

**TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPULSORY PURCHASE ACT 2004
LAND AT UPNOR ROAD, UPPER UPNOR, KENT**

APPEAL BY ESQUIRE DEVELOPMENTS LIMITED

APP/A2280/W/3276221

Inquiry sat 28-30 September, 1 and 25 October 2021

APPELLANT'S CLOSING SUBMISSIONS

Introduction

1. Esquire Developments is a well-regarded SME housebuilder with a good reputation for the delivery of high-quality bespoke homes in the Medway area. The 72 dwellings and childrens' nursery proposed in the appeal scheme represent a genuine attempt to meet some of the growing housing deficit in a sustainable location next to existing residential development in Upper Upnor.
2. I come back to the detail later, but at the outset it is important to register the severity of the housing shortfall: the supply is somewhere between 2.54 years and 3.03 years, which equates to a deficit of between 3,932 dwellings and 5,813 dwellings. For the reasons he sets out, Mr Wilford is of the view that the deficit is 5,813 dwellings. The longer-term performance in terms of housing delivery in Medway has been exceptionally poor, with several thousand units failing to be delivered over recent times. But even if one takes the Council's approach to calculating housing land supply, the deficit is substantial.
3. This matters. The appeal hearing spent most time on landscape and visual matters, but there is a blunt truth to be faced which goes to the heart of the appeal. Medway simply does not have enough homes to meet its needs, and that is a growing problem that the passage of time is

worsening, not improving. Choices have to be made as to whether a degree of harm to the landscape must be accepted to enable the social and economic needs of the area to stand a chance of being met. The local plan (when, and if, it finally transpires) will be too late to meet needs which exist now, and have been going unmet for years.

4. As such, this appeal, for 72 homes in a sustainable countryside location with an aging ALLI designation, encapsulates the issue facing the area. The Appellant does not say – despite how the Council may try to characterise the case- that there should be housing ‘at any cost’. Of course not. However, over-stating the value of the landscape and the potential harm perpetuates the difficulties that the area has faced for some time. In this case, the fact that Mr Etchells, for instance, largely disregards the presence and effect of the housing at Castle Street, means the Council’s case inevitably tends to overstate the landscape and visual harm the scheme would cause. That kind of approach is part of the problem, not the solution, to planning problems in Medway.
5. The main issues in the appeal are the application of Policy BNE34, and the balance between effects on landscape character and visual receptors, and the largely accepted benefits of the scheme. The r.6 party raises highways issues but there is no objection from either the Council or the County highways authority on highways issues.

Policy issues

Development Plan

6. BNE25 and BNE34 are the only development plan policies referred to in the single reason for refusal¹. BNE25 (a policy adopted in 2003) is agreed not to conform to the Framework because it restricts development in the countryside without regard to needs which have long escalated beyond those sought to be met in the adopted (and now expired) plan². Clearly, paragraph 174(b) of the Framework asks decision-makers to have regard to the countryside’s intrinsic qualities, and therefore the policy is not without any relevance, but its weight is very much

¹ See CD 3.2.

² See SCG paragraph 3.9, page 14.

reduced. A finding of ‘some’ or ‘limited’ weight would be consistent with the judgement of Inspectors in decision letters between 2015 and 2020, as Mr Wilford’s evidence records³.

7. BNE34, the ALLI policy, also dates from 2003, with earlier policy antecedents. It is more in keeping with the Framework simply because it allows economic and social benefits to outweigh even material harm to the character and function of the identified area (here the Hogmarsh Valley ALLI)⁴.
8. Mr Wilford strikes the right balance in terms of the weight to be given to BNE34. He says that it accords with the Framework in terms of permitting a balanced view to be reached, but that it runs counter to the need to meet escalating housing needs (ie those that apply now, not those in mind in the plan period of the adopted plan). For that reason, he gives the policy moderate weight. As he records⁵, a range of views have been expressed about the weight to be given to BNE25 over the past five or so years; but the weight is undoubtedly affected by the obsolescence of the plan of which it formed a part, and the hugely significant housing challenge that Medway now faces.
9. That was in essence what the Secretary of State found in his decision in 2017 on land at Gibraltar Farm in Medway⁶, when addressing a supply of between 2.21 years and 2.79 years:

“Moreover, the shortfall in five year housing land supply is so great and the pressure on sites so significant, that it is agreed to be inevitable that greenfield land will have to be developed. Furthermore, given the extent of the ALLI designations, ALLI designated land will need to be developed unless new development is to be located where it would not be accessible in terms of proximity to existing development with its associated services and facilities.”
10. Mr Wilford recognises in his evidence that later Inspectors have reached a different view. However, as we stand in later October 2021 - with a very poor housing land supply - a designation which was put in place in 2003 as part of a superseded plan-making balance between meeting the needs of the time and restricting effects, should be given only moderate weight.
11. At this stage it is also important to recall the scope and limits of the ALLI designation itself. It is not a policy aimed at protecting areas of identified high landscape quality or value. The adopted plan contains such a policy, BNE33⁷, which identifies areas of particular landscape

³ See Mr Wilford’s paragraph 3.11 and Table 3.1, page 14.

⁴ Recognised in the SCG, paragraph 3.14 page 15.

⁵ Table 3.2, page 16.

⁶ CD6/1, paragraph 200 IR, adopted by the Secretary of State.

⁷ CD 5.1 page 91.

value and quality in Medway. The Hogmarsh Valley does not lie within one. This is an area in close proximity, physically and visually, with a great deal of urban form, urbanising influences and infrastructure, and which lacks notably or highly-valued landscape value or quality. In fact, the ALLI designation has a different, spatial planning, essence to it which distinguishes it from a landscape protection policy. It is concerned with effects on areas which are already marginal/fringe to the urban areas of the Borough.

