Amber Valley Borough Council

TOWN AND COUNTRY PLANNING ACT 1990

Appeals pursuant to Section 78

CLOSING STATEMENT OF THE LOCAL PLANNING AUTHORITY

1) **Appeal by Catesby Estates against the decision of Amber Valley Borough Council to refuse outline planning permission for the erection of up to 400 dwellings (Use Class C3), convenience store (Use Class A1 up to 500 sqm floorspace) with associated access, earthworks and other ancillary and enabling works. All other matters (appearance, landscaping, layout and scale) reserved (this is a Departure from the Development Plan)**

on land off Kedleston Road/Memorial Road, Allestree

2) **Appeal by Appeal by Catesby Estates against the failure of Amber Valley Borough Council to give notice of its decision within the appropriate period on an outline planning permission for the erection of up to 195 dwellings (Use Class C3) with associated access, earthworks and other ancillary and enabling works. All other matters (appearance, landscaping, layout and scale) reserved (this is a Departure from the Development Plan)**

on land off Kedleston Road/Memorial Road, Allestree

Planning Application References:

1) **AVA/2014/0928**
2) **AVA/2015/1243**

Planning Inspectorate References:

1) **APP/M1005/W/15/3132791**
2) **APP/M1005/W/16/7147743**

CLOSING STATEMENT OF THE LOCAL PLANNING AUTHORITY

INTRODUCTION

1) This Inquiry has been concerned with two outline planning applications for substantial housing development on green-field land off Kedleston Road and Memorial Road, Allestree, Derby. The first and larger application is for 400 houses and was refused by Amber Valley Borough Council.[1] The second smaller application is for 195 houses.[2] The Council's case is that both applications warrant refusal for the same reasons. Those reasons have been set out in full in many places and are not repeated here.

2) It is common ground that the Council cannot demonstrate that it has a 5 years' supply of housing land. The agreed figure is 3.08 years.[3] Therefore, relevant policies in the Local Development Plan which may be regarded as policies for the supply of housing should not be considered up-to-date.[4]

3) The Council's case hinges on the following issues:

   a) Are the development sites within the setting of the Grade I Listed Kedleston Hall?
   b) Would the developments result in less than substantial harm to the significance of Kedleston Hall?
   c) It is agreed that the development sites are within the settings of the Grade I Listed Kedleston Hall RPG and the Kedleston Conservation Area.[5]
   d) It is agreed that the developments would cause less than substantial harm to the RPG and the CA.[6]
   e) Is the landscape within which the developments are to be situated a valued landscape?
   f) To what extent would the developments cause harm to that valued landscape?

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[1] AVA/2014/0928.
[2] AVA/2015/1243. The Appellant appeals the Council's failure to determine this planning application.
[3] Additional SoCG re: Housing Land supply para. 2.1.
[4] NPPF para. 49.
[5] SoCG June 2016 para. 2.2.2.
[6] See, e.g., Crutchley Proof para. 2.14.

4) The Council's case is that the less than substantial harm to the heritage assets is such, when the quality of those assets is properly considered, that the public benefits arising from the proposals do not outweigh the harm caused and that these applications should be refused pursuant to the provisions of paragraph 134 of the NPPF. Indeed, if the Inspector shares this conclusion, it is submitted that this is an end of the matter.

5) Further and in any event, the Council submits that the harm to the heritage assets and the landscape is such that the proposed developments cannot be considered to be sustainable development. As a consequence, the proposals do not benefit from the presumption in the NPPF favouring approval of sustainable development. Again they should be refused.

THE LEGAL AND PLANNING BACKGROUND

The Statutory background

6) Pursuant to sections 70(2) and 79(4) of the Town & Country Planning Act 1990 regard must be had to:

(a) the provisions of the development plan, so far as material to the application;

(b) any local finance considerations, so far as material to the application, and

(c) *any other material considerations.*

7) A local finance consideration is defined by section 70(4) of the 1990 Act as:

(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or

(b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy.

8) Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that:

If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.

9) Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides,

In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

It is accepted that section 72 of the Listed Buildings Act is not applicable in circumstances where the development proposed is not within a conservation area.

The Planning Background

10) The local development plan is comprised of the saved policies of the Amber Valley Borough Local Plan adopted April 2006. The relevant policies are listed at para. 4.2.3 of the SoCG. However out of date it may be, it remains the case that planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise.[7] As was noted in *South Northamptonshire Council v SoS CLG* [2013] EWHC 11 (Admin), HHJ Mackie QC, at para. 20,

"I conclude from all this that the section requires not a simple weighing up of the requirement of the plan against the material considerations but an exercise that recognises that while material considerations may outweigh the requirements of a development plan, the starting point is the plan which receives priority. The scales do not start off in even balance."

11) In this context the National Planning Policy Framework is a material consideration.[8]

[7] *Daventry DC v SoS CLG* [2015] EWHC 3459 (Admin) Lang J at para. 13.
[8] NPPF para. 13.

12)Paragraph 14 of the NPPF states that:

*At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.*

…

*For **decision-taking** this means:*

- *approving development proposals that accord with the development plan without delay; and*

- *where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:*

  - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
  - *specific policies in this Framework indicate development should be restricted.[9]*

13)Footnote 9 of the NPPF identifies such policies as including those relating to heritage assets.

14)In *Wychavon DC v SoS CLG* [2016] EWHC 592 (Admin), Coulson J, the correct approach was set out at paras 20-25,

"20. In my view, in the sort of circumstances that arose in the present case, the correct approach required the decision-maker to ask a number of questions in sequence.

"21. First: is there is a development plan? It is only if there is a development plan that s.38(6) of the 2004 Act comes into play.

"22. Second: if there is a development plan, is it absent or silent or are relevant policies out-of-date? That question needs to be asked in order to see whether the approach set out in the second bullet point of paragraph 14 comes into play.

"23. Third: if there is a development plan which is not silent and/or relevant policies are not out-of-date, then the decision-maker has to decide whether or not the proposed development is in accordance with the development plan. If it is in accordance with the plan, the proposed development must be approved without delay.

"24. Fourth: if the proposed development is not in accordance with the development plan then the decision-maker has to undertake the balancing exercise referred to in s.38(6). In other words, the decision-maker must start with the statutory priority of the development plan, and therefore a presumption against granting planning permission, and balance against that other material considerations that may indicate the contrary result. That is also in accordance with paragraphs 11 - 13 of the NPPF.

"25. Fifth: if the development plan is silent or the relevant policies are out-of-date then the decision-maker must grant permission unless one or other of the two alternative limbs in the second bullet point in paragraph 14 of the NPPF applies."

15) In *Forest of Dean DC v SoS CLG* [2016] EWHC 421 (Admin), Coulson J, considered the position where Footnote 9 applied in the case of a heritage asset. At paragraph 18 of the judgement he said,

"Limb 2 of the last bullet point of paragraph 14 of the NPPF disapplies the presumption in favour of granting planning permission in circumstances where "specific policies in this Framework indicate development should be restricted." Footnote 9 gives examples of those policies. One of those policies is identified as relating to "designated heritage assets".

16) Rejecting the submission that paragraph 134 of the NPPF was not a restriction on development he said at paragraphs 25 and 26,

"25. First, based on the words used in paragraph 134 in the context of the NFFP as a whole, I consider that paragraph 134 is a policy indicating that development should be restricted. Throughout the NPPF, there is a presumption in favour of sustainable development, and therefore in favour of granting permission. That is the default setting. However, certain specific policies within the NPPF indicate situations where this presumption does not apply and where, instead, development should be restricted. Paragraph 134 is, I think, one such policy.

