, pdf. 162) includes a policy requirement to '*make provision for mitigation and compensation measures ... to the grazing land adjacent to Victory Park*'. This provision will be engaged as soon as the need for offsite biodiversity mitigation is accepted.

5.40. It is agreed between the parties that three broad habitat types – *Grassland, Heathland and shrub* and *Woodland and forest* – will require offsite compensation. The quantum of compensation

required is not agreed. We also contend that lost hedgerow habitat will require offsite compensation.

- 5.41. Principle 7 of the BNG 3.0 User Guide states that: 'Compensation habitats should seek, where practical, to be local to the impact. They should aim to replicate the characteristics of the habitats that have been lost, taking account of the structure and species composition that give habitats their local distinctiveness' (CD11.6 (g), p.16, pdf. 18). As the grazing land adjacent to Victory Park is 'local to the impact', it is appropriate that this land is identified in BSA1201.
- 5.42. However, Clause 21 of the Land Agreement entered into between the Appellant and the Council on 20 March 2020 requires that 'Where a Permission requires the use of any Additional Mitigation Land for the purposes of ecological mitigation, biodiversity mitigation or similar in order to satisfy any condition under a Permission ... the buyer shall ...' (CD8.16, p.11, pdf. 14).
- 5.43. 'Additional Mitigation Land' is defined as: 'any land adjoining the Site which is currently owned by the Seller, other than land which comprises of adopted highway.' (p.1, pdf. 4).
- 5.44. 'Site' is defined as: '... together, the Palmer Land, the O&H Land and the Property' (p.4, pdf. 7) and is, effectively, the land which forms BS1201 (Plan 2, Annexe 1 – Form of Transfer, pdf. 38).
- 5.45. To the extent that there is a conflict between the definitions of the offsite 'mitigation and compensation' land in BSA1201 and the Land Agreement, BSA1201 must prevail.<sup>19</sup>
- 5.46. It is notable that Victory Park itself is not included in either definition – there is a field between BSA1201 and Victory park (ID12, p.2 pdf. 2), so it is not 'adjacent' within the ordinary meaning of the word -

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<sup>19</sup> S38(6) of the Planning and Compulsory Purchase Act 2004 - [https://www.legislation.gov.uk/ukpga/2004/5/section/38#:~:text=\(5\)If%20to%20any%20extent,part%20of%20the%20development%20plan%5D](https://www.legislation.gov.uk/ukpga/2004/5/section/38#:~:text=(5)If%20to%20any%20extent,part%20of%20the%20development%20plan%5D) .

next to or adjoining something else.<sup>20</sup>

- 5.47. It would have been clear to the Appellant at a very early stage that offsite biodiversity mitigation would be required as part of its plans. Indeed, it commissioned a habitat survey of the land to the south of the proposed development site, which was undertaken on 8 September 2020 (CD16.8, Annex C, pdf. 76). Despite this, it was not until the Appellant served its rebuttal evidence that this survey, together with the BNG 3.0 calculation based on it, was made available (CD16.8, Annex D, pdf. 93).
- 5.48. Not only does this calculation include a proposal to create *Lowland grassland* within Victory Park (not part of the offsite compensation land defined in either BSA1201 or the Land Agreement), but it also proposes enhancements of broad *grassland habitat* (and a pond not envisaged by BSA1201). However, it ignores the agreement to provide offsite compensation for lost broad *Heathland and shrub* and *Woodland and forest* habitats and makes no proposals for the compensation of these.
- 5.49. It also ignores the fact that the land proposed for enhancement is currently tenanted and, partly, used for grazing livestock (ID12), raising questions about whether these proposals are even practicable or viable - we have seen nothing about what the tenants of these proposed 'compensation' sites have to say about these proposals. It is not enough (or, we suggest, acceptable) for the Appellant to suggest that they can simply be evicted.
- 5.50. If, despite all the above, it is decided that offsite mitigation can be provided in Victory Park, then the concerns expressed by the Friends of Victory Park will need to be taken into account (ID16).
- 5.51. If all or any of the Appellant's proposals for offsite mitigation cannot be achieved, then, as a fallback, it is proposed that '[a]s best

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<sup>20</sup> Oxford English Dictionary of English, 2<sup>nd</sup> Edition.



practice, additional scrub creation or enhancement would be sought, either within Brislington Meadows SNCI, or potentially other local wildlife sites or BWNS within the local network.’ Alternatively, ‘... additional offsetting within land under the control of the Council is considered feasible and practical’ (paras. 4.3 & 4.4 - CD16.8, Annex D, p. 6, pdf. 99).

- 5.52. It is a moot point whether this proposal accords with the BSA1201 development considerations described above. However, there can be no doubt that the principle set out in Principle 7 of the BNG 3.0 User Guide above (1.3.26) will still need to be followed. On the balance of the evidence available, it is unlikely that this can be achieved.

