IN THE MATTER OF:

LAND AT SPENCER'S FARM
NORTH OF LUTMAN LANE
NORTH-EAST MAIDENHEAD

APP/T0355/W/23/3333831
APP/T0355/W/23/3333834

CLOSING SUBMISSIONS
ON BEHALF OF THE APPELLANT

Introduction

1. Through this appeal, IM Land 1 Ltd and Summerleaze Ltd ("the Appellants") seeks:

    a. Outline permission for residential development of up to 330 homes, land for a primary school of up to three-form entry and associated landscaping, open space, car parking, drainage and earthworks to facilitate surface water draining; and all ancillary and enabling works ("Appeal A"); and

    b. Full permission for enabling works comprising the provision of construction access, site preparation and earthworks (in connection with Appeal A) ("Appeal B") (collectively "the Proposed Developments").

2. Both applications were determined by the Royal Borough of Windsor and Maidenhead ("RBWM") on 26th July 2023. Three reasons for refusal ("RfRs") were provided on Appeal A, and four RfRs on Appeal B[1]. Upon the Appellant seeking clarification from RBWM, it emerged that a number of these RfRs covered overlapping issues[2]. It was also agreed that RfR4 of Appeal B would no longer be pursued[3]. At the CMC, a further list of issues was agreed[4].

3. Following the service of evidence, the position reduced to:
    a. flood risk for the outline scheme;
    b. a small number of highway matters relating to access on the outline scheme - largely relating to walking routes (and not highway safety as per the RR), plus an issue with the location of 3 bins;
    c. noise of construction traffic specifically on the haul road in terms of the full application;
    d. the scale of the shortfall in five-year housing land supply,

4. At the outset, it is important to observe that the Proposed Developments have been the subject of extensive consultation and discussion between the Appellant and RBWM. This extensive

[1] CD E3, CD E6
[2] CD F1b
[3] Planning Statement of Common Ground (CD F3) §7.15.1
[4] Case Management Conference Summary Note, 30 January 2024

collaborative work ultimately led to the Site being allocated in the BLP for precisely the scheme for which the Appellant now seeks permission[5], and the production of a carefully designed Stakeholder Masterplan Document ("SMD"), in close consultation with RBWM and the local community[6].

5. Perhaps unsurprisingly, therefore, at the culmination of this detailed work, the application benefitted from a clear recommendation for approval from the professional officers of the Council, who considered that all technical matters were fully resolved; a position reflected in the lack of objection from any relevant stakeholders[7]. In due course, the Appellant will demonstrate that the Council officers and stakeholders were correct in their assessments – the Proposed Developments are wholly compliant with the Development Plan and there are no meritorious reasons for refusing permission.

The Development Plan

6. We operate in a plan-led system. Parliament has provided, by section 38(6) of the Planning and Compulsory Purchase Act 2004, that applications for planning permission *must* be determined in accordance with the development plan unless material considerations indicate otherwise. The consequences of that for development proposals which *accord* with a development plan are made abundantly clear in paragraph 11(c) of the NPPF – they are to be approved without delay.

7. Here, it is common ground that the development plan comprises only the Borough Local Plan 2013-2033 ("the BLP")[8]. The BLP was adopted relatively recently, and was the culmination of a lengthy examination process lasting four years. Despite this, it is the agreed position of both parties that RBWM cannot demonstrate a deliverable five-year housing land supply[9].

8. It is of central significance in resolving this appeal that this Site is allocated in the BLP for residential development of up to 330 homes. Indeed, these appeals seek to deliver precisely the scheme for which the Site was allocated – 330 deliverable homes and associated open space. There is also land provided for a three-form entry primary school should the county

[5] CD H1, p.225
[6] CD H17
[7] Officer Report (Outline Permission) (CD E1, p.10); Officer Report (Full Permission) (CD E4, pp.6-7)
[8] Planning Statement of Common Ground (CD F3) §6.2.1
[9] Housing Land Supply Statement of Common Ground (CD F4), §5.1

education authority wish to take this up. The local plan process was lengthy, and the Site was included at all key stages of plan production. Throughout, the Appellant and RBWM's Development Management team worked in close consultation, so as to develop a strategic plan for the delivery on the Site of significant residential development, in a borough with a considerable and worsening housing shortage. This Site was allocated expressly to play its part in addressing that, and we turn now to the details of that allocation.

9. Work on this allocation began back in 2009:
    a. Fifteen years ago, the Appellant began work on the Site, seeking to bring forward a residential development in a Borough in the midst of a severe housing shortfall
    b. Eight years ago, in 2016, the Appellant began detailed discussions with the Council, with the aim of bringing forward the site a housing allocation.
    c. Seven years ago, in 2017, the Appellant commenced formal pre-application meetings with the Council, and began carrying out public consultation exercises.
    d. Six years ago, in 2018, the Appellant began conducting specific topic-based consultation meetings on a wide range of specific areas including highways and flood risk.
    e. Since then thirty-four meetings were convened with RBWM and statutory consultees[10].
    f. Five years ago, the Appellants began helping the Council with securing the site through the local plan examination process
    g. Two years ago, the Site was duly allocated in the adopted development plan in two tranches.

10. Allocation AL25, the southwestern side of the Site is allocated for up to 330 new homes, and a three-form entry primary school. At AL28, the northeastern portion of the Site is allocated for a green infrastructure site providing sports facilities, public open space, habitat area and flood attenuation.

11. The policy for AL25 sets out a detailed list of 18 site specific requirements, which development on the site is required to meet. These include maintaining a clear and defensible Green Belt boundary, ensuring the development is well-served by public transport, and

[10] Kathryn Ventham, Proof of Evidence, Appendix 1

providing a network of high-quality pedestrian and cycle routes. No issue arises as to compliance with 17 of those 18 site specific requirements.

12. Similarly, the policy for AL28 sets out a list of 8 site specific requirements, including the delivery of green and blue infrastructure, improving the existing football facilities, and delivering "significant" biodiversity improvements. No issues with AL28 were cited in the reasons for refusal.

13. Accordingly, it is manifestly clear that the applications which are now the subject of this appeal seek to bring forward a scheme which was allocated in the local plan after a considerable degree of long-term collaborative work with the Council. They seek to bring the Site forward in a sustainable manner, and that these applications align with the requirements of that Plan.

14. It was rightly recommended for approval by Council Officers, and ought to have been granted permission without delay. But local politics got in the way. It is a complete affront to a plan-led system for sites like this to be turned into a political football. This is why we have a housing crisis in this country because the politics gets in the way of good plan making, sensible decision making and housing delivery.

15. Following this mountain of work, done over the last 15 years, the Appellant submitted an outline planning applications for the allocation and a full application for the enabling earthworks to raise the site up in line with the discussions that took place at the local plan examination. Both applications were duly considered by officers and statutory and non-statutory consultees. Following discussion and the submission of additional material, it was brought before members. Following this, there were no objections from any professionals including none from the planning department, any consultees such as the Environmental Health Department of the Council, nor any statutory consultee such as the Environment Agency and the Local Lead Flood Authority. Both were written up up in a detailed set of reports with a clear officer recommendation for approval, subject only to necessary and appropriate conditions and the signing of the Section 106 agreement[11].

16. Both applications were refused by members unanimously.

[11] Kathryn Ventham, Proof of Evidence (Section 4)

17. Unable to refuse in principle because the site is allocated for the development proposed in the development plan allocations, the members refused both applications on specialist technical grounds relating to noise, flooding and highway safety. They did so without any technical evidence to support their position whatsoever. The members had not a scintilla of technical evidence to support their position.

18. So why did they refuse, without having any professional or technical evidence to support their position? They did so for purely political reasons. The BLP, though adopted, had proved unpopular with some local people. Local people removed the longstanding Conservative Party control of the Council and elected the Liberal Democrats candidates who campaigned against the plan. So the decision was made to refuse this application in line with what the new councillors had promised to do. The trouble is, they had absolutely no basis for doing so.

19. The only thing the Members could think of in terms of technical complaint was to suggest the traffic data from 2017, upon which the transport modelling was based, was out-of-date and underplayed the amount of traffic on the roads, Hence they tried to suggest the transport modelling underplayed the impact of the proposal.

20. That however proved to be an utterly fallacious argument: because when examined, it is clear that the traffic in the local area was, on average, 10% lower in 2023 than in 2017. So the members managed to score a near perfect own goal, demonstrating that the Traffic Assessment was in fact robustly assessed: excessively so. But that provides a taster of what this inquiry has been about. A hopeless set of criticisms which are ill-judged, ill-informed. Criticisms that are based on conjecture, supposition and a complete lack of professional knowledge, misunderstanding and common sense. The Council appear to have struggled to find experts to support the Members case, with the justification for the decisions only emerging in the middle of January. And even since then, the criticisms have changed and evolved multiple times.

21. The reasons for refusal (RR) provided by the Members were vague in the extreme.

22. After the refusal, Stantec on behalf of the Appellant's wrote to the Council asking the simple question of which criteria in each policy referred to in the RR were said to be breached. This appears to have sent the Council into a blind panic. It took them 10 weeks to answer even that simple question. That there was a 10 week delay in doing so makes it crystal clear that the

Council had absolutely no understanding of its own case at that stage and no evidence to support it.

23. What has followed since has been an attempt to manufacture a case out of thin air. The Council has sought to complain about things which never were, and never should have been a concern.