12. This is an important point of clarity when focusing on what it really at stake in this appeal on the landscape front. The fact that the policy is aimed not at high-quality landscape but areas which perform certain perceived functions is clear from its terms: the emphasis is on landscape character and *function*⁸. The supporting text explains why: *[t]here are several areas of landscape that enhance local amenity and environmental quality, providing an attractive setting to the urban area and surrounding villages*⁹. The policy identifies functions that the areas may play:

- (i) *As green lungs and buffers, helping to maintain the individual identity of urban neighbourhoods and rural communities;*
- (ii) *As green corridors (or links) for the community to reach the wider countryside;*
- (iii) *As edge or “fringe” land, needing protection from the pressures of urban sprawl; and*
- (iv) *As habitats for wildlife and corridors, along which wildlife from the wider countryside can reach the urban environment.*

13. These are the landscape and amenity functions which the ALLI in Hogmarsh Valley performs to a greater or lesser extent. Of course, there remains a dispute as to whether the development of the appeal site would materially affect these functions, given the current nature and context of the site. But the critical point is that BNE34 is framed by reference to certain functions, rather than any particular landscape value or intrinsic quality. “ALLI” tells you that the importance is local and lies in the functions of these interstitial or marginal landscapes in the way Medway plan-makers perceived the area in 2003.

14. Putting those points together with the Framework at paragraph 174(b), I note that the protection sought to be given to ‘valued landscapes’ in national policy must be commensurate with their statutory status (not applicable here) or their status in the development plan. The points I have made already about BNE34’s local plan context are also supportive of the more tempered approach to BNE34 taken by Mr Wilford and Mr Chard. The kind of full-throttle landscape objection which seems to underlie Mr Etchells’ evidence and the Council’s submissions rather misses the point about BNE34 and certainly should not distract from it.

⁸ CD 5.1 page 93, para (i).

⁹ Ibid paragraph 3.4.104.

15. In addition, it is clear is that the emerging local plan does not intend to repeat the approach found in BNE34. The draft suite of Reg 19 policies – to which very limited weight can be attached as policies for the decision-making process – do not contain a similar approach, relying instead on a more qualitative approach to the landscape of different parts of the District. The emerging policy obviously raises the question of whether it would be right (were it to be adopted in that form) to continue to accept that the site lies within a ‘valued landscape’, given that it would have no development plan status. The absence of a similar approach in the Council’s direction of travel for the Hogmarsh Valley at the very least adds to the case for treating BNE34 with a little caution in terms of weight.
16. This is nothing to do with the age per se of the policies, or the 2012 Framework issues about ‘policies for the supply of housing’. The Appellant does not rely on those issues.
17. Nor does any of this take away from the fact that the site lies within the ALLI, that it has landscape characteristics which are associated with the Hogmarsh Valley (sloping sides, arable fields, wooded fringe to the rear). The point is that one must always keep in mind what kind of policy BNE34 is in order to reach a fair, Framework-compliant assessment of whether permission should be granted.
18. An oddity of Mr Canavan’s evidence was the stress he laid on Policy S1 of the adopted plan, including to cases in which Inspectors have given it moderate weight. S1 is not cited by the Council as a reason for refusal and represents a development strategy adopted for the period to 2006. Again, it is not a question of the age of the policy or the fact that the plan it forms part of has expired, but rather of the fact that it has been entirely superseded by the much higher housing targets now set for Medway. S1 may have been the adopted strategy for meeting the needs that were relevant in 2003 (date of adoption), but it cannot purport to set out what the appropriate strategy for meeting the needs of 2021 to 2034 may be. That is why it cannot in a development management context be given more than very limited or negligible weight, as Mr Wilford says¹⁰.
19. I note that Mr Wilford was asked about the idea that there might be a benefit in having a consistent body of policy applied even if it was out of date¹¹. The issue here is that there is no coherence or sense in applying BNE34 (or for that matter, S1) to circumstances where the housing need to be met is so much greater than was every envisaged when the 2003 plan was

¹⁰ Mr Wilford confirmed his view (in answer to the Inspector) that the scheme did not conform to S1, but noted that was a matter of limited or no weight given the changed housing requirement and the subsequent deficit.

¹¹ A reference to the obiter commentary to that effect in the *Daventry* decision.

being put together. There is obviously not much public interest in judging the planning balance now through that lens.

Framework

20. There is little by way of dispute between the parties over the Framework's application to the appeal. Paragraph 11(d) applies because there is no five year housing land supply. It is not disapplied by application of the footnote relating to specific designations or effects.
21. That means that permission should be granted unless the residual adverse effects judged to arise from the proposals significantly and demonstrably outweigh the benefits. Needless to say, that is a high hurdle and requires adverse effects of very considerable weight in circumstances where the benefits are agreed to merit significant weight.
22. There is no Neighbourhood Plan affecting the site and, as I have observed already, the emerging local plan is still at too early a stage to afford it anything more than limited weight.

Landscape character and visual effects

The landscape character of the site

23. Mr Chard identifies the landscape of the site as lying within the Hogmarsh Valley sides, characteristic of the undulating topography. The remainder of the description of the area in the local plan as "...open farm land and distinctive wooded hilltops extending north from Frindsbury and Medway City Estate to Chattenden" needs a slightly more nuanced treatment, as he says.
24. First, although the site is not built on, it forms an indent in the woodland either side¹² and due to topography and trees the degree to which it is "open" varies markedly depending on one's viewpoint (as no doubt has been seen on the site visit).

¹² See Figure MDC-4 as a reminder of what would have been obvious on the site visit.

25. Second, although there certainly is a strong wooded hilltop on the crest above the site, that feature does not join seamlessly to the site's landscape, but has Castle Street prominently interposed onto it in most views. How to assess the effect of that urbanising feature was a marked difference between the two landscape experts' evidence.
26. Descending to the more detailed Landscape Character Assessment of the Hogmarsh Valley¹³ Mr Chard's analysis drew on what is said in section 18 of the LCA 2011¹⁴: the condition of the area is identified as 'poor' in landscape terms and the sensitivity 'moderate'. No attempt was made by Mr Etchells to suggest that these judgements were wrong. Indeed, the point was made that nothing had particularly changed about the area since the LCA in 2011. Whether the site is more or less sensitive than any other part of the LCA 18 depends on a realistic assessment of its sensitivity.
27. The area forms a green buffer and a distinctive gateway to the Medway towns, according to the LCA 2011, and of particular note are the broad valley with open, gently undulating arable farmland and the strongly wooded hilltops. However, in keeping with its overall assessment of condition and sensitivity, the study observes the urban detractors, saying that the area *retains rural character but coherence and overall integrity disrupted by urban fringe and military infrastructure land uses; unsympathetic boundary treatment features and neglected pockets of land*. Those elements have direct relevance to the appeal site and its surrounds.
28. There are inevitably variations in the character of the Hogmarsh Valley, and Mr Chard draws attention to the assessment in the LCA 18 of the site as lying within area T2, noted as "urban fringe with urban/industrial influences". Indeed, the site is actually located within sub-type T2b¹⁵, described in the work as *land that is either significantly degraded by adjacent intrusive urban or industrial areas (sometimes characterised by an abrupt urban/rural transition) or contains features which significantly intrude upon or detract from its once rural character*. This is a refinement of the general description of landscape character area T2, [*l*] *landscape adjacent to intrusive built-up/urban areas and containing features which intrude upon or detract from the essentially rural, agricultural character to a significant degree*.
29. A lot of time was spent, and ink spilt, on the baseline, because that is the root of the disagreement between the landscape experts. The Council's case, as advanced in cross