"26. Paragraph 134 provides for a balancing exercise to be undertaken, between the "less than substantial harm" to the designated heritage asset, on the one hand, and the public benefits of the proposal, on the other. The presumption in favour of development is not referred to and does not apply. Paragraph 134 is thus a particular policy restricting development. Limb 2 of paragraph 14 applies."

17) In *Suffolk Costal DC v Hopkins Homes Ltd* [2016] EWCA Civ 168 it was made clear that even in circumstances where a local planning authority cannot demonstrate a five years' supply of housing and therefore that pursuant to paragraph 49 of the NPPF relevant policies for the supply of housing should not be considered up to date, the specific policies in the NPPF indicating that development should be restricted wold continue to apply. At paragraph 39 of the judgement of the court Lindblom LJ said,

"… Footnote 9 explains the concept of specific policies in the NPPF indicating that development should be restricted. The NPPF policies it gives as examples relate to protected birds and habitats, Sites of Special Scientific Interest, the Green Belt, Local Green Space, Areas of Outstanding Natural Beauty, Heritage Coasts, National Parks, the Broads, heritage assets and locations at risk of flooding or coastal erosion (see paragraph 12 above). For all of these interests of acknowledged importance – some of them also subject to statutory protection – the NPPF has specific policies. The purpose of the footnote, we believe, is to underscore the continuing relevance and importance of these NPPF policies where they apply. In the context of decision-taking, such policies will continue to be relevant even "where the development plan is absent, silent or relevant policies are out-of-date". This does not mean that development plan policies that are out-of-date are rendered up-to-date by the continuing relevance of the restrictive policies

to which the footnote refers. Both the restrictive policies of the NPPF, where they are relevant to a development control decision, and out-of-date policies in the development plan will continue to command such weight as the decision-maker reasonably finds they should have in the making of the decision. There is nothing illogical or difficult about this, as a matter of principle."

18) It is therefore submitted that in this case, where on any view it is unarguable that the setting of heritage assets is affected, the correct approach is not to apply the presumption in favour of sustainable development in paragraph 14 of the NPPF, assuming that the proposals do constitute sustainable development (which they do not), but to consider the applications in light of the provisions of paragraphs 132 and 134 of the NPPF and section 66(1) of the Listed Buildings Act.

19) With regard to the latter provision, there are two particular decisions of relevance. These are *Barnwell Manor Wind Energy Ltd v East Northamptonshire DC* [2014] EWCA Civ 137 and *R (Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin), Lindblom J.

20) In *Barnwell Manor* Sullivan LJ, who gave the only substantive judgement, made it clear at paragraph 29,

"… that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise."

21) In *Forge Field* Lindblom J said at paras 48-51,

48. As the Court of Appeal has made absolutely clear in its recent decision in Barnwell*, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in* Barnwell *it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation*

area, it must give that harm considerable importance and weight.

"49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in Barnwell*, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.*

"50. In paragraph 22 of his judgment in Barnwell *Sullivan L.J. said this:*

> *"… I accept that … the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment [in* The Bath Society*] is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight"".*

"51. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in South Lakeland *(at p.146 E-G) that if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area "there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest". Sullivan L.J. said "[there] is a "strong presumption" against granting planning permission for development which would harm the character of appearance of a conservation area precisely because the desirability of preserving*

the character or appearance of the area is a consideration of "considerable importance and weight"" (paragraph 23). In enacting section 66(1) Parliament intended that the desirability of preserving the settings of listed buildings "should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise" (paragraph 24). Even if the harm would be "less than substantial", the balancing exercise must not ignore "the overarching statutory duty imposed by section 66(1), which properly understood … requires considerable weight to be given … to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings" (paragraph 28). The error made by the inspector in Barnwell *was that he had not given "considerable importance and weight" to the desirability of preserving the setting of a listed building when carrying out the balancing exercise in his decision. He had treated the less than substantial harm to the setting of the listed building as a less than substantial objection to the grant of planning permission (paragraph 29)."*