24. The Council offered very little by way of explanation of its case until January of this year.

25. Less than 4 weeks before the exchange of evidence, RBWM served a Statement of Case, raising a plethora of highly technical and entirely new objections to the Proposed Development. These were allegedly missed by all professional officers at RBWM and all statutory consultees across the period of over a decade during which the Site has been under close consideration for residential development. Indeed, even after that date, further technical objections continued to flow until just weeks before the inquiry.

26. The substance of these concerns has however been close to laughable. They include the following:

    a. Absurd claims about a pedestrian pathway in a park, which doubles up as a back-up access, is a mass evacuation route.

    b. Desperate claims that an early preliminary version of a CEMP should dictate the speed of lorries on the haul road, despite clear submitted evidence to the contrary.

    c. Utterly unconvincing claims that the Environment Agency ("EA") would somehow look to block a small section of material added to a path to achieve a 1:20 gradient could not be compensated for by a hole located anywhere at the same level across a massive site when large scale excavations are proposed.

    d. Unfortunate claims that a concern about pulling a wheelie bin a few additional metres on a estate, where many of the bins are pulled significant distance, is a reason to refuse this application.

27. There is no substance to any of the points the council raise. But even if there were, all of these matters were well capable of being addressed by way of condition.

28. It is important to point out that the Members have never endorsed the criticisms that have made some 6 months after their decision. The points now taken have been taken without any authority. Members were not asked to endorse the Statement of Case, not the many other issues which have emerged since.

29. Crucially, what the Council appear to have lost sight of is the fact this is a planning decision. A planning decision requires the balancing of the benefits of the scheme against the disadvantages. The advantages of this site are legion. Added to which it is, of course, a crucial part of the Council's own development plan. The proposal matches the allocation perfectly, delivers the number of new homes proposed and the policy compliant level of affordable housing, parkland and much more. That is even before one turns to consider the huge shortfalls in both the planned housing delivery and affordable housing delivery in the Borough. Members were required to take all these positive factors into account when deciding whether to grant planning permission. The criticisms come nowhere near providing even the beginnings of reasons capable to outweighing the benefits of the scheme, even on the statutory flat balance, let alone the tilted balance which also applies in this case.

30. In short, the Members decision brings the planning system into disrupt. It undermines the plan-led system. It undermines the effort that both the Appellants and all the planning officers have made to bring this scheme forward. It offends the professionalism and respect for professional judgment. The Members case is a case built entirely on conjecture and absurd nit-picking, with has no regard to the wider merits of the scheme.

31. It is against that background that this appeal falls to be determined.

32. Across two weeks, this inquiry has heard evidence of remarkable narrowness and petty absurdity. RBWM maintains a set of wide-ranging objections based on increasingly microscale elements of the Proposed Developments. The housing proposal is in outline. The only detail is in the access arrangement from the public highway. The Appellant was crystal clear in the application that all internal roads and pathways were, quite rightly, for the Reserved Matters. The Council changes that description for reasons best known to themselves, but the Appellants were clear and Council's can't change the description of development without good reason. The earthworks are understandably a full application. Both of course, can and should be, the subject of conditions where possible. Matters which can be dealt with by way

of condition should be. They should not be refused on that basis. Not that Members showed any awareness of that. And nor were they interested on conditions.

33. Moreover, the Members were not interested in deferring so that that the professional officers could provide more detail about the evidence to protect the Members from their folly. The planning officer and the Head of Planning both tries multiple times to get the Members to see sense. But the Members just would not listen and didn't care.[12]

34. We deal with each of the three sets of technical evidence in turn, in the order in which they were heard, in. The submissions below demonstrate that they are wholly unfounded. We then put these objections in context, by identifying the scale and magnitude of the affordable and market housing shortage in the Borough, and the crisis of affordability on which remarkably little focus has been placed. We then address the planning balance.

NOISE

35. Before descending into the detail of this highly technical issue, it is important to take a step back: to look at the context in which the Council has now raised concerns about noise and the sequence of events.

36. The starting point is that over the course of more than a decade, the appeal site was identified as a housing allocation. This has been done in the certain knowledge that there would be a need to raise the level of the land and ensure defence from the risk of flooding.

37. It follows that, of necessity, the land needs to be raised. As a consequence the allocation has proceeded on the clear assumption that material needs to be imported onto the site. No-one who took the trouble to look into the history of the allocation, could fail to have appreciated this fact.

38. When the allocation was proposed by the Council, and when plan was found sound by the independent inspector, it was clear that land raising would be proposed. The allocation itself was, of course, itself found sound. Again, land raised was well understood to be part of the proposal, not least because flood risk had, quite rightly, been investigated as part of the examination process.

[12] Transcript of the committee meet

39. It was therefore clear, plain and obvious to the Council that land raising was required.

40. It would be an absurdity for the Council to now claim that land raising is inappropriate. The land raising obviously involves the importation of material to ensure the levels across the site rise on average 1-2 metres.

41. Therefore, the land raising is perfectly acceptable and indeed necessary to deliver the allocation as land raising across the site is required to achieve the necessary levels. Members raised a noise concern. The only issue therefore is the mitigation required to lessen the noise impact of the work on others. In other words, the only issue raised by the Council is to question whether the noise can be mitigated to acceptable levels.

42. It is a matter which very obviously lends itself to being addressed by condition. And for reasons set out below, a matter which is actually far better addressed by a condition seeking a detailed site specific CEMP at a time when the Principal Contractor has been appointed.

43. A planning application for the earthworks, which includes cut as well as fill was duly submitted. The Council raised no concern about its submission, recognising as they did that it was necessary to delivery this allocated site.

44. In considered the earthworks application, what did the Council's Environmental Health Department think was necessary. The answer is a condition.

45. The Environment Health Officer ("EHO") had before her the initial framework Construction Environmental Management Plan[13] ("CEMP") for the earthworks application (see paragraph 1.1.1). The document itself made it crystal clear that:

    a. it was just an initial framework document (1.1.3)
    b. to be updated when the Principal Contractor was appointed (1.2.3).

46. Did the EHO treat this as the definitive CEMP for the earthworks? No. Very obviously she did not.

[13] CD C6.1

47. The EHO made it pellucidly clear in her consultation response that the Council required a new site- specific, detailed CEMP to be produced in due course.[14] Her response explicitly required the CEMP (yet to be submitted) to address **"Mitigation measures as defined in BS5528[15]: Part 1 and 2 2009 Noise and Vibration Control on Construction and Open sites."** And why did she require this? **"To minimise the noise disturbance from construction works."**

48. The EHO required this to be imposed as a condition on the planning permission for the detailed scheme. The clear, obvious and most appropriate solution suggested by a professional experience in these matters was a condition. Everything the Council has sought to do ever since has been to try and deny this – despite the fact it is obviously the solution.

49. In other words, what the EHO judged was required here was simply:

    (i) mitigation measures,
    (ii) Set out in a CEMP
    (iii) to be imposed in accordance with the correct standard BS5228
    (iv) to minimise noise disturbance; and
    (v) attached as a condition to be discharged by the same body (the Council) at a later stage,

    because that is all that was needed.

50. That was the professional judgment of the Council's own Environmental Health Dept. It is unclear why Mr Owen questions the EHO professional judgment in this matter. She is the local EHO, knows the area, and was perfectly satisfied with the imposition of a condition. Why was the EHO satisfied that a condition was sufficient? The reasons are blindingly obvious:

    (i) The Council routinely addresses noise issue through construction noise management plans attached as pre-commencement conditions to its permissions for major development.

[14] Louise Beamish, Proof, Apdx A
[15] sic 5228

(ii) The site is large and therefore as a matter of common sense there is clearly plenty of space in which to erect mitigation measures (in contrast to a tight urban site).

(iii) There is a single haul road into the site, which is not immediately adjacent to the houses, and therefore with plenty of space for mitigation between the haul road and the homes.

(iv) The application itself seeks the importation of vast amounts of material in the form of earth, the very same material upon which developers build earth bunds to mitigate noise.

(v) The ground is already proposed to be raised by between 0.5 and 3.5 metres as part of the planning permission. In the first few weeks that the Principal Contractor gets on site, they can build bunds to these heights using the material they are importing. This includes areas to the north of the closest houses on Aldebury where the land raising is proposed up to 3 metres.

(vi) Acoustic fences can then be placed on top of the bunds, which is a very common way to mitigate noise.

(vii) Large parts of the application site are far removed from the nearest houses.

(viii) The whole land-raising is only a temporary activity.

(ix) The initial estimate (the maximum importation of material 130,970 cubic metres) would only last 10 months on the assumed lorry movements identified in the highway evidence.

(x) The EHO required a detailed site-specific CEMP in line with the BS5228; and

(xi) All designed to achieve best practicable means to reduce the effects of noise.

51. It was the EHO's professional judgment that a condition would be entirely appropriate and the mitigation required would be line with BS5228 and include other constraints such on the hours

of operation. There has been no actual criticism of the EHO for reaching this judgment. She did not have a detailed noise report for the internal site work at that stage because she judged she did not need one. She had plenty of other detail but was satisfied a noise report at a later stage would be most appropriate. There can be no sensible criticism of that judgement. None of the development management policies in the BLP say when the report must be produced. The condition and the need for the CEMP meant there was no breach of policy.