¹³ CD 5.13

¹⁴ Ibid page 70/121

¹⁵ Nothing turns on the way that Mr Chard has transposed the edge of T2b on his MDC-6. As he explained, the source data was a hard copy at very poor resolution. There is no sense in which a character area dividing line runs through the middle of the site or chops Castle Street in two as the line on MDC-2 does. The exact location shown on that image therefore needs to be treated with caution.

examination and in Mr Etchells' evidence, is that the site and its immediate surrounds are "essentially rural". The site visit will have made it clear that, on the contrary, while there are absolutely certain rural aspects to the site and its surrounds, the published work is spot on: there are also intrusive urban and industrial features, and in the case of Castle Street, right next to and above the site, these are characterised by an abrupt urban/rural transition, which intrude upon its once rural character.

30. None of this is rocket science. The only way that Mr Etchells was able to justify his assessment of the site and its immediate surrounds was by characterising Castle Street as 'houses in the countryside' and also by downplaying the role of the WWTW, the tennis area, views of the Chatham tower behind the hill, and the A289 itself.
31. That approach is too much at odds with the real experience of the site, as reflected in the published work, to be given much weight. Mr Etchells struggled to say that Castle Street was not harmful to rural character – it is obviously a built-up, residential intrusion into what would otherwise have been a simply rural landscape character. For that reason, as I put to him, he would doubtless oppose it on grounds of harm were it proposed today. The site visit discloses (and the photographs before the inquiry illustrate) how unmediated the back gardens are, elevated above the site and the valley¹⁶.
32. It is true that Castle Street is smaller than Wainscott or Frindsbury. It is also true that the BNE34 designation does not treat it on the policies map as an urban area whose setting is in some way preserved by the ALLI. It is true that the site lies between the edge of Wainscott and the designated edge of Upper Upnor. But none of those points grapples with the actual effect of Castle Street in the landscape – sitting in an elevated position, between the wooded backdrop and the lower parts of the valley, unmediated and prominent.
33. Castle Street and the other detractors therefore have an effect on the degree to which the ALLI at this point shares the essential characteristics of the landscape, and/or fulfils the functions identified in the policy: as a buffer to help maintain the individual identity of communities, as a green backdrop to built up areas, and as an attractive setting for the A289 corridor.
34. First, it is difficult, as Mr Chard said, to pin down the extent to which the site and its immediate surrounds 'buffers' or 'separates' Upper Upnor from Wainscott or Frindsbury. Castle Street is plainly regarded by some of the local residents who spoke at the inquiry as part of Upper Upnor, and either one should treat the reality of the situation as such, or treat Castle Street as separate

¹⁶ See, as an aide memoire, the images at Photo 9 and photo 4 in Mr Chard's Document B: *Appeal Site Photographs*.

from Upper Upnor. It doesn't make much difference, as the landform and mature woodland makes it impossible to see or experience Upper Upnor at the same time as Castle Street. So what does Castle Street do in terms of the buffer? It has little effect on the separateness of settlements due to landform and so on, and the appeal site needs to be treated consistently.

35. Second, as for the green backdrop to built areas – a similar point arises. The wooded ridge certainly plays that role, and to some extent so does the site and undeveloped land; but the greenness of the backdrop is obviously affected by the presence of Castle Street, which undermines in this location the generalised effect that the metaphor “green backdrop” suggests. The site is ‘behind’ in some views, but to the extent that it is, it has Castle Street *behind it*, affecting the role that the enclave in the wooded ridge plays.
36. Third, the attractiveness of the area of the site and its surrounds as a setting for the A289 corridor is subject to the same range of effects, some rural and some urbanising.
37. Nothing in the recently-released landscape character appraisal produced for the emerging plan¹⁷ undermines the more balanced assessment carried out by Mr Chard. The assessment correctly identifies that Castle Street is prominent in long views across the valley, comprising an exception to the generally well-vegetated edges to development in the area. To that extent, it is flatly contrary to the claims relied on by the Council that Castle Street has no effect on the “essentially rural” scene here. The general description of the area¹⁸ observes that it is more linked to the urban edges of Wainscott and Frindsbury than to the more agricultural areas to the north. Again, right.
38. So in summary, the site is of moderate landscape sensitivity. It has some rural aspects, and contains a small part of the sloping side of the valley; on the other hand it is rightly identified as subject to urban influences, which affect the overall sensitivity of the site and its immediate context. Mr Chard is right to categorise it as an urban fringe site with rural aspects; Mr Etchells wrong to seek essentially to ignore the manifest intrusions of Castle Street, the WWTW and the tennis club.
39. In visual terms, there are some views across the valley towards the site as illustrated in the photomontages. They show precisely the same thing – an indentation of arable field ringed with

¹⁷ The *Hoo Peninsula Landscape Sensitivity and Capacity Study (Draft Feb 2019)*. The Council and the Appellant have both made observations about this document, which remains in draft, has not been tested at EiP and is of only limited weight.

¹⁸ See paragraph 1.1

woods and lying directly underneath and adjacent to the prominent development at Castle Street¹⁹.

40. For these reason, it is an opportunity site in a sustainable location rather than an untouchable landscape resource, as long as the scheme proposed for it is of a high quality.