22) Paragraph 132 of the NPPF provides (insofar as it is relevant to these appeals),

"When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. …"

23) Paragraph 134 of the NPPF provides,

Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

24) Annex 2 to the NPPF contains the Glossary. That tells us that:

"***Setting of a heritage asset:*** *The surroundings in which a heritage asset is*

experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral," and

*"**Significance (for heritage policy):** The value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting."*

25) In *R (Butler) v East Dorset DC* [2016]] EWHC 1527 (Admin), Rhodri Price Lewis QC, noted at para. 19 of his judgement,

"It has long been held that "preserving" in that context means not harming: see South Lakeland District Council v Secretary of State for the Environment *[1992] 2 A.C. 141 at p.150 A-F. So in my judgment a heritage asset is not conserved if its significance is harmed and that significance is not protected if it would be a harmed by a development proposal."*

26)Further guidance on the setting of a heritage asset and how it is to be taken into account is to be found in the online Planning Practice Guidance, Conserving and enhancing the historic environment at paragraph 13. This tells us, amongst other things:

a) that assessment of an asset should be proportionate to its significance and the degree to which the proposed changes enhance or detract from that significance and the ability to appreciate it;

b) that the setting is the surroundings in which an asset is experienced;

c) that that experience is influenced not only by views, but by our understanding of the historic relationship between places;

d) that the contribution that setting makes to the significance of a heritage asset does not depend on there being public rights or an ability to access or

experience that setting[9]; and

e) that the implications of cumulative change need to be taken into account.[10]

27) In their guidance document The Setting of Heritage Assets[11] Historic England draw attention to the following matters:

i) setting may include associative relationships that are sometimes referred to as 'contextual'[12];
ii) the 'character' of a historic place, which may include its relationships with people now and through time and space associated with its history[13];
iii) the character of the wider landscape in which an asset is situated[14];
iv) that views which contribute more to understanding the significance of a heritage asset include those with historical associations and those where the composition within the view was a fundamental aspect of the design or function of the asset[15];
v) views that merit consideration include important designed views from, to and within historic parks and gardens and views that are identified when assessing sites as part of preparing development proposals[16];
vi) that it is important that the extended and remote elements of design are included in the evaluation of setting of a designed landscape[17]; and
vii) that when considering a zone of visual influence trees and woodland should not be taken into account[18].

Further guidance as to the assessment process is given at pages 9 and 11of that guidance.

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[9] See too Historic England – The Setting of Heritage Assets – Core Document 41 at para. 9 3rd bullet point.
[10] See too Historic England – The Setting of Heritage Assets – Core Document 41 at para. 9 1st bullet point.
[11] Core Document 41.
[12] Para. 2 box.
[13] Para. 3 2nd bullet point.
[14] Para. 4 3rd bullet point.
[15] Para. 6 2nd and 3rd bullet points.
[16] Para. 8 3rd and 4th bullet points.
[17] Page 5 Heading "Designed Settings".
[18] Page 7 box.

SUBMISSIONS

Heritage

28) It was accepted by all the relevant witnesses who gave evidence[19] that Kedleston Hall, Kedleston Hall RPG and its associated Conservation Area are heritage assets of the highest quality and importance. Therefore, it is submitted that paragraph 132 of the NPPF makes it quite clear that the greatest weight is to be given to the conservation of, i.e. doing no harm to, the significance of these assets. Further, it is submitted that the necessary corollary of this is that even if the harm to these assets is slight on the sliding scale of "less than substantial harm" it is nonetheless a matter of real weight having regard to the importance of the assets in question.

29) The most relevant policies of the Local Development Plan are those identified by the Appellant's planning witness, Mr Fenwick, at Table 3 of his proof of evidence.[20] It is not proposed to rehearse those policies here. They are to be found at Core Document 39. However, it is submitted that when those policies, together the other relevant policies contained with the Development Plan, are read as a whole[21] these applications are not in accordance with the provisions of the Local Development Plan and so should be refused.