#### **Retain or incorporate important trees and hedgerows**

- 5.53. Save for the points made above and for pointing out that the errors which were apparent in the two iterations of the Arboricultural evidence relied on by the Appellant (CD1.19, CD2.2) were not corrected until after we had cross-examined Mr Hesketh (who admitted that he was aware of them), and that this evidence still does not comply with the requirements of BS5837:2102 – there is no key to common species names provided to scientific names or any topographical survey (CD8.9 para. 4.4.2.5, p.6, pdf. 13 & section 4.2, p.4, pdf. 10) - we adopt the submissions made by the Council.

## **6. *Heritage and archaeology***

- 6.1. The acceptance by the Appellant that hedgerows H1 to H5 and HH1 to HH8 meet the archaeological and history criteria under section 41 of the Hedgerow Regulations 1997<sup>21</sup> reinforces our case that the whole of this site is a unique part of Bristol's heritage which must be protected.
- 6.2. The evidence of the Council's Landscape Architect, Ms Antonia Whatmore (CD13.4), also makes it clear that the Appellant's proposals would have an adverse effect on the heritage value of the whole site which has value as a cohesive group and where all the hedgerows are valuable component to the integrity of the whole site.
- 6.3. This 18th century field pattern is a rarity in Bristol. There is nowhere else in Bristol which has a group of fields like this which are in such good condition. The whole site has Community value so that to lose some 74% of its hedgerows would be unacceptable because to lose them would fundamentally change this closed field landscape to an open landscape.
- 6.4. This combined, with the other archaeological and heritage assets which we have identified (CD11.4 to CD11.4 (i)) and which the Appellant's own archaeological evidence identifies (CD1.18 b)), confirms that the whole site is a rare, if not unique, heritage asset in Bristol with community value which must be preserved intact and complete.
- 6.5. We accept these heritage assets are 'non-designated'. However, paragraph 203 NPPF states that: '[t]he effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of

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<sup>21</sup> <https://www.legislation.gov.uk/uksi/1997/1160/contents/made>

any harm or loss and the significance of the heritage asset' (p. 57, pdf. 57). As such NPPF 203 is engaged and must be, at the very least, weighed in the planning balance.

- 6.6. This is also reflected in SADM31 which states that: 'Scheduled monuments and other non-designated archaeological sites of equivalent importance should be preserved in situ.'
- 6.7. Given that the majority of the hedgerows on the site meet the archaeological and history criteria under section 41 of the Hedgerow Regulations 1997 and form an integral part of the cohesive community value of the site, means that both these hedgerows, and the context in which they are found, should be treated as having 'equivalent importance' to scheduled monuments so that SADM31 is also engaged thereby requiring their preservation 'in situ'.

## **7. *The emerging plan***

- 7.1. We repeat the issues raised in our Statement of Case below. Nothing the Appellant has brought forward in this Appeal has caused us to change our position.
  - 7.1.1. "This appeal must also be seen on light of the well-advanced emerging plan recently published by the Council.
  - 7.1.2. The Council has now published a further review of the draft Local Plan.<sup>22</sup> The Draft Policies and Development Allocations proposals (R6.8.5) states:
  - 7.1.3. 'Since the last Local Plan was agreed in 2014, we now include new policies on biodiversity and proposes changes of approach at sites such as the Western Slopes, Brislington Meadows and Yew Tree Farm that aim to give priority to nature conservation and food growing.' ...

### **'Development site allocations Changes to existing**

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<sup>22</sup> <https://www.bristol.gov.uk/residents/planning-and-building-regulations/planning-policy-and-guidance/local-plan/local-plan-review>

### **site allocations**

- 7.1.4. 11.15 The Local Plan consultation in 2019 proposed that development site allocations from the existing Local Plan which had not yet been developed should be retained in the new Local Plan. It is proposed that this should remain the approach, with the exception of two locations where a change is considered necessary to reflect the greater priority for biodiversity required in response to declaration of the ecological emergency.

### **Brislington Meadows**

- 7.1.5. 11.20 This site has city wide importance for nature conservation. In 2014 a part of the meadows area was allocated for housing development subject to providing compensation and mitigation for the loss of habitat which would arise from development. Since that allocation was made in the adopted Local Plan, an ecological emergency has been declared by Bristol City Council and it is considered that it would now be more appropriate for the existing site allocation to be discontinued and for the site to be retained as open space with nature conservation interest.
- 7.1.6. 11.21 The following existing development site allocations are therefore proposed to be discontinued and not retained in the Local Plan: BSA1201 Land at Broomhill, Brislington.
- 7.1.7. 11.22 At the time of this consultation a planning application had been made for residential development. The application will be determined in accordance with planning legislation. The next stage of the Local Plan will reflect the outcome of that application.'
- 7.1.8. Whilst Planning law requires that applications for planning

permission be determined in accordance with the DMP, material considerations can indicate otherwise. As para. 48 of the NPPF makes clear, Local Planning authorities may give weight to relevant policies in emerging plans according to, inter alia, the stage of preparation of the emerging plan.

- 7.1.9. The recent publication of the draft Local Plan is at a 'stage of preparation', which makes it just such a material consideration. The proposed development by the Appellant is now clearly in conflict with the emerging plan for Bristol."

**09 March 2023**