The scheme

41. As Mr Chard and Mr Wilford both explained, the ethos of the scheme lies in the combination of high-quality built form set *within* new planting, not hidden or screened by it. The landscape is settled in this location and looking up toward the site from any given viewpoint, one gets a strong sense of the wooded ridge and a strong sense of unmediated ribbon housing at Castle Street, of a form and setting which would not be justified today.
42. There are two key aspects of the scheme relevant to the issue of landscape and visual impact. First, the layout seeks to address the valley and any views from the west by presenting dwellings (and the nursery) interwoven with planted open space. Houses are arranged in the main side-on to the slope (unlike the long almost unbroken lines of Castle Street), with opportunities for greenery in and space in gardens to exert and influence²⁰. There are three relatively large-scale landscape corridors leading back up the slope – the largest being on the Southern edge adjacent the nursery, but the others will have a perceptible effect on the proportion of built form to landscape as well, especially at closer quarter from Upnor Road and in the valley bottom²¹.
43. That landscape-led approach is take further with substantial areas of ‘off-site’ planting, thanks to the extent of ownership held with the appeal site. That means a number of tangible local landscape benefits:
 - (1) A large area of landscaping to screen the WWTW from the South West. Given the local prominence of the operational structures, this effect would go well beyond mitigating any additional structure (located, as Mr Chard said, at the back of the site where it would add very little to the current agglomeration).

¹⁹ See for example Mr Chard’s photo 9 (from the Manor Farm site) or 7 (from the footbridge over the A289) in his Document B.

²⁰ See the photomontage View 1 from the footbridge as an illustration. The large area of open space towards the northern end of the scheme is highly visible in this view.

²¹ See for example the photomontage View 2 from the junction of Upnor Road and the entrance to the WWTW.

(2) Extensive new planting on the slope between the site and Upnor Road as it descends to the small green by the nature reserve. This planting extends across the Upnor Road at the valley floor and connects to a new hedge across the amenity grassland (where the car boot sales are held). Additional planting would be wrapped around the tennis facility with its fencing and non-native leylandii. The hedge would then continue across the open amenity grassland all the way to the footbridge.

44. The second key aspect of scheme design is the quality of the design. As Mr Wilford recounted, this was strongly supported by the relevant officers at the Council, and follows in the highly-successful footsteps of other Esquire developments in Medway. The houses would be designed with a farmstead aesthetic²² – not pretending to be farm buildings but homes well-suited to the rural/urban edge they would occupy. They would be good to see in context, and in that respect distinguishable from the less thoughtful housing at Castle Street. The SCG²³ records agreement that “[i]n design and layout terms the proposed development has been well thought through and would be capable of being a high quality development in design terms (subject to detailing)”. In a District where housing is in deficit and is bound (with absolute certainty) to require greenfield locations, some of which are in land designated in 2003 as ALLIs²⁴, the Appellant’s design approach should be given due weight.

Landscape effects

45. The development would cause some harm to landscape as Mr Chard (and the LVIA submitted with the application) accepted²⁵. There would be loss of the arable field on the valley side, and some (limited) loss of landscape features²⁶. There would be a degree of additional urbanising influence perceptible within the Hogmarsh Valley. Staying with landscape pure and simple for the moment, Mr Chard’s judgement was based on combining (a) a balanced assessment of the sensitivity of the site due to its urban fringe location, and (b) a realistic sense of the net effect of additional housing, closer to the valley bottom, with all the additional planting and design quality, as well as the benefit of reducing the effect of the prominent raw edge of Castle Street.

²² See SCG paragraph 7.17 page 15.

²³ Paragraph 7.21 page 15.

²⁴ See for instance the housing at Gibraltar Farm.

²⁵ See in summary form Mr Chard’s paragraph 10.46, page 64.

²⁶ Though no important hedgerow or particularly valuable tree (see the Arboricultural report CD 2.64) would be lost.

46. By contrast – something absolutely clear in the submissions made - the Council’s landscape case was based on the over-evaluation of the site’s value, caused by failing to be realistic about its overall context, especially by the dogged refusal to come to terms with the effects of Castle Street and the other lesser detractors²⁷. Yes, there would be loss of arable fields and some limited landscape features, none of which are noted as of particular value; but that does not equate to the kind of adverse impacts judged likely by Mr Etchells, because of the lower actual sensitivity and the better net landscape outcome.
47. It was also a strong theme of the Council’s case that the Framework requires the “protection and enhancement” of valued landscapes, by virtue of paragraph 174(a). Mr Chard accepted that was the case. But again, one has to be a little careful not to blur things. The site and the Hogmarsh Valley more generally are not valued landscapes because of intrinsic landscape quality or beauty. They are valued as performing certain functions in the spaces between, and on the way into, and out of, settlements. So a degree of landscape harm by, say, the loss of arable field or hedge in the Hogmarsh Valley does not equate to a failure to protect and enhance *what is valued* about the ALLI. This blurring or equating any degree of landscape harm with harm to a ‘valued landscape’ is an important misstep in the Council’s approach to the development.
48. A particular landscape point taken up by the r.6 party was the effect of the new access on vegetation along Upnor Road. There would be an obvious initial impact, with the removal of scrub and some trees to create the access and the localised widening of the road. This effect would, in landscape terms, be both geographically localised (due to the alignment of the road either side of the proposed access), and temporary: the scheme has been designed with ample space to replant a better, native alignment of trees and hedges along the lane. It is not the case, as Mr Chard said, that the end result would be suburban or out of character²⁸. With good design, surfacing materials and planting, one would see new housing from Upnor Road, but not a bland suburbia.
49. These are all matters of judgement for the Inspector but he is respectfully asked to prefer Mr Chard’s more reasonable analysis as a guide. The photomontages are a helpful reminder of the degree to which there would more development visible, and the extent to which arable slope

²⁷ The odour issue will be overcome, as Mr Wilford identified. The statutory process to authorise the works under the Water Industry Act 1991 has already begun. Even if the solution involves a 6 metre stack, Mr Chard describes how it would be at the back of the WWTW site, in the context of other structures of similar height, as well as prominent telecoms equipment. It will make no material additional contribution to the way the WWTW appears in views. This point was effectively confirmed on Mr Etchells’ case too when asked by the Inspector.

²⁸ Mr Etchells said in answer to the Inspector’s question that the proposed development would be “quite different” to Castle Street.

would be taken up; they are also telling in the way that existing features affect the overall composition as well as in the beneficial effects of the design and the landscaping. I come back in a moment to effects on the ALLI.