52. The only reason we have the Council raising theses issues now, and seeking reports now, is purely because Members decided to raise noise without any evidence. Ironically, the Council's criticism of the absence of a specific report examining noise from the on-site activities supports the Appellants' case. It proves the Members had no evidence to justify their concern. The Appellants and the EHO were the ones who wanted a report – hence the condition requiring one which both saw as necessary. It was the Members who refused with no evidential basis for doing so. All that Mr Owen has done is attempt to shore up their position with criticism which, as explained below, involve a torturous rejection of common sense.

53. What Members failed to understand is that it is abundantly clear that the most appropriate time for carrying out the noise assessment is not at the planning permission stage, but at the stage when the principal contractor has been appointed. This is writ large throughout the initial generic CEMP[16]:

    (i) ***"This document represents the first stage in the preparation of the CEMP for the proposed development, as it prepared in advance of the appointment of the Principal Contractor(s). Once appointed, the Principal Contractor will use the CEMP as a framework to produce the final CEMP that will be agreed with the planning authority (envisaged to be via an appropriate planning condition on any planning permission for the proposed development.)"*** (1.2.3)

    (ii) ***The Construction and Environmental Management Plan (CEMP) provides a framework, which governs the construction works associated with the proposed development of all contractors and sets out, in broad terms, methods to avoid, minimise and mitigate construction phase effects on the environment."*** (1.1.3)

[16] CD C6.1

(iii) ***"The CEMP is a live document, which will be updated and reviewed at key milestones as the project progresses, to account for changes in working practices, regulatory requirements, personnel and equipment. Responsibility for adherence to its requirements will be the responsibility of the appointed principal contractor."*** (1.1.4)

(iv) ***"It is envisaged that, as a minimum, the CEMP will be reviewed and issued at the following project milestones:…"*** (1.3.1)

(v) "***The Principal Contractor will be charged with responsibility for management, co-ordination and implementation of the CEMP***" (3.2.5)

(vi) "At the application stage it is not yet possible to estimate in detail the number and types of construction vehicles, which will be generated by construction activities for the proposed development. The Principal Contractor will be responsible for ensuring the sufficient management of deliveries and vehicles movements within the site." (3.11.3) (all our underlining)

54. The CEMP is explicit in saying that the details of the vehicles to be used on site will be up to the Principal Contractor. Which is why it is best to assess the noise issue once that takes places not at the planning application stage.

55. It follows that not only is a condition requiring a CEMP to be submitted an appropriate way of assessing the noise impact and the necessary mitigation: it is in fact the best way to address the issue. Which is precisely what the EHO and Mrs Beamish knew. The Members did not. They demonstrated no awareness of this at all.

56. The EHO raised no fundamental concerns about the ability to mitigate noise impact on this large site to desired levels. Indeed, that is not Mr Owen's position either. He has just looked at various issued and tried to provide some justification for increasing the noise levels and lowering the threshold to be set, in the hope he can persuade the inspector of what? And that is the question. What precisely is he hoping to persuade the inspector of? That there is no opportunity to mitigate the noise from this site. That is hopeless. Is he trying to suggest that whatever is done by way of mitigation secured through the condition, it can never be enough

to make the noise impact of the ground raising can be made acceptable. Everything else is acceptable because it can be secured by condition.

57. But, of course, Mr Owen does not say that mitigation cannot be achieved. And nor could he. This is evident from his own work. He has advocated placing 1.8m noise barriers along the haul road. That could be done, albeit not as Mr Owen has done - which is to only erect for about 50 metres into the site – which makes no absolutely sense at all. They would be far more effective if they didn't stop at this artificial point.

58. Equally, acoustic fences could be erected at the edge of the site. Plainly these could sit on top of the raised ground levels for which permission is sought through appeal B as proposed by Mrs Beamish. These are more effective than Mr Owen's proposed mitigation as Mrs Beamish's results in Table 5.1 show.

59. But of course, what the Council have failed to appreciate is that there is nothing wrong with doing both - if that is considered appropriate. There are in fact multiple ways in which the noise can be mitigated on a site of this size. Which is why a condition requiring it to be assessed when the Principal Contractor has been pointed makes much more sense.

60. It has to be remembered here that this a members only RR. It was not based on any technical evidence of any kind. It was therefore dreamed up as a reason without any evidential basis. There is no rational basis for suggesting a condition cannot be imposed, just as the EHO proposed.

61. Indeed, that is precisely what the Council are now asking for: a condition requiring a CEMP, albeit renamed as a "Construction Noise Assessment" at the insistence of the Council. The necessity for a such a Construction Noise Assessment undermines the Council's whole case. Nothing screams ***"this is a matter cable of being addressed by way of condition"*** than the Council seeking such a condition addressing the same matter as original proposed by the EHO.

62. As to the condition now proposed, there was a lot of reluctance on the part of Mr Jarvis to agree this until after the noise evidence had been heard. That is understandable from the Council's perspective. No one wants to give evidence on a matter which can, and indeed is, being addressed by a condition with the condition sat there in front of them. Yet that condition drives a coach and horses through the Council hopeless arguments that this matter cannot be

addressed by way of condition, when the Council itself asks for the matter to be addressed by condition.

63. It stands to reason that a condition requiring an updated and site specific CEMP as proposed by the Council's EHO is the most appropriate course of action. Which is despite the attempt at name change, precisely what the Council are now asking for. The condition proposed by the EHO explicitly referred to BS5228, so the Council have only secured a condition which delivers precisely the same outcome as the one proposed at the application stage.

64. This completely undermines the Council criticism that the full application was not accompanied by its own assessment of noise. It simply fact is it didn't need to be. What was required was an appreciation of the fact an assessment is best done at a later stage. No-one is suggesting that a noise assessment is not required. It just was not needed at the planning permission stage. Moreover, as the CEMP acknowledges, the noise assessment is in fact better done when there is far more detail, including details of the vehicles the Principal Contractor intends to use.

65. A condition still gives the Council full control. The mitigation must ensure unacceptable levels of noise are not permitted (as per EP4(2)). If not, then the condition will not be discharged and commencement of development cannot take place. The onus will be on the developer to achieve that.

66. There was however, no evidence before the Members that mitigation would fail to deliver an acceptable level of noise. Far from it. The matter was considered by an EHO, who came to the conclusion that mitigation (hence requiring a further version of the CEMP predicated on mitigation measures) would be an appropriate solution to any noise concerns. And plainly it is, as there is plenty of space and the material by which to achieve it.

67. It is genuinely difficult to understand what the Council's case is at this point. If it is to suggest that fencing above 1.8m high needs planning permission, then all that would require is a planning application for higher fencing, which supposedly residents want. On this site, because of its scale, the fencing does not need to be close to the houses, less there be any amenity concerns. And any such fencing would be temporary anyway.

68. But of course, there is no need for any fencing above 1.8m in any event. Mrs Beamish evidence, shows on her table 5.1[17] that in all locations the levels of noise are below 65 dB LAeq 1 hour (the threshold she considers appropriate) with simply a 1.8m fence in place.

69. The Members however, had their own ideas. So they refused the full application on noise grounds without any technical evidence. That was July. The Council could not identify any case to make against the Appellant until the following January. In August the Appellant wrote to the Council to ask what criteria of policies EP1 and EP4 were relied upon. The delay in replying was inexplicable. No one from the Council's side has tried to explain it. But one sign of the problems that befell the Council is set out in Mrs Beamish proof at 1.3.4. Mrs Beamish contacted the Council's EHO following the refusal of the full application. And the EHO made clear she would be unable to support the Members position.

70. The RR itself is vague in the extreme not identifying any specific activity which was said to be unacceptable or to whom, being identified only as result in increased noise "***in the surrounding area"***. This is an utterly hopeless assertion which reveals in stark terms the lack of any tangible evidence.

71. Mrs Beamish kept asking what the foundation of the Members concern might be. By the Autumn she had established that the concern related solely to the noise levels from the construction access road within the redline boundary.[18] This has not been raised as a concern before. But keen to try and resolve it as quickly as possible Mrs Beamish produced an assessment of noise from the construction vehicle noise: Spencer's Farm.[19]

72. This noise report was produced in an effort to address Members unevidenced concerns about noise. But it had to be done despite the rather obvious difficulty that the vehicles to be used by the Principal Contractor could not be known, and for the reasons explained in the initial CEMP, would not be known until the Principal Contactor had been appointed.

73. This report makes clear was what being assessed. It made clear the number of vehicle movements proposed for the 130,970 cubic metres of material in line with the Transport

[17] Proof, page 22 of 26
[18] WSP Addendum Noise Assessment (October 2023) see page 1, 4th paragraph and page 2, second paragraph; Apdx F to the Appellant's Statement of Case
[19] Addendum Noise Assessment (6 Oct 2023) CD F8a.

Assessment[20]. Added to this, Mrs Beamish sensitivity tested lesser quantities of material in light of work done by Mr Wilkinson as explained in his section 7 of proof of evidence. Mrs Beamish set out all this information on Table 1 on page 3 of the Addendum Noise Assessment.

74. It is important to note that Table 1 also makes it crystal clear what the intended vehicle speed was - 24 km/h (which is 15mph).