30) The Appellant contends that the weight to be attached to those policies varies from very limited to significant. The Council submits that Mr Fenwick has underestimated the weight to be attached. The policies remain relevant and therefore deserving of significant weight in the planning process.

31) In any event, it is accepted that the NPPF is a material consideration. It is accepted that the harm that will be caused to the significance of the heritage assets is "less than substantial". This is a term of art used in the NPPF. It does not mean that the harm can be ignored or overlooked. Instead paragraph 134 of the NPPF requires the decision maker to weigh in the balance the harm caused against the public benefits of the proposal. It is submitted that in the context of this appeal, if it is decided that the harm caused is not outweighed by the public benefits arising, then

[19] i.e. Mel Morris, Christopher Gallagher and Andrew Crutchley.
[20] Pages 62-63.
[21] *R v Rochdale MBC*, [2001] Env. LR 22, Sullivan J, at paras 45-50.

the applications should be refused and the appeals dismissed. It cannot sensibly be argued, where such a balance is struck, that the appeals should otherwise be allowed.

32) It must be remembered that the landscaping of Kedleston Hall and its Park and Garden was very much designed – indeed contrived. As Mr Crutchley acknowledged in his proof of evidence *"the [Hall][22], principal buildings and wider parkland focused around them were specifically intended to create a single harmonious and balanced composition."*[23] *"… there should be little doubt that Robert Adam's mid/late 18th century re-working of Charles Bridgeman's earlier landscape design was equally contrived and based around carefully composed 'experiences', they were no longer rigid, formal or linear, and instead comprised a circular pattern of movement around the Park, which was laid out in such a way that the principal buildings, structures, features and spaces (especially the Hall) could be 'read' as a single, coherent composition."*[24] Given these statements, it is simply not understood how it can be argued that the settings of the Hall and the RPG are different. They are one and the same. Mr Crutchley, whose evidence relies entirely on secondary sources, e.g. the National Trust Guidebook to Kedleston Hall, is a lone voice crying in the Park to the contrary. He has not properly analysed the situation or recognised what makes the assets significant and why.

33) The historical record and evidence given to the Inquiry clearly shows that at the time that the principal works were done in about 1760 the development land was in the ownership of the Curzon family and formed part of the Curzon estate as it still does today. Further, in order to create the *"single harmonious and balanced composition"* Lord Scarsdale obtained a private Act of Parliament to divert the turnpike road that ran in front of the site of the Hall. Nothing was left to chance. Everything was planned and designed. If a view was provided it was deliberate.

34) It is crystal clear that an open view to the east was provided across a sunk fence, which open view remained in place until the planting of the Derby Screen in the

[22] The term he used was "House".
[23] Crutchley Proof para. 4.33.
[24] Crutchley Proof para. 4.144.

latter part of the 20th century.[25] The Derby Screen was no part of a designed landscape; it was a pragmatic response to the intrusion of the suburb of Derby, Allestree, which had been built on land sold off by the estate. The historic mapping all supports this conclusion. Map regression is a key tool; it is a tool ignored by Mr Crutchley, who did not even find the readily available 1835 Sanderson map.[26]

35) Further, it is submitted that the evidence given by Dr Hickie clearly demonstrates that the view to the Hall existed from Kedleston Road across the development sites. Equally, there would have been a reciprocal view from the Hall and the Park. This was part of a reveal, hide, reveal, hide sequence of views on the approach to Kedleston Hall from Derby. That principle was not disputed by Mr Crutchley; he merely refused to accept that this view existed because it was not described in any of the secondary literature he used as the source for his proof.