Visual effects

50. The visual effect of the scheme is illustrated from a number of representative points in the montages. Close at hand, on Upnor Road, there would be a sense of greater residential development on the hillside, but this would be tempered by the extensive planting²⁹. New footpath links would enable close at hand views to be taken of the scheme, on Upnor Road and also leading up from the valley bottom into the heart of the site. At such close quarters, the quality of landscaping and of the buildings themselves would be paramount in the view. These close views, looking up across the site to where one currently has views of Castle Street, would not cause harm to visual receptors.
51. Similarly, from further afield, the effect needs to be assessed realistically. In views from the footbridge, and from the Manor Farm area of Wainscott/Frindsbury, the scheme would be perceived framed by the strong wooded ridge and the blocks of woodland (especially the very locally prominent Tower Hill). It would be well-treed³⁰, contain fingers of openness and planting connecting even the back of the site to the lower valley slopes; and it would not present serried ranks of box-like houses such as one sees in Castle Street or indeed in the newer developments at Wainscott.
52. In other words, the degree of additional urban ‘intrusion’ into the Hogmarsh Valley would be relatively limited, and in the wider views absorbed into the scene, an effect assisted by the landscaping of the site. These longer views would not harm visual receptors or qualities in the area.

Effects on the functions of the ALLI

53. The landscape points I have summarised apply equally to the aspect of BNE34 which refers to local landscape character, and I have made the key point about the purpose for which the

²⁹ See for instance the photomontage viewpoint 02.

³⁰ Mr Chard was taken to task for saying that the scheme would create an “instant sylvan backdrop”. Perhaps there was an element of hyperbole there. But the scheme would as he said remain very well treed.

landscape is in fact ‘valued’ here. As for the ‘functions’ of this particular designated area, they would be affected to a very small degree. Part of the reason for that is that, given the nature of the existing edges of the Hogmarsh Valley, it does not follow simply from the fact of additional development within the ALLI that there would be harm to the functions of the area. That is why BNE34 requires a judgement as to material harm, rather than assuming that development equates to harm; and that judgement is as to *material* as opposed to *any* harm. That is before one reaches the part of the policy which allows even such harm to be outweighed by economic and social benefits. One could be forgiven when listening to the Council’s evidence and case for thinking that any visible residential development on a slope in the ALLI must automatically be a breach of the policy, but that is not the case.

54. Mr Chard’s view is that the ALLI functions would not be materially harmed by the appeal scheme, for the following reasons:

- (1) The ‘green buffer’, separating the named settlements, would not be changed such that any degree of further perceived coalescence would be felt. The Council’s evidence and submissions were full of measured distances and proportions of space between Wainscott and Upper Upnor, but this misses the point of actual effects³¹. Upper Upnor cannot be seen from Wainscott or Frindsbury and the appeal scheme would, as Mr Etchells acknowledged, not have the effect of blurring or coalescing the identities of these very-clearly-separated places. The settlements are severed by the A289, and kept well apart physically and perceptually by the wide open space of the valley floor, which plays a critical role in the sense of separateness. The site is on the upper slopes by Castle Street and, even if was to be read and understood as part of Upper Upnor once it was constructed, would not harm the overall greenness or separation between the settlements. Frankly, even if that was not the judgement reached, the degree of conflict with that function would be very small, something easily perceived when moving about the relevant area.
- (2) Similarly, the ‘attractive setting’ for the A289 would not be materially affected. The site is only perceptible from the road itself fleetingly; some of the road is in cutting as it passes Wainscott, and views of the site are curtailed by intervening landform and vegetation. There would be some views of the scheme in which the A289 is also visible, but that is not really the point of the ‘function’. So the effects would be minimal.

³¹ It could equally well be observed that the officers’ report on Manor Farm (CD7.1 at page 53) prayed in aid that that site (17ha) was only a small part of the ALLI at 2%. The appeal site is only 0.47% of the ALLI. It is not the numbers and distances that are important, it is the way the area is perceived in the real world that matters.

- (3) No effects would be felt, indeed, none is alleged, on the function of connectivity or the setting of heritage assets. There would be no effect at all on the setting of Upnor CA, which is several hundred metres away and screened by dense woodland and the brow of the hill; there is a distinctive ‘tucked away’ feel to the approach to the historic settlement when approaching from the West, contrasting with its open, riverine setting to the East.
55. One other reflection on the way the Council’s case developed. A series of points were put to Mr Chard as part of the general proposition that the site has an essentially rural character, but were then deployed in the context of the ALLI policy: that the site is ‘centrally located’ in the Hogmarsh Valley ALLI; it is prominent; it has undulating arable fields; Castle Street is ‘not urban or stark’ but a ‘small group of houses in the countryside; the view is ‘almost entirely rural’; the tennis facility and leylandii are ‘low key’; the WWTW is ‘quite well screened’.
56. But it was also put to Mr Chard that the site is of importance *because* of the distinction between the unbuilt areas of the Hogmarsh Valley and those affected by urban influences, in other words, there was a sense that the ALLI was fragile due to actual encroachment into the valley, which the scheme would compound.
57. This is what I described during the inquiry as the ‘two wrongs don’t make a right’ argument: even if the appeal scheme is high quality and comes with net landscape advantages in this part of the valley, it is just more harm. The straightforward answer to that point is that the net effect would not be materially harmful. But the more interesting aspect of how that point featured in the Council’s case is that it wholly depends on Mr Etchells’ judgement that the site is essentially rural. If in fact, the site is part of an edge within the ALLI already impinged upon materially by urban development, then rather than pretend otherwise, overstate its value and resist its development at all costs, one should actually be looking for net gain through development done well, such that the functions of the ALLI are supported and not undermined in line with the balance that one finds in the policy.
58. That is the Appellant’s key submission on the ALLI. There would be very limited harm through loss of undulating arable slope and a degree of urbanisation in an area which already feels that effect. That would be outweighed by the net effect of high quality development and excellent landscaping, going well beyond mitigation of effects. The result would be that the functions of the ALLI in this particular location would not be harmed.
59. Even if having considered the evidence and visited the area, the Inspector forms the view that there would be material harm, a judgement of degree is still required once one has found

‘material’ harm. The Appellant submits that a proportionate judgement, even contrary to its case, would be a relatively low level of material harm. That finding needs to be set against the benefits of the scheme in economic and social terms.