75. Page 2 of the Addendum Assessment makes clear ***"This information [in Table 1] has been provided by i-Transport, the applicant's transport consultant."***

76. Despite being hindered rather obviously by the fact she could not know what vehicles the Principal Contractor will use, Mrs Beamish selected what she thought might be appropriate - a 29 tonne "***Dump truck (tipping fill)"*** from Table C2 of the BS5228. This table was selected because it is entitled "***Sound level data on site preparation".*** This is item reference number 30, selected amongst the vast array of possible vehicles set out in BS5228 – across multiple tables in Annex C, several of which might be said to be applicable to the proposed nature of the proposed works on site . What Mrs Beamish has done is make perfectly reasonable assumptions in the absence of any specifics (that being the whole problem with trying to assess it now- see above). To suggest that she has been inconsistent, as set out in the Council's closing is grotesquely unfair. The fact is there are lots of potential options. She selected a perfectly reasonable vehicle option for the report. It being remembered that this was back in early October last year. At this stage, the Council had not been able to particularise even which parts of the policy Members allege had been breached, let alone been able to substantiate their own RR. This despite having been asked to do just this simple task 6 weeks earlier.

77. This dump truck item has an A-weighted sound pressure levels at 10m of 79 dB.[21] One then adds 28 dB to get the sound pressure level from the noise source itself at source. In simple terms, the sound power level is the acoustic energy emitted by a machine, item of construction plant etc at the source. It is a fixed noise level. The sound pressure level is a measure of the sound power level but at a given distance from the source. The sound pressure level varies with distance.

[20] CD C.23, page 16, Section 5.22 and paragraph 5.2.3 precisely and Table 5.1
[21] See BS5228, page 47

78. Adding 28 dB to 79dB results in a sound power level of 107 dB, which is set out explicitly in the Addendum Assessment on page 4, second paragraph. ***"The model implements the calculation algorithms in British Standard 5228 and a sound power level (LWA) of 107 dB".***[22] This is also explained in Mrs Beamish's proof at paragraphs 4.1.6 to 4.1.7. The sound power level is the noise level at the source. Obviously noise reduces with distance.

79. The Addendum Noise Assessment also makes very clear that the relevant ABC method in the BS5228 was being adopted and the relevant threshold level to be used was 65 dB LAeq.[23] The results from this Addendum Assessment show all the noise levels well below 65dB LAeq, as set out on the Table 2, on page 5.

80. At this point the Council had no expert, no evidence and no case on noise.

81. The Addendum Assessment was then submitted to the Council along with the Appellant's Statement of Case on 23 November 2023. It is important to record that by this stage, the Appellant has been crystal clear to the Council that

    a. the noise impacts were best addressed through a condition requiring a CEMP
    b. the relevant standard was BS5228, as identified by the EHO in her consultation response
    c. that the conventional ABC method of assessment set out in BS5228 should be adopted
    d. that the vehicle speed on the haul road was 24 kph (15 mph);
    e. an assumption was made about the vehicles to be used; and
    f. the ABC method threshold of 65dB LAeq was not breached.

82. At some stage around Christmas 2023, Mr Owen was instructed.

83. To be able to support the Members in anyway he had to:
    a. explicitly reject any suggestion about the acceptability of noise being addressed a condition;
    b. explicitly reject the vehicle speed identified in the noise assessment;[24]

[22] [22] WSP Addendum Noise Assessment (October 2023) see page 4, 2nd paragraph, Apdx F to the Appellant's Statement of Case (CD F8a)
[23] WSP Addendum Noise Assessment (October 2023) see page 4; Apdx F to the Appellant's Statement of Case (CD F8a)

[24] Addendum Noise Assessment CDF8a

c. explicitly reject the vehicle selected;
d. minimise the effect of mitigation.
e. adopt a threshold well below 65 dBA;
f. reject the ABC method used routinely by the council in its noise conditions;

84. Without arguing against all of these points the Council had no case. So that was the position he had to adopt. But as has become evident, he has had to follow a torturous and unconvincing path to get there. We deal with each of his points in turn.

a. Rejecting any suggestion about the Acceptability of a Condition

85. Perhaps the greatest hurdle Mr Owen has faced is trying to convince everyone (including himself) that this is not a matter capable of being to be addressed by condition. The Council's EHO had done just that. He knew that. But rather than speak to her about it, he simply ignored her and made absolutely no attempt to speak to her, as he confirmed in XX.

86. That is really odd. Why would a newly instructed expert go and speak to the Council's existing expert, who had already studied the application material, understood the proposal and had spoken and liaised closely with the applicants noise expert. At the very least one would want to understand why the EHO had considered a condition acceptable. But Mr Owen did not do that.

87. Instead what happened was he set out a case in the Council's Statement of Case, issued on 10 January 2024. But he does not address the condition issue in the Statement of Case and remains silent on the issue. He then had his first meeting with Mrs Beamish, which was conducted on-line. Mrs Beamish records what was agreed in her proof of evidence on page 7. This page is worth reading carefully. It states that:

"It was agreed that an assessment of construction noise should be included in a planning condition with the appellant happy to commit to a Section 61 application (in accordance with the Control of Pollution Act 1974 (Core Document reference G6) being submitted to RBWM for determination once a contractor has been appointed and the detailed information necessary for a meaningful construction noise assessment is available."

88. The contemporaneous email exchange of this is set out in Mrs Beamish's Appendix B. It takes places on Thursday 18th January 2024 from 4:56pm (directly after the meeting). Mr Owen is presented with what was understood to be the agreed position. But rather than reply there and then, he does not reply. He does not in fact reply at all that day and not through the whole of the next day. It was not until after 5pm on the Friday that he replies. Not a time generally associated with people sat at their desks. Indeed, he felt the need to apologise ***"for leaving this late in the day".*** That was after 5pm on a Friday.

89. Mr Owen replies is evasive. He simply says a condition or similar commitment is not something that can be proposed or agreed. Nothing more than that.

90. When this was challenged by Mrs Beamish 6 minutes later, he fails to reply.

91. Mrs Beamish chases a reply again at midday on the following Monday. At 12.22pm Mr Owen does eventually reply. There are further exchanges and on 24 January Mrs Beamish confirms in an email the excuse Mr Owen gives for his failure to agree to a condition to resolve the noise issue: "***You confirmed your team's position that we, as technical experts, have no delegated powers to agree planning conditions as it was the members decision to refuse the application."***

92. This, of course, is completely inappropriate. The experts should be meeting to agree matters without the interference of others. The experts should be able to agree matters regardless of who they are instructed by. Their duty is to the tribunal – in this case the inspector. Not their client or whoever else is directing them on behalf of their client.

93. The Appellant had the same problem at the inquiry. For a long time, there was a refusal on the part of the Council to agree the noise condition. It subsequently transpired that it was Mr Jarvis who was directing the Council's team on this matter, as he accepted in XX.

94. The noise emanating from vehicles on the haul road is well capable of being addressed by condition: a condition requiring the submission of a CEMP, and based on BS5228. It should have been. The Council now seek a condition for the submission of a CEMP (albeit the Council has insisted on changing the name of the document). We are right back where we started.

95. The Council's unwillingness to agree a condition was in part based on their insistence on it prescribing a fixed decibel threshold. That despite the fact this is expressly discouraged in the same paragraph of the very guidance the Council relies upon to try and suggest this is 1-2 metre earth raising is akin to surface mineral extraction such an open cast coalmine (PPG 27-021-20140306).

96. As noted above, it has been really difficult to agree the condition. The one proposed by the EHO is of course the right one to impose. However, the Council won't now agree this. So instead the Appellant has been forced to agree a condition (because one ought to be agreed), which does not refer to a fixed decibel threshold, but seeks exactly the same thing by requiring the inspector to decide whether to apply either the ABC method set out in the BS5228 (65 dB) or the method set out in E.5 of the BS5228 (55 dB). In other words asking him to decide which fixed noise level to apply.

97. So the Council have insisted on a fixed decibel threshold which is precisely what the PPG on Minerals says not to do. And to be clear, the Appellants do not think this is appropriate. But it has to agree to it otherwise there would be no agreed condition at all.

98. Crucially however, the Council's insisted approach lends support to the Appellant's case that this site should not be treated as a minerals extraction site because the minerals guidance deprecates the use of fixed thresholds which is precisely what the agreed condition now does. As a consequence, if the inspector were to treat this as akin to a mineral site, he would have been led into error as the same paragraph of the guidance he would be relying upon, makes clear fixed levels are not appropriate.

99. The Council's position on rejecting any form of condition until after the noise evidence was heard and then insisting on a condition which the PPG says should be avoided is both confused and confusing, and completely unconvincing.

b. Reject the Vehicle Speed on the Haul Road in the Noise Assessment

100. Mr Owen's case hangs significantly on trying to insist that vehicles on the haul road can only travel 5mph (8kph). This is not what is set out in the noise report submitted to the Council in

October 2023.[25] That report was very clear that a speed of 24 kph was being adopted to assess the noise.

101. This figure is nearly identical to the speed in the example for dump trucks moving spoil on a haul road suggested in the BS5228 (25 km/h) at F2.7.2.1. see ***"Example 2 – Civil engineering: spoil movement on a haul road"*** , part ***"(a) dump truck: 12 journeys each way per hour at 25 km/h);"***

102. Mr Owen would have been well aware of this. But he has tried really hard to ignore it. That is because he needs the vehicles to be travelling much slower than 24 kph, to mount any kind of case against Mrs Beamish's analysis. . In fact he needs them to be 3 times as slow. This is because, only if the vehicles are travelling really slowly down the haul road can they create enough noise to achieve what he wants: which is to increase the average noise level over the hour – the LAeq 1 hour prediction. In other words, he needs the vehicles to be travelling on the haul road for as long as possible to get the noise levels up to the level he needs them to be. And for that vehicle movement to take place as much as possible over the course of the one hour of measurement. For anyone who has ever driven, 5mph is an incredibly slow speed to drive any form a motorised vehicle.