36) Whilst the Hall and the Park may no longer be owned by the Curzon family, who transferred it to the National Trust in 1986, they do continue to reside in the Hall and to run their estate from the Hall. It appears that the transfer took place for tax reasons; the Deed of Transfer records the approval of the Inland Revenue.[27] Therefore, apart from this accident of ownership in 1986, all of the historic ties between the Curzon family, the Hall, the Park and the surrounding landscape remain today as they have done since 1135 – a period of almost 900 years. All of the cultural and historic links remain in place. The landscape is recognisable from at least 1835 when the area was mapped by Sanderson, and probably before; very few field boundaries have been lost or changed.

37) Therefore, it is submitted that the evidence clearly shows that the development sites are firmly and clearly part of the setting of the Hall and the Park. When properly understood they contribute massively to the significance of the Hall and Park as heritage assets. They were part of a deliberately provided vista out over the estate lands. There was a view from Kedleston Road on approach to the Hall and Park of both over the sites. Loss of these sites to development will plainly damage the significance of the heritage assets. It will deny our successors the

[25] See, for example, Fig 11 in the proof of Dr Hickie, aerial photograph taken in 1952.
[26] Mel Morris App. 4 Plate 10.
[27] Inquiry document 3 Clause 1.

ability to appreciate these matters. It will advance built development unacceptably close to the Hall and Park thereby negating any future benefit that might be achieved from opening out the Derby Screen. Whilst there has been change previously in the form of the development of Allestree, this development, if were permitted to take place would cause significant damage to the significance of heritage assets of the utmost importance.

38) Given that the Derby Screen is a recent planting, which itself detracts from the significance of the heritage assets, it is submitted that it is to be discounted from the assessment process in accordance with the advice of Historic England. It was not planted for any aesthetic reason; it was planted for purely pragmatic and practical reasons. Further, it is clear from Appendix 2 to the National Trust's 2015 Management Plan[28] that it is an objective to *"Identify, recover and maintain key views, vistas and vantage points, in order to secure, once again, a tightly knit web of relationships, to be discovered as one travels through the landscape."* That Management Plan acknowledges *"the likelihood of there being other important visual relationships between Kedleston and the estates to the east."* The development sites are part of those estates to the east. The Management Policies for the Derby Screen recommend creating more open woodland with permeable edges to the parkland.

39) Having regard to the damage that would be caused to the heritage assets and, in the case of Kedletson Hall, to the particular importance and weight that that is to be given in the planning balance, it is submitted that the public benefits of the proposal fall a long way short of the clear and convincing justification that is required for the harm that would be caused. It is submitted that these matters hold true for both applications.

40) It is accepted that there is a real and substantial need for housing, including affordable housing, both within Amber Valley and the City of Derby. This is probably the greatest element of the "benefits" that are claimed for the proposed developments. The remaining benefits go with the territory of any large housing application. The extent to which there will be additional jobs created during the

[28] Inquiry Document 17.

construction phase, as opposed to providing work for those already employed within the building trade, who would probably be employed elsewhere in any event, and the benefit to be derived in terms of extra spend is debatable. It is submitted that in light of the answers given by Mr Fenwick in cross-examination they are not as significant as Table 1 of his Proof of Evidence[29] claims. That arising from the convenience store is predicated on the assumption that it will be built. It is accepted that the New Homes Bonus is a local finance consideration as defined be section 70(4) of the 1990 Act. However, council tax revenue is not and should not be taken into account.

41) In the circumstances, it is submitted that the benefits claimed in respect of good design, transport, biodiversity, flood risk, open space and landscaping should be afforded little weight in the decision making process.

42) What is clear is that housing need is not a trump card. It was expressly acknowledged in the *Suffolk Costal DC* case at para. 47 that,

"There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment…"

43) The crunch issue in this case is whether or not the need for housing outweighs the undoubted harm that will be caused to heritage assets of the highest significance and which, in the case of Kedleston Hall, is a matter to which considerable importance and weight must be attached. It does not.

[29] Pages 16-19.