Highways – the r.6 party’s case

60. I first deal relatively briefly in these submissions with the case advanced by the r.6 party. There is a degree of overlap with the Council’s case on landscape effects which I do not repeat.
61. Mr Sharp raises concerns over highways. The appeal was the subject of early and continuing engagement with the highways authority throughout the application process, and the officer’s delegated report records the fact that there were (are) no outstanding objections. There is no technical evidence before the inquiry to substantiate claims that the access, or Upnor Road, or any junction or link in the wider area would either lack capacity or be unsafe.
62. Instead, Mr Sharp’s evidence was more in the nature of a critique of certain evidential points. None of them gives rise to a substantive objection, let alone the kind of safety or capacity objection which would weigh heavily against the grant of permission³².
63. Mr Sharp queries why full speed survey results for those travelling westbound on Upnor Road were not included in the TA, implying that they would possibly have shown the site visibility requirements to be greater. The answer was that this was due to a formatting error but that the summary data was included in the TA³³ and there has never been any suggestion that a different junction design was merited or required, or that the site visibility required could not be provided.
64. Mr Sharp raised the issue of the time of year the speed survey was done, saying that February was a time when weather conditions and daylight hours might have combined to bring the recorded speeds down. Leaving aside whether the highways authority was right to accept the February data, the point goes nowhere: there is no record of accidents on Upnor Road, and speeds are affected much more by the road alignment – a slope with near blind corners both up and down hill from the proposed site entrance. There is no basis to consider that the speeds would have been any different, or even, had they been higher, it would make any difference to

³² For instance, following Framework paragraph 111.

³³ CD 2.10, page 60.

the safety case. This is a point which fell foursquare within the technical competence of the highways authority and as ever, significant weight should be given to their views.

65. Mr Sharp expressed scepticism over the number of trips which might be made to and from the nursery. This was also part of his queries about safety, and for the same reasons led nowhere. But in any event on its own terms it also failed. As Mr Wilford reported, the TA assessment of trip generation (38) was based on TRICS data for nurseries. There is no real basis for considering that the TRICS data is unreliable – Mr Sharp asserts that many trips would be linked to parents journey to work times, but he ignores the realities of nursery trips³⁴: full time parents (ie not going to work) walking or travelling by other modes (recall the evidence of locals saying they walked to Wainscott for a variety of purposes), other carers (family members/nannies or au pairs) doing the same; joint trips where a parent picks more than one child up in a rota; the catchment of the nursery in any event. All of these things go on with nursery travel and are no doubt reflected in the TRICS data. But as I have said, there is absolutely no evidence that, even if the trip generation from the nursery were higher, anything in terms of safety or capacity flows from that.
66. Mr Sharp was also concerned about the effect on pedestrian safety on Upnor Road. Pedestrians currently use the road, and there are no recorded personal injury accidents, doubtless due to the constraints that the road alignment places on speed in any event. The passing place which the scheme would provide was not required by the highways authority, but it would actually increase, rather than decrease, the features tending to make pedestrian use of the road acceptable and safe. Again, there is no evidential basis on which to base an objection to the grant of permission.
67. Finally, Mr Sharp gave some evidence about queuing and capacity on the more strategic road network which he said would be harmed or exacerbated by development traffic. There is no evidence that the scheme would come close to causing any capacity or safety issues on the A289 or any roundabout or junction. This was another genuine concern without evidential foundation and no weight can be given to it.
68. There is no highways or transportation harm and no reason to withhold permission on such a basis. The site is in a sustainable location and would improve certain accessibility challenges that currently exist.

³⁴ In other words, the fact that there might be a 73% mode share for journeys to work cannot be read across to trips for this kind of purpose.

Social and economic benefits of the scheme

Housing and affordable housing

69. Mr Canavan’s evidence on behalf of the Council was that housing and affordable housing should both (individually) be given significant weight³⁵. That is self-evident. Before I come to the two arguments the Council advances to seek to limit the full force of the point in the context of BNE34, and in the planning balance more generally, I set out the key points which support a significant amount of weight being given to these two benefits.
70. The Statement of Common Ground records the fact that there is on either party’s case a substantial shortfall: the supply is only between 2.54 years and 3.03 years. That equates to a shortfall of either 5,813 dwellings or 4655 dwellings, enormous either way³⁶.
71. A technical issue divides the parties on whether it is the lower or higher deficit, which I address briefly because the scale of the deficit is so large even on the Council’s case the answer is unlikely to make a difference to the outcome of the appeal. Mr Wilford argues that the deficit since the LHN system came into effect in 2018 should be included in the requirement for the 5 year housing land supply. Mr Canavan says that it should be excluded because the affordability index/factor in the LHN calculation takes into account past under-performance.
72. It is a moot point because the PPG guidance does not deal clearly with deficits in a situation where one is calculating 5 years supply on the basis of LHN outside the plan-making process. The first year of a new plan is covered by the advice in PPG 2a-008³⁷, but when the LHN process started several years before, across which there has been continued under-delivery against that target, it is by no means clear that the 5 year supply calculation should simply ignore it or assume that it has been swallowed up in the affordability adjustment.
73. Indeed, a straightforward reading of PPG 68-022 indicates otherwise: *to ensure that there is a realistic prospect of achieving the planned level of housing supply, the local planning authority should always add an appropriate buffer, applied to the requirement in the first five years*

³⁵ See his paragraph 7.15 for the overall point and XX for the need to disaggregate them.

³⁶ “Significant” is Mr Canavan’s summary, with a touch of understatement: paragraph 6.17 page 15.

³⁷ As Mr Canavan notes, “once a Local Plan has been submitted for examination”: paragraph 6.16 page 15.

(including any shortfall). This will result in a requirement over and above the level indicated by the strategic policy requirement or the local housing need figure. There would be no need for the last six words in that sentence if the issue was simply related to the requirements of a plan (adopted or submitted).