103. Of course, he does not totally believe in using the 5mph because in Table 1.1 in his proof he sets out the figures from his noise modelling and these show the results for both 8km/h and 25 km/h. He has at least recognised 25 km/h as legitimate. He has not had the strength of conviction to just rely on 5mph. It is implicitly that he recognises that it is unconvincing argument.

104. That Table is also important for revealing why Mr Owen is insisting on a 5mph speed down the haul road is revealed in Tabel 1.1 of his proof of evidence. One can readily see that by rejecting the 24 km/h in Mrs Beamish's noise report and insisting on vehicles moving at only 8kph this inflates his noise figures by around 6dB to 7dB in each instance.

105. What is problematic for him is that the highest predicted noise levels in gardens when speeds are 24kph [26] is 57 dB LAeq 1 hour at 146 to 150 Aldebury. The other two locations the has

[25] Addendum Noise Assessment, CD F8a

[26] For some reason he has used 25 kph, despite what is said in Mrs Beamish's Addendum Noise Report)

examined are, in fact, below 55 dB LAeq 1 hour.[27] Without those higher noise levels derived from lower speeds, he is in some difficult to mount a case for unacceptable noise levels in gardens of any property even on his own threshold of 55 dB LAeq 1 hour. And that is even allowing for his own completely bizarre and inadequate attempt at mitigation (see below).

106. So where does Mr Owen obtain his 5mph? He hangs his whole case on this issue, on a single reference in the initial CEMP; a document which itself claims to be only an initial generic set of concepts. He relies on a single sentence referred to in paragraph 3.11.6 of a document dated May 2022 from a section concerned with a Construction Management Plan (i.e traffic matters). This report is generic in nature and that is very evident from its contents. The initial CEMP also contains very clear statements about how it is just a framework, setting things out in broad terms and to be provided in detail once the Principal Contractor has been appointed: as detailed above. But Mr Owen makes no mention of any of these points. Because to do so would of course completely undermine his reliance on the document in the first place.

107. As is made explicitly clear from its own wording, the CEMP is a living document. That much is obvious from its basic nature. But also because it explicitly says so in its opening section[28]. Accordingly, concrete reliance on anything within it is misplaced. Furthermore, it is clear that even highly significant elements of the CEMP can, and will, change. As was put to Mr Owen during cross-examination, the version of the CEMP on which he seeks to rely, contains reference to a phantom access the site from the east, which has never been proposed[29]. That reference is of no consequence given the application material on transport matters makes very clear where the access points are, as does the officers report. But it does reveal how reliance on this document for non-generic material is inappropriate. That much was not lost on the EHO who expressly required a new CEMP in her proposed condition. Plainly, the initial CEMP it is not a reliable basis for making concrete assessments. Otherwise why would it come with all the clear text and warnings about its status.

108. Mr Owen's reliance upon this reference in the initial CEMP, and his wilful refusal to acknowledge the figure in Mrs Beamish's noise report for the internal haul road, which the Council had had back in November, is blatantly contrived.

[27] These figures rely on the inadequate and puzzling approach to mitigation that he employed with open ended fences along a small section of the haul road (see his proof 1.61, the further note seeking to explain what he had done and why and these closing below)
[28] CD C6.1 (§1.3.1)
[29] CD 6.1 (§4.6.2)

109. But it gets worse. That is because this issue of the noise source term was not even raised in the Council's Statement of Case. This point is well made by Mrs Beamish at paragraph 2.4.2 of her proof of evidence where she records the fact that at the first meeting ***"Mr Owen widened the scope of the RfR further by including disagreement of the source term (i.e. the noise level) used for construction vehicles on the haul road."*** In other words, Mr Owen had not even raised this issue of the noise source term by the time of the Council's Statement of Case, less than four weeks before the evidence was due to be exchanged. It was something new which he raised, no doubt in recognition of the fact he had to use lower vehicles speeds to get the noise levels up higher than those set out in the Addendum Noise Assessment.

110. In its closing submissions, the Council has tried to suggest there is no basis for the 24 kph speed set out in the Addendum Noise Assessment. But one only has to read the report, to see that on the second page it was i-Transport that had provided the figure: as it says in the fourth paragraph, the information in the Table 2 (including the 24 kph speed) ***"has been provided by i-Transport"***. Mr Thomas did not need to give oral evidence on the point. It was already set out in the documentary evidence, which the Council had before it by the time it had written its Statement of Case.

c. Reject the Vehicle Selected.

111. As noted above, Mrs Beamish had to select a vehicle that would be using the haul road from the vast selection on offer in the tables in Annexes C and D of BS5228. She has made clear why this was very difficult at this stage; and it is evident from the initial CEMP why: as it is a matter which can only really be addressed when the Principal Contractor has been appointed. But she had to select something given the Members were refused to agree a condition, contrary to the advice of their own EHO. As noted above, Mrs Beamish selected from the table addressing ***"site preparation"*** (C2), opting for a dump truck which is 29 tonnes: as close as one can get to the 30 tonne size vehicles iTransport used to calculate the vehicles movements in the TA.[30] In Table in BS5228 is C2, entry reference 30.

112. Mr Owen has rejected this. He made other selections. But his approach has been very confusing. He started with 82 dB in his proof. But in his rebuttal he increased that to 87 dB.

[30] TA submitted with the full application, Tabel 5.1 on page 16, CD C23

The claim made in the Council's closing that Mr Owen has been consistent is completely wrong, He has not been consistent at all. His starting point was, of course, not to raise any issue with the noise source in the Council's Statement of Case; then he opted for a sound pressure level of 82 dB at 10m and then changed it was 87dB. That is inconsistency.

113. Mr Owen criticised the fact that the vehicle Mrs Beamish relied upon was a measurement full of material and that she should also have looked at the vehicle empty. He points to the next entry on table C2 (ref 31) which is a 29 tonne dump truck showing 87 dB. This is where the 87dB in Mr Owen's rebuttal comes from. That is a very high figure.

114. But as Mrs Beamish has rightly pointed out, the vehicles would only be empty half the time. They will enter the site full. And so it is quite wrong to rely on 87dB as the appropriate figure. Again, Mr Owen does this to inflate the noise levels, as he has to.

115. Mr Owen has not challenged the noise generated from the earth moving activities on site and during cross examination accepted Mrs Beamish's levels for on-site activities. That includes the stockpiling, the excavators the dumper trucks which move it to the final location and the dozers which grading and spreading the earth to final required contours.[31]

116. What has emerged however, is recognition by both noise experts that because haul road is being used for the importation of material, the vehicles that will bring this material onto the land will travel on public roads. So they will not be dump trucks at all. They will be road lorries. Both noise experts now adopt this position and so there is no need to consider dump trucks using the haul road any further: so there is no need to consider entries 30 and 31 in Table C2 of BS5228. Mrs Beamish relies on entries 19-22 on table C6. These are all road lorries and a mixture of empty and full. As can be seen there is not much variation in lorry noise between the empty and the full lorries. The average of these entries of 80 dB (80.2 dB) which is just 1dB more than the figure in her Noise Assessment[32] for the full application.

117. Mr Owen uses table C11 and selects a series of 32 tonne lorries: the average of the 6 he has selected is 81.5 dB.

[31] See Mrs Beamish PoE, page 19 of 26, paragraph 5.1.2 for the list of activities included in the noise assessment model

[32] Addendum Noise Assessment

118. So in the end, there is not much to chose between the two sets of figures. Both experts have recognised that it is more appropriate to look at lorries rather than a dump truck. And there is only 1 dB difference between them even when looking at empty and full lorries. But the real truth is that we don't know what road lorries the Principal Contractor will use, which is yet further support, if it were needed, for this issue to be addressed by way of condition and a detailed site specific CEMP to be submitted at a later, more appropriate stage. Just as the Council's EHO had suggested.

119. Mrs Beamish figure of 80 dB is perfectly acceptable and only 1 dB difference from the original 79 dB figure she has used in her modelling. There is nothing of significance here that impacts the modelling.

120. What is agreed is it is appropriate to look at road lorries. The haul road will have to be constructed to be suitable for them. The idea that road lorries will travel at just 5mph (8kph) down the road is absurd. Especially when for moving spoil on a haul road the example in BS5228 adopts a speed of 25 kph for dump trucks.

121. Mr Owen's rebuttal sought to focus on 87 dB for empty dump trucks which, as explained above is not applicable, as the lorries will plainly be full half of the time – that is why they are arriving in the first place. And it is now agreed not to use dump trucks. But nevertheless, Mrs Beamish's Additional Noise Note of 4th March 2024, she approaches the matter from a 'worst-case scenario' analysis, and adopts a source term based on 50% 82 dB LAmax at 10m and 50% 87 dB LAmax at 10m, as a sensitivity test. It should be noted that the footnote to many tables in Annex C of BS5228 (including C2 and C6) which explains the Lamax parameter: "Drive-by maximum sound pressure level in Lamax".

122. Mrs Beamish concludes that, at the worst affected dwelling (150 Aldebury Road), this would result in a 4dB addition to the noise level, which could still, with appropriate mitigation, fall under the 55dB criterion. In his oral evidence, Mr Owen provided the following assessment of the Additional Note:

> "The approach in the two bullet points on page 2 was 50% being 82dB at 10m, which was the approach that I took in my proof as 100% being at that level. The 50% in the second bullet point is at 87dB at 10m. So what would be proposed here

would be noise levels higher than what I have outlined in my proof. *This would definitely be a worst case*" (emphasis added).