Landscape

44) The Council's case is that the landscape in question is a valued landscape because of its heritage connections to the Kedleston Hall, RPG and estate.[30]

45) It is accepted that to be a valued landscape, it must be more than just valued by those who live around it.[31] This is such a landscape. This is not because it is a well-preserved example of estate farmland. As Mr McInerney commented in his evidence, there is much of that in the surrounding area and throughout the East Midlands. Nor is it because it ranks amongst the best and most versatile agricultural land, a matter which the Council's own officers accepted weighed lightly in the balance. It is because it is the landscape upon which the views from the Hall and Park were deliberately left open and over which views to the Hall and Park could be had together with its centuries of association with the Curzon family who have resided in the Hall and managed the farming of the land from the Hall. Its history and sculpture is intimately interwoven with that of the Hall and Park. It is from these historic and cultural associations that it derives its value. Frankly, the appellant could not have chosen a more sensitive parcel of land to develop.

46) The policies within the Local Development Plan provide that this landscape should not be developed.

47) Paragraph 109 of the NPPF requires the planning system to contribute to and enhance the natural and local environment by protecting and enhancing valued landscapes.

48) It is submitted that paragraph 109, together with the paragraphs which follow it and which create a hierarchy of land to be developed with preference being given to previously developed land and then land of lesser quality, fall with the second limb of paragraph 14 of the NPPF and within footnote 9 as policies which indicate that development should be restricted. Therefore the matter is to be approached as set out in paragraph 39 of the *Suffolk Costal DC* decision.[32]

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[30] Evidence of Dr Hickie to the Inquiry.
[31] *Stroud DC v SoS CLG* [2015] EWHC 488 (Admin) Ouseley J.
[32] See para. 17) above.

49) Whilst the policy of the Local Development Plan that restrict housing development in the countryside are to be considered out of date, given the specific policies contained within the NPPF, they remain relevant. Paragraph 215 of the NPPF provides that due weight is to be given to relevant policies according to their degree of consistency with the Framework and that the closer the policies in the plan are to the Framework, the greater the weight they may be given.

50) Framework policies, because they are statements of Government policy are likely always to merit significant weight.[33] Further, as Lindblom LJ noted in the *Suffolk DC* case at paras 46 and 47:

"46. We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make "out-of-date" policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker (see the speech of Lord Hoffmann in Tesco Stores Ltd. v Secretary of State for the Environment *[1995] 1 W.L.R. 759, at p.780F-H). Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied. That idea appears to have found favour in some of the first instance judgments where this question has arisen. It is incorrect.*

"47. One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive

[33] *Suffolk Costal DC* at para. 42.

policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment …."

51) That the proposed developments would cause harm to the landscape is inescapable and not in issue. Nor can it be disputed, in general terms, that the Council will have to develop greenfield sites if it is to meet its objectively assessed housing need. The question is whether or not it is appropriate to develop <u>these</u> sites. It is not.

52) Accordingly, it is submitted that for this reason too, given the protection that the NPPF gives to valued landscapes, both alone and in addition to the protection afforded to heritage assets, and having regard to the provisions of the Local Development Plan, permission should be refused for housing development on these sites notwithstanding the housing need.

<u>Sustainable development</u>

53) Putting it very succinctly, for all of these reasons the development proposed is not properly to be regarded as sustainable development. There are three dimensions to sustainable development: economic, social and environmental.[34] These proposals fail the environmental test for the reasons already set out. Therefore, whilst paragraph 14 of the NPPF has been referred to, it is the Council's case that the development proposed is not sustainable development. There is no presumption in favour of it. It is not in accordance with the provisions of the Local Development Plan. It is contrary to the policies expressed in the NPPF. There are no other material considerations sufficient to warrant the granting of planning permission.

[34] NPPF para. 7.

CONCLUSION

54)Accordingly, the Council invites the Inspector to refuse the appeals.

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28th July 2016

jm/laptop