74. Medway is a good example of why this should be so. The requirement for 2019-20 was 1550 units³⁸, down on 2018-19 (1672). But delivery in 2018-19 was only 647 homes, ie a shortfall of some 1025 units. If the affordability ratio really did deal with or reflect mounting shortfall, then that for 2019-20 would presumably have been higher than that for 2018-19. But in fact, the affordability ratio fell between 2018-19 and 2019-20: 8.67 to 8.41³⁹. That is why the LHN has to have a buffer added to both the requirement *and* the shortfall.
75. In any event, the appeal scheme represents 72 units of housing proposed (well over 10% of the total delivery achieved in Medway each year between 2017 and 2019⁴⁰). Mr Canavan’s assessment of how much weight should be given to this benefit apparently includes the idea that given the scale of the deficit, a mere 72 units is “not significant”. If Medway haven’t learned by now that every single unit of housing delivered is worthwhile *because* of the scale of the unmet need, then no wonder we are at an appeal. 72 units is very significant when the Borough is falling further behind cumulatively every year.
76. As Mr Wilford says, the weight to be given to the 72 units that Esquire would deliver in a timely way is increased when seen against the quite awful housing deficits seen in this Borough over the past 30 years⁴¹.
77. The Council draws attention to the advice of the Court of Appeal⁴² that *the extent to which relevant policies fall short of providing for the five year supply of housing, the action being taken by the local planning authority to address it...*” are relevant to the weight to be given to policies deemed out of date by the Framework due to the absence of a 5 year housing land supply. Mr Canavan says that the “steps taken by the Council are significant in regard to meeting need in a sustainable way.”⁴³

³⁸ See Mr Canavan’s table page 15. The SCG Table 7.2 has 1662 requirement for 2019-20 and a shortfall in the previous year of 1036, but the order of magnitude is the same.

³⁹ See Mr Wilford’s Table 5.2, page 26.

⁴⁰ See Mr Wilford’s Table 5.1, page 24.

⁴¹ Ibid – only in 5 years in 33 have the relevant housing requirement been met, and not for the last 11 years.

⁴² *Secretary of State for Communities and Local Govt v Hopkins Homes Ltd* [2016] EWCA Civ 168; see Mr Canavan’s paragraph 6.60 page 29.

⁴³ Ibid.

78. Anything that the Council may or may not have done in terms of granting permissions for housing development has failed, as the agreed numbers show. There was a cumulative shortfall of some 2,222 units over the period 2017/18 to 2019/20 when LHN applied. The emerging evidence is that the Council will again fail to meet its housing target in 2020/21⁴⁴. The Council accepts it fails the Housing Delivery Test applicable at present⁴⁵. So whatever the Council may be trying, the shortfall is in fact only worsening, as Mr Canavan acknowledged.
79. The Inspector should be very cautious indeed to accept any suggestion made on behalf of this Council that less weight should be given to the colossal deficit because of things they are trying to do under their Housing Delivery Test Action Plan. Mr Canavan's lists of permissions were not wholly accurate to begin with⁴⁶; they are also simply the detail behind the five year supply shortfall – every one of the entries would have, at the relevant time, contributed to the housing supply, but still the 5 year supply is not met and still the housing delivery is significantly below the requirement.
80. Mr Canavan also asks the Inspector to take into account the emerging local plan⁴⁷, the suggestion being that it is in the local plan process that housing needs will be met sustainably (and by implication, that will not be the case with this appeal scheme)⁴⁸. He forgets that the Framework was written, and amended, *precisely to deal with plan failure of this kind*, ie, to ensure that a presumption applied where the plan-led system was failing to ensure that needs were being met. In the absence of a Framework-based prematurity objection (and there is none, as Mr Canavan confirmed), it would be contrary to the Framework to diminish the weight to be given to the delivery of housing here because of an emerging plan of no weight.
81. Look carefully too at the way the Council seeks to rely on some steps taken in preparation for the emerging plan: Mr Canavan refers to the HIF funding for infrastructure on the Hoo Peninsula, and indeed on the progress towards a reg 19 decision by the Council. Neither reduces the imperative brought to bear by paragraph 11(d) in this case:

⁴⁴ Mr Wilford referring to the discussions re the emerging figure in XC.

⁴⁵ 55% only in 2020: Mr Canavan's paragraph 6.18-6.20 page 15-16.

⁴⁶ The list at paragraph 6.27, page 18-19, of "permissions granted by the Council" is a confused mix of outlines, reserved matters permissions and detailed consents (the outlines in the latter cases having been granted some time before. The list at paragraph 6.28, purporting to refer to "consent ... granted for large scale (5+) development" since 1 April 2020, includes a number of examples of sites granted consent before that date, as he accepted.

⁴⁷ See for instance paragraph 7.17, page 37.

⁴⁸ See his paragraph 7.17, page 37, second sentence, "*the need will be properly considered and addressed ... through the emerging plan making process*" (my underlining). The need will be properly considered and addressed in part by granting permission on this appeal by applying the Framework.

- (1) As Mr Canavan accepted, the HIF funding towards major infrastructure on the Hoo Peninsula is not dependent on the current ideas of very major housing there surviving the local plan examination process. It is payable anyway, and that means that it does not provide any comfort that the local plan will progress in its current (pre-Reg 19) form.
- (2) The reg 19 decision which we were told was to be taken earlier in October was inevitably deferred⁴⁹, and there is clearly substantial work still to be done before it returns to the Council for any approval as the Reg 19 draft. Mr Harris' email submitted to the Inspectorate on 18 October 2021 holds out the provisional view that the plan is unlikely to be submitted for examination before June 2022. One would be forgiven for a degree of scepticism about even that latest target, given the sorry history of plan-making here in the past decade. I say that not to blame officers of the Council, but (I hope fairly) to stress that very little, if any, weight should be given to the hopes of a new Local Plan in Medway solving the ongoing housing crisis anytime soon. And certainly no discount whatever should be made to the very significant weight that should be given in this appeal to the housing delivery the scheme represents. The Appellant is exactly the kind of SME housebuilder, proposing to deliver 50+ dwellings, that the Council's own Housing Delivery Test Action Plan says they wish to support in meeting part of the deficit⁵⁰.

Affordable housing in particular

82. The reason why significant weight in addition should be given to the policy compliant level of affordable housing that Esquire will deliver here is obvious. In the monitored years 2013/14 to 2017/18, only 748 affordable homes were built in Medway, around 20% of the identified need, and the affordable housing need is acute. Due to the enormous annual shortfalls in overall housing delivery, affordable housing targets have also fallen well short, something of acute importance to those in housing need.
83. Partly as a result, housing has become 34% more expensive in Medway over the past 5 years, as the Council's most up to date AMR reveals⁵¹. The Housing Strategy 2018-22⁵² shows how

⁴⁹ As Mr Wilford reported in an email to the appeal case officer.

⁵⁰ CD 5/9 paragraph 3.56. There is a need, the document says, to strike a balance between the very large sites (one thinks of the possible reg 19 Hoo Peninsula development(s)) and medium site size short term delivery.