123. Accordingly, even when one adopts a source term described by Mr Owen as "definitely a worst case", and applies it to the worst-affected property at 150 Aldebury Road, Mrs Beamish's evidence is that appropriate mitigation brings the noise level under even the more stringent 55dB threshold. Mr Owen cannot challenge that evidence, as his analysis of mitigation is fatally flawed: see immediately below.

d. minimise the effect of mitigation

124. Mitigation is a fundamental part of noise assessment work. Significant and important reductions in noise levels can be achieved by placing barriers in the right places. Modelling work to look at the levels of noise can accurately assess the impact of noise barriers. What is important is show where the barriers are located. Mrs Beamish did this very clearly for her evidence to the inquiry. The location of the barriers she has included in her modelling work are shown in her proof at Appendix F. The location of the barriers seeks to mitigate the noise for residents on Aldebury Road to the south of the appeal site, and Culham Drive which is to the west of the railway line. One can see in Table 5-1 of Mrs Beamish's proof of evidence how even a 1.8m barrier mitigated the noise levels below 65dB LAeq 1 hour in all instances and at all residential areas.

125. It is important to remember that Mrs Beamish's model uses the proposed finished ground levels granted by the earthworks planning application itself. So that a 1.8 metre barrier will be much higher than 1.8m above the current ground levels. Mrs Beamish used the finished site levels for her barrier to make sure they provide the required noise reduction as the earthworks evolve. This is because, as the land around the barriers is raised, the construction plant gain height but the barrier remains effective. If she had used the existing site levels as Mr Owen appears to have done, and specified a 1.8m high barrier, the barrier would become ineffective very quickly as the site levels and height of the construction plant around it increases.

126. The land raising will increase the height of the land across the site by between 0.5 and 3.5 metres. A lot of the most significant raising will take place in the land to the north of the properties along Aldebury which face the site.

127. The top of Mrs Beamish proposed 1.8m high barriers has modelled would therefore be sitting some 4 or 5 metres higher than current ground levels on the site.

128. As noted above, the imported earth material can be used to create bunds in these areas to the height of the proposed finished ground levels permitted by the planning permission. This can be done in the first few weeks. It is also the reason the PPG guidance on Minerals expressly endorses a higher noise level for short period of up to 8 weeks for amongst things noise bunds (baffle mounds):

"Increased temporary daytime noise limits of up to 70dB(A) LAeq 1 h (free field) for periods of up to 8 weeks in a year at specified noise-sensitive properties should be considered to facilitate essential site preparation and restoration work and construction of baffle mounds where it is clear that this will bring longer-term environmental benefits to the site or its environs." (PPG 27-022-20140306)

129. It follows that consistent with the full planning permission, substantial bunds with acoustic fences on top can be erected around the edge of the site without the need for any further requests for temporary planning permission.

130. Mr Owen's approach is very different. He has put a mitigating fence along the edge of the haul road. That will have an impact. But the problem is he has only provided the mitigation between the line of trees at the edge of the allocated site to a point approximately 50 metres inside the site. But

(i) from the edge of the actual site entrance off Cookham Road to the trees; and
(ii) from 50 metres into the site, along all the rest of the haul road,

his modelling shows no mitigation whatsoever.

131. The mitigation he proposes is bizarre. It is severely limited in length and completely non-existent along most of the haul road, the very thing he claims to be mitigating.

132. Mr Owen was not very forthcoming about his so-called mitigation. His sole reference to this mitigation is contained in the last bullet point of his proof at paragraph 1.61. He refers to an enabling works fence to be 1.8m high. Curiously,
    (i) he does not say where his fence is located; and
    (ii) he does not reveal the fencing on any plan

133. He says it is shown on noise modelling plan in figure 1.2 in his proof. But it is almost impossible to see against the colours and most significantly it is not labelled anywhere in that plan. It presentation looks to be deliberately opaque, no doubt designed to try and mask its complete inadequacy and ineffectiveness.

134. Crucially, it provides no mitigation in terms of the lorry movements beyond 50 metres into the site. The noise from lorries beyond this point is therefore completely unmitigated. The same is true for the site entrance of Cookham Road and the land it crosses, albeit in that location there is already frequent traffic during working hours.

135. Where did Mr Owen get this supposedly suitable location for the noise barrier. As his proof reveals, it is from the initial CEMP, the very document the EHO considered need to be replaced as part of the condition to be imposed: see Mr Owen's proof at 1.61 ***"as stated in the CEMP".*** Added to which the CEMP does not show where this Enabling Works Fence would be. So Mr Owen has just sought to place it at wherever he things is appropriate. It is certainly not working as effective mitigation as it is open ended.

136. There is also no evidence in what he has provided that his modelling relies on the raised levels secured by the full permission itself. That height increase has the potential to further enhance mitigation by causing there to be less chance of the lorries being unmitigated by the fence.

137. Mr Owen's attempt to suggest what he has done is genuine mitigation is completely inappropriate and unreasonable.

138. It is important to understand the three sets of predicted noise levels which are before the inquiry.

    a. Mrs Beamish's October Addendum Noise Report, Table 2: These show the predicted noise levels at the nearest receptor property (150 Aldebury Road), for noise from just

the haul road vehicles (as per the Council's concern). The vehicle speed is 24 km/h and has a dB sound pressure level for a haul route vehicle of 79 dB at 10m. This noise source is unmitigated. The noise level at the nearest property in the garden is 59 dB LAeq 1 hour. It is important to note that various scenarios are presented in Mrs Beamish's Table 2. For the importation of 130,000m3 of material over 10 month, the noise level is 60dB. For 100,000m3 over 10 months, the level is 59dB. The latter is what Mr Owen modelled.

b. Mr Owen's Proof of Evidence, Table 1.1: this show the predicted noise levels at three locations (the nearest being 146-150 Aldebury Road), for noise from just the haul road vehicles (as per the Council's concern). With a vehicle speed of 8 Km/h he has a dB sound pressure level for a haul route vehicle of 82dB at 10m. This noise source is mitigated by the 1.8m high barrier, but for the reasons explained above it is inadequate mitigation. The noise level at the nearest properties in the garden for vehicles travelling at 25kph is 57dB LAeq

c. Mrs Beamish Proof of Evidence Table 5-1: this shows the predicted noise levels at all of the properties along the southern and eastern boundary which are closest to the site (see her Apdx F). It relates to the noise from all the activity on site happening at once – including vehicles on the haul road, excavators, dump trucks and bull-dozers: the predicted noise levels with a 1.8 meter fence on top of finished site levels of between 56-64 dB LAeq, 1 hour at the properties along the southern boundary when on-site construction activity is in this area (Phase 1 of the Earthworks Phasing plan).

139. The first two sets of noise predictions show how ineffective Mr Owen's mitigation is – it makes hardly any difference to the figures in Mrs Beamish's Addendum Noise Report.

140. The third set of noise predictions – from Mrs Beamish proof – and the most important and the ones to be relied upon. They are expressed as ranges because they relate to the large number of properties that she has considered Crucially, they also show the noise modelled from all activity on site. Mr Owen has not attempted to do this. He accepted in XX this is not something he has looked at. This becomes important when one considered the "6 months" duration point below – because other than the haul road, the activities on site need never be anywhere near a property for more than 4.5 months at most.

141. Equally important is the fact that by using different barrier heights, Mrs Beamish is able to demonstrate how effective the mitigation is that she has proposed, which is in complete contrast to Mr Owen's mitigation. Both the location and the design of the mitigation Mrs Beamish has included is far more suitable and effective. And raising the height of the noise barrier would make it even more effective – meaning that if the Council was really concerned about noise impacting on residents it would plainly make sense to grant permission in due course for higher temporary barriers if that was thought necessary as part of the CEMP process.

142. A proper full length acoustic fence either side of the haul road might well offer some mitigation. But it would need to be erected from the Cookham Road (where there are already plenty of daily HGV movements) to the end of the haul road located well within the Phase 1 area. And it should be erected on the finished ground levels. This could be done in addition to the mitigation proposed by Mrs Beamish and lead to dB levels far below even those shown in her Table 5-1. Such a haul road fence therefore has some potential value in terms of the content of the agree noise mitigation strategy proposed in the condition.

143. But what Mr Owen has done to try and demonstrate mitigation is inadequate and potentially misleading. He has not modelled an effective noise barrier and that is very clear from a comparison of the figures.

144. In a last-ditch attempt to address the fatality of this point to their case, RBWM advance a series of criticisms against Mrs Beamish's mitigation modelling in their Closing Submissions[33]. None are well-founded.

    a. First, it is said that "***consideration to additional mitigation***" was only given **"at a very late stage"**. The mitigation subsequently referred to was in fact detailed in Mrs Beamish's Proof of Evidence. If RBWM seeks to contend that such a stage is "a very late stage", then it follows that more or less its entire case on noise issues was advanced "at a very late stage".

    b. Second, there is reference to planning permission not having been sought for the mitigation proposed, and to a consequent failure to consider impacts on amenity.