⁵¹ CD5/7 Table 5.2. See Mr Wilford's paragraph 5.29 page 25.

⁵² CD 5/18 says that (under 'Priority 1') in 5 years between 2013/14 and 2017/18, only one year's worth of affordable housing was delivered. In 2018/19 only 181 affordable housing units were delivered.

acute the need has become. Upnor has seen no major new housing of any kind, let alone any affordable housing units⁵³.

84. Against that background, it is simply not an appropriate response to say⁵⁴ that “[t]he Appellant is offering no more than policy compliant levels of Affordable Housing”. If policy targets for meeting the needs of the homeless or those who cannot access the housing market were being met, that might begin to be a good point. It isn’t a good point when the authority in question is in the grip of a very severe housing crisis⁵⁵. Every unit of affordable housing is meaningful to those for whom it may mean security, stability, and more.

Other social and economic benefits

85. First, the nursery. There is an acknowledged need for a children’s nursery here⁵⁶. The Montessori Group has indicated its support for the proposal, with a viable nursery for up to 53 children, and reaffirmed its commitment to taking a 10 year lease to deliver that benefit should permission be granted⁵⁷. The provision of early years schooling where needed is a matter to which significant weight should be given.

86. Next, jobs. It is also acknowledged by Mr Canavan that the 22 FTE jobs that the nursery would create merit due weight – moderate in his judgement. Mr Wilford, bearing in mind paragraph 81 of the Framework, suggests greater weight. Weight should also be given to the construction jobs⁵⁸, and to the consequential economic benefit from the new housing⁵⁹.

⁵³ Something which should be a cause for concern, not (as some of the comments made at the inquiry by third party objectors seemed to suggest) simply lead to Esquire being sent off to Strood to deliver housing.

⁵⁴ Mr Canavan, paragraph 7.16 page 37.

⁵⁵ The point made to Mr Wilford in cross examination about the *Kings Lynn* case, that not all affordable housing needs necessarily have to be met, was a particularly specious suggestion, in the light of the colossal shortfall here and the acceptance of significant weight by the Council’s witness. It was a bad point anyway as that case is about whether the Full Objectively Assessed Need (“FOAN”) necessarily included meeting 100% of affordable housing needs, not whether the 25% policy target not being met disclosed a shortfall.

⁵⁶ SCG paragraph 7.14.

⁵⁷ Mr Wilford’s Appx 3, supported by the general capacity/need work carried out by Barton Willmore at Mr Wilford’s Appx 4.

⁵⁸ 65 direct and 63 indirect: Mr Wilford page 50.

⁵⁹ Appendix AW6.

87. Mr Wilford⁶⁰ also identifies the high quality of the development itself, to which weight should be given as a benefit, given the emphasis on good design in the current version of the Framework.
88. Then we come to the changes to the area around the site. Due weight should be given to the improvements to the PRow network, which would benefit the existing as well as proposed community in Upper Upnor: not only would the new connections make it a more pleasant network to use for leisure, the inquiry heard evidence from local people that they make trips on foot to Wainscott for local shopping and schools – these would also be enabled by the new footpath improvements.
89. For travel by other modes, the Inspector is asked to give due weight to the delivery of the new bus stop and enhanced service – the topography and geography of the area make this a real benefit.
90. I referred in the context of the landscape points to the extensive off-site planting – those benefits would benefit the wider community and the Hogmarsh Valley, and will work in conjunction with the extensive Biodiversity Net Gain the scheme will bring. At 34%, it obviously goes very far beyond anything that could be required by policy or law – or indeed even envisaged being required in the years ahead. It would be a tangible benefit of the scheme.
91. In summary, the economic and social benefits would be substantial. They are not just ‘nice to have’, either: there is a pressing need for housing and affordable housing now in sustainable locations in Medway, an existing need for early years (nursery) provision, and a huge public policy imperative to ensure a robust recovery from the pandemic.

Planning balances

BNE34

92. BNE34 contains an internal balance, which applies if the Inspector finds, contrary to the Appellant’s evidence, that the scheme would cause “material” harm to the landscape character and function of the ALLI. The balance is clearly worded: the harm is to be weighed against the social and economic benefits, and the question is whether the benefits are “so important” that they outweigh the local priority to conserve the area’s landscape.

⁶⁰ See summary table at page 49.

93. Matters of degree are in play – if there is material harm, to what extent? If still relatively moderate, then that is set against the benefits. However, as I have submitted, the benefits are obviously really important here and now in Medway, and the Appellant contends that, even if a degree of “material harm” is found, that the benefits of this scheme clearly outweigh it.

Development Plan as a whole

94. On the Appellant’s case, there is full compliance with the development plan and pursuant to s.38(6) of the 2004 Act, permission should be granted. But even if there is a degree of non-compliance with the plan, by reference to BNE34, it is still very much an open question as to whether the plan overall would be breached. It is obviously the case that BNE34 (if the only main policy in play) is breached – ie the benefits are not judged to be so important that they outweigh the harm to the landscape – then it may well be that the development plan overall is not met. That is for the Inspector.

The Framework

95. Finally, I address the hypothetical situation where the development plan is not complied with. At that point, s.38(6) asks whether any material consideration indicates that permission should nevertheless be granted. In this case, the overriding material consideration is the Framework. Paragraph 11(d) imposes a different approach from BNE34: it says that permission should be granted unless the adverse impacts *significantly and demonstrably* outweigh the benefits. That so-called ‘tilted balance’ is deliberately pro-development where (as here) it applies. An outcome in which the landscape harms only barely, on balance, outweigh the benefits, would mean that permission should be granted under paragraph 11d. The harm would not come near – even assuming that kind of finding on BNE34 – to significantly and demonstrably outweighing the harm,

96. That all makes perfect sense when one steps back and asks what is really at stake. The Council refused permission for 72 houses, (18 of which would be affordable), relying on an out of date

landscape policy and the ALLI policy. The ALLI policy contains a balance which is the complete opposite of the Framework balance which all agree applies. Even if the functions of the ALLI were harmed to some degree, and the landscape character detrimentally affected (contrary to the Appellant's evidence), permission should still be granted. That amount of housing in such a sustainable location against such an awful deficit is an opportunity which should be let slip.

97. For these reasons, and subject to the s.106 obligation and conditions as discussed, the Appellant respectfully asks that the appeal be allowed and permission granted.

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25 October 2021