[33] §§31-32

Using the ABC method, and Mrs Beamish evidence there is no need for any fence to be higher than 1.8m for which planning permission is not required.

c. Third, it is suggested that the barriers proposed near the site boundary at 150 Aldebury Road are "***unassessed"***. It is wholly unclear what is meant by this; as the Additional Noise Note makes clear, Mrs Beamish *has* produced specific updated predictions in respect of the impact of that mitigation.

d. Fourth, it is suggested that the mitigation suggested by the Appellant is "***a product of the failure at the application stage to give any consideration at all to the noise effects of the construction activities".*** This is simply not true – the only reason the Appellant has been required to produce updated predictions close to the inquiry is the wholesale failure of RBWM to be even remotely clear as to the nature of its case on noise until that point, as detailed in the separate costs application.

e. adopt a threshold well below 65 dBA

145. Perhaps the second most significant problem for Mr Owen (aside from the fact the matter is best addressed by condition) is that none of the figures in Mrs Beamish's assessment of noise are above[34] 65 dB even for the closest receptors to the works in Phase 1 on the SE corner of the site. Not even with just a 1.8m fence: see her table 5-1. The predicted noise levels all fall within the ranges of 50-64 dB LAeq 1 hour. Higher fences would reduce them all to 55dB of below.

146. The Council seem intent on suggesting that nothing more than 1.8m fence can be contemplated because anything else needs planning permission. But it would seem very odd if a temporary higher fence would have an even more beneficial effect, yet the Council sought to oppose that, whilst also seeking to express a genuine concern about noise from earthworks it has deemed necessary to delivery an allocated site. Very odd indeed. Either the Council has a desire to mitigate noise effectively or it doesn't.

[34] It is to be noted that acceptable noise threshold of 65 dB, including noise at 65dB. It does not need to be below 65dB.

147. Added to which, the noise mitigation modelling does not account for existing fences and walls around the existing properties, such as the very solid brick 1.8m high wall that is already located on the western side of the rear garden of 150 Aldbury Road. That will clearly have a significant mitigating effect. So the actual noise level in the garden will be far less.

148. Such a wall could be built around the northern end of the garden at the Appellant's expense and indeed other properties and provide significant mitigation at close quarter for these residents. Fences could also be replaced with acoustic grade wooden fences of an appropriate density. Temporary fences could be erected along the edge of the footpath backing onto the site around the houses at Aldbury Road and Lutman Lane. BS5228 advocated considering these type of bespoke measures for residents if necessary, including in extreme cases improving glazing at some properties. All these sort of additional measures are the type that can be employed as part of the CEMP, if there are any localised noise issues which need addressing.

149. But crucially, the evidence does not show that is necessary. Because even without any of these additional measures, such as haul road fencing, taking account of existing fencing or the brick wall at 150 Aldbury, offering residents improved fencing (none of which require planning permission), or building the bunds higher using some of the significant quantum of material to be imported onto the site, the noise predictions in Mrs Beamish assessment in her proof (Table 5-1) show appropriate noise levels below 65 dB LAeq 1 hour, with just a 1.8m boundary fence on top of the raised ground levels permitted in the permission.

150. This assumes, Mrs Beamish's noise source, vehicle speed and mitigation barriers located on the edge of the site, as proposed shown in her appendix F. But for the reasons explained above these are to be preferred to Mr Owen's figures in each instance.

151. But if Mrs Beamish's evidence is preferred on these disputed issues, then Mr Owen's only option to argue for a noise threshold below 65 dB as his measure of unacceptability. And that is what he has had to do.

f. reject the ABC method used routinely by the council in its noise conditions

152. One the assumption Mr Owen arguments addressed above are without any merit, then he is forced to reject the 65dB LAeq 1 hour threshold which Mrs Beamish has adopted. That is very clear from the analysis above.

153. The 65 dB LAeq 1 hour level is set out in BS5228 in Annex E. This is the section dealing with the significance of noise effects. Numerous possible approaches are suggested. Crucially, it begins with these words ***"This annex gives examples only."***

154. The next paragraph beings ***"The examples in this annex offer guidance that might be useful in the implementation of discretionary powers for the provision of off-site mitigation of construction noise arising from major highway and railway development."*** (our underlining)

155. The earthworks are definitely not on the scale of major highway and railway developments. There is a note in the text at this point, which states that ***"The assessment can include eligibility for noise insulation or temporary re-housing, as forms of mitigation…"***

156. The main text continues ***"These powers were introduced in the Noise Insulation Regulations 1975 under the Land Compensation Act 1973… Off-site mitigation might not be applicable in all circumstances or to other categories of construction project."***

157. To be clear, there is no evidence of the need for any off-site mitigation here, but these sections of text give an indication of the scale of proposals which are being contemplated in this Annex.

158. This is also the section that deals with the "**c) Control of Pollution Act (CoPA) 1974, Section 61** ***"Applications for prior consent for work on construction sites" Applications under this section of the CoPA are often found to be desirable and useful by both local authority and the contractor"*** Which is precisely the procedure which could have been secured by condition and which Mrs Beamish had understood Mr Owen to have agreed to by the end of their first meeting on 18 January 2024.

159. Section E2 deals with ***"Potential significance based on fixed noise limits"***. It begins ***"For projects of significant size such as the construction of a new railway or trunk road, historically there have been two approaches to determining whether construction noise levels could be significant."*** One gets a sense of the scale of projects being contemplated in

the guidance from this wording and that quoted above – major road and trunk road construction projects.

160. Section E2 then details the first of these approaches being proposals promoted by the Wilson Committee in its report on noise setting a level of 70 decibels (dBA) in rural, suburban and urban areas away from main road traffic and industrial noise. The second method ***"to determine the potential significance of construction noise levels is to consider the change in the ambient noise levels with the construction noise."*** (E3.1)

161. The first example in this second approach is the ABC method. The Council routinely adopts the ABC method by the Council in the noise condition it imposes on other planning permissions for major projects. One is then directed to Table E.1 which has ***"Example thresholds of potential significant effect at dwellings".*** The daytime ambient noise levels around the appeal site are less than the values in the table, so category A is used as Mrs Beamish explained in his oral evidence. So the relevant threshold is the lowest one on the table for daytime noise – namely 65 dB LAeq, T). As note 1 below the table records ***"A potential significant effect is indicated if the LAeq, T noise level from the site exceeds the threshold level for the category appropriate to the ambient noise level."***

162. What all this means is that the appropriate daytime threshold figure to be adopted in this instance is 65 dB LAeq and if it is exceeded ,this means there is a potential significant effect. Not that there definitely will be. But that there is the potential for that to happen.

163. The text above in table in E3.2 makes this clear. That paragraph then ends with these words: ***"The assessor then needs to consider other project-specific factors, such as the number of receptors affected and the duration and character of the impact, to determine if there is a significant effect."***

164. There is no need to consider these issues if the values are 65 dB and below. But even if they are exceeded what is relevant here is that the earthworks proposed are a temporary operation, taking place in three phases and moving further and further away from the very limited number of receptors who are considered to be potentially impacted. The only noise the Council have raised objection to lorries on the haul road, in a location where there is already a lot of traffic from Cookham Road. There are no noise sensitive receptors to the north or east of the site. And to the west there is a railway line and a road, which both also separates the site from the

houses on Culham Drive. These houses are in the main are side on to the site and behind boundary fences adjacent to the road: fences which are located well above the site.

165. It follows that even if the noise levels were above 65 dB LAeq, there are plenty of reasons why that would not amount to a potential significant effect, which is what this method is advocating. Yet, as explained above, Mrs Beamish's evidence does not show any values above 65 dB LAeq. They are in fact all below 65 dB LAeq.

166. It is though worth reflecting on the fact that the projects being identified in this section are ***"major highways and railway developments"*** and projects where people might need ***"temporary re-housing"***. It is therefore fanciful to suggest that the ABC method relates only to small projects or those that only last a few weeks. What are being discussed in this section, to which the ABC method is a part, are huge projects which last for years. Indeed, the Council's closing suggests that the ABC method does not take account of duration. But as cited above, "duration" is a specific factor in deciding whether an exceedance of the threshold (65 dBA in this case) amounts to a significant effect (E3.2).

167. For the reasons outlined above, Mr Owen needs a lower threshold to sustain the Members case. He has selected section E.5 ***"Construction works involving long-term substantial earth moving".*** As explained the text ***"Where construction activities involve large scale and long term earth moving activities, then this is more akin to surface mineral extraction than conventional construction activity."*** The guidance then refers to Technical Guidance to the NPPF, which has been withdraw.

168. Similar text is now found in the PPG on Minerals. This sets a threshold of 55dB LAeq. Crucially, however, the text in BS5228 makes clear this threshold should apply ***"only where the works are likely to occur for a period in excess of six months."*** The last vestiges of the council's case on noise are based on this one sentence. It is inappropriate for the following reasons:

    - Erroneously claiming the works are akin to Surface Minerals Extraction
    - Inappropriate insistence on fixed thresholds in a condition
    - Adopting guidance used for major construction projects like ports
    - Focussing on the wrong duration
    - There will be less material

(i) Erroneously claiming the works are akin to Surface Minerals Extraction

169. The earthworks proposed with this application are the bringing on of soil material to increase the height of the site by an average of between 1-2 metres. That is it. The initial estimates were that 130,970 cubic metres of material needed to be imported. The time estimate for doing this is 10 months.

170. Surface mineral extraction such as open cast coal mines and stone and slate quarries are often worked for 30 or 40 years.[35] If not a lot longer. They involve a constant development process. These mines and quarries involve the constant extraction of material often with blasting and other mining related activity. The proposal here is nothing like that in terms of either scale or duration. Again, it is to be remembered that Section E of BS5228 is focussed on ***"major highways and railways developments".*** The scale of such works is far in excess of the earthworks proposed with this application.

171. The more detailed work on the cut and fill carried out by Mr Wilkinson suggests that might only need to be 86,100 cubic metres (66%)[36]. That would be close to 6 months if done at the same rate as that original proposed. Alternatively, for the 10 month period it would far less vehicles movements each day – which again would lessen the noise.

172. Mrs Beamish has worked on minerals sites and in her expert opinion what is proposed here is not akin to a surface mineral extraction. Mr Owen has no such experience. Yet he asserts it as conjecture. That is unfortunate.

173. Mrs Beamish has worked on other development sites like this. Again that has helped inform her view of what is and is not akin to surface minerals extract. Mr Owen has no such experience of sites like this as he confirmed in answer to the inspector's questions to him. Therefore again his assertion is theoretical in terms of how this proposal compares or differs to a mineral sites.

174. Mrs Beamish is in a far better position to make that professional judgment. She has worked on a number of large-scale earthworks projects lasting over six months *and* on a number of

[35] The minerals PPG makes clear at the start it applies to aggregates and bodies of rock***: "What are minerals resources and why is planning permission required?"*** (27-001-20140306)
[36] Andy Wilkinson, Proof – section 7

surface mineral extraction schemes. She is ideally placed to compare and contrast the two from a noise perspective, given that expertise. That is the task which Annex E.5 sets. By contrast, Mr Owen has never worked on a surface mineral extraction scheme, and nor has he worked on a scheme of any kind involving this extent of earthworks. It is therefore difficult to see how Mr Owen can be in a better position to compare and contrast two types of scheme than Mrs Beamish, having never worked on either type.

(ii) Inappropriate insistence on fixed thresholds in a condition

175. Section E5 quotes from Technical Guidance which has been withdrawn. In its place there is paragraph 021 of chapter 27 of the PPG. It is similar to the Technical Guidance quoted. But not the same. It does refer to 55 dB(A). But it also acknowledges that might not always be practicable. Crucially, what the extract from the Technical Guidance in BS5228 does not contain is the next part of the PPG in the same paragraph. This reads

"Care should be taken, however, to avoid any of these suggested values being implemented as fixed thresholds as specific circumstances may justify some small variation being allowed."

176. In very clear terms what it is making very clear is that decision makers should avoid setting standards as fixed thresholds: the very thing the Council has sought to insist on. The Council is insisting on a fixed value as it wants the inspector to chose between the ABC method (65 dB) and or the E5 method (55 dB). Contrast that with the EHO's suggested condition which plainly does not look to prescribe the method until the detailed site specific CEMP has been prepared, which will be when the main contractor is appointed.

177. The fact the Council's inquiry team are seeking to insist on a threshold being set before the detailed CEMP has been prepared and the Principal Contractor and their equipment have been identified is completely at odds with the Council's normal position. It is the exact opposite of what the EHO advised, who provided a condition which does not have a fixed value in it. And the Council has provided no examples of other conditions it has imposed which contained fixed values. The Council's inquiry team is operating in a way which is inconsistent with the Council's own decision making and inconsistent with the PPG.

178. The Councils want to keep reliance on the Technical Guidance alive by saying it is replicated in paragraph 27- 021 of the PPG. Yet at one and the same time want to distance themselves form the full contents of that paragraph i. It is the wrong guidance to be using in this instance. The Technical Guidance did not contain the guidance in the PPG quoted above (see para 30 of the Technical Guidance). Which is why reliance on E5 is problematic, as it's amended contents paints a very different picture about the applicability of fixed values.

179. Fixed values should definitely have been avoided. But the Council won't agree a condition without prescribing the method and hence a fixed value. So the Appellants have been forced into the current position. But to be clear the Appellants are content for the condition to refer to the ABC method. That is only because Mrs Beamish has had to do all the on-site noise modelling works. This shows how the 65 dB can be achieved with just 1.8m fences. But none of that work should have been necessary at this stage.

(iii) Adopting guidance used for major construction projects like ports

180. Section E5 of BS5223 requires careful reading. Most of the text is not from the Technical Guidance. That part which is not reveals where this approach - linking the withdrawn guidance on surface mineral extraction to construction - has been judged appropriate. It is based on an approach adopted ***"within a number of landmark appeal decisions associated with the construction of ports."*** The construction of a port is a vast engineering project which last years and involve continuous working throughout those years. That tells the inspector all he need to know about whether this proposal for 1 - 2m land raising[37] is akin to construction projects of this scale. Self-evidently it does not.

181. The Council seeks to dismiss the reference to ports. But it could not be more apposite in the context of this case for demonstrating Mr Owen (if it was indeed his idea) has misjudged the character of the full application.

182. Contrary to RBWM's Closing Submissions[38], it is clearly relevant that the only worked example in which Annex E.5 is cited as having been used in practice is in the construction of ports, schemes of incomparable greater magnitude than Appeal B.

[37] Average of 1-2 m across sthe site
[38] §22

(iv) Focussing on the wrong duration

183. The Council's entire case hangs by a thread based largely on the reference to 6 months. But what the Council have singularly failed to acknowledge is that the land raising will take place mostly far away from the nearest houses. Unlike most mineral operations which remains in the same place for years, the land raising nearest to the houses will be over in a few months. Indeed, the whole of phase 1 is estimated to be over in 4.5 months. Mrs Beamish includes the earthworks phasing plan as Apdx D to her proof.
    - It shows that Phase one involves 47,920 tonnes of fill;
    - that is 44% of the total of 109,300 tonnes;
    - in terms of time, 44% of 10 months is 4.5 months.

184. Phases 2 and 3, which make up the remaining 5.5 months are far removed from the houses on Aldebury Road. They are also far removed from the houses on Culham Drive which are impacted by Phase 1. So, no area of housing has more than 4.5 months of activity. As a consequence, the 6 months point does not help the Council at all.

185. There will continue to be lorries on the haul road. But Mrs Beamish's Addendum Noise report shows how that will have a much lower noise level even at the nearest property. That 59dB LAeq figure is an unmitigated figure (i.e. with no noise barriers at all). So the mitigated noise levels at that property from the lorries will be far below 59 dB LAeq. The Council's focus on the haul road has fizzled out to a whimper. There is absolutely no evidence whatsoever that the noise from the haul road is an issue. It can plainly be suitably mitigated. It is, and always was, a bad point.

186. The noise that has been predicted by Mrs Beamish is the combined noise from all the on-site activities and the haul road – see paragraph 5.1.2 of her proof. So the noise that has been examined involves the combined noise from all the activities on site. And after 4.5 months there will no such combined activity in the Phase 1 area.

187. The Council's concern here contrived. It is very obviously both a temporary and a transient phased operation. Local people will be able to see that. They will see it being completed, they will in most instances see the operations moving further away from them and, crucially, that it will then come to an end. As Mr Owen accepted the fact it is only temporary will be

important to people concerns. That much is made plain from the contents of BS5228, which repeatedly references duration as a relevant factor.

188. RBWM's case on this point rests entirely on the 'six month' threshold. Yet, Mr Owen accepted in cross-examination that, if the works lasted under six months, Annex E.5 would be inapplicable. . RBWM's position is indefensible on even the briefest analysis of the phasing plan.

189. In Closing Submissions, by way of wholly different line of argument, the Council seek to suggest that Annex E.5 is also preferable because it incorporates concerns raised in Section 6 of BS 5228 as to 'duration' and 'noise character', whereas the ABC method does not[39]. This is wrong for a number of reasons. First, the question of 'duration' is relevant only where the receptors in question are likely to be exposed to a significant effect to begin with. This is recognised in paragraph 6.3(c) of BS 5228-1, which states, "***in general, the longer the duration of activities on a site, the more likely it is that noise from the site will prove to be an issue, assuming [Noise Sensitive Premises] are likely to be significantly affected"***. The duration point is, accordingly, inconsistent with BS 5228.

190. Second, the question of 'noise character' is not addressed in Annex E.5 at all. As paragraph 6.3(f) makes clear, 'noise character' or 'noise characteristics' refers to "a particular characteristic of the noise, e.g. the presence of impulses or tones" which "can make it less acceptable than might be concluded from the level expressed" in ordinary terms. Simply, Annex E.5 makes no reference to 'noise character', and does not deal with it at all. Accordingly, this alternative line of argument fails on both counts.

191. It is to be remembered that the Council's only concern, and the only thing Mr Owen has modelled is noise on the haul road as it passes nearby houses. There is no impulses or tonal element to a lorry driving down a haul road. This relates to things like metal being thrown into a skip or a machine that makes an unusual and persistent noise. There is no evidence from the Council about these matters.

192. For completeness, the Council also refer to an alleged "error" in Mrs Beamish's Proof of Evidence as lending weight to this alternative line of argument[40]. There is, on analysis, no

[39] §§16-18
[40] §21

such error. The point appears to be that Mrs Beamish failed to make specific reference to the 55dB limit in BS 5228 and the PPG in paragraphs 3.2.1 and 3.4.7 of her Proof of evidence. This is a complete non-point, it is wholly unarguable that Mrs Beamish was unaware of, or did not draw attention to, the existence of the 55dB limit in both documents. Her proof of evidence refers repeatedly to the 55 dB level relied upon by Mr Owen[41]. This type of claim reveals the extraordinary extent to which the Council's inquiry team has been wasting inquiry time with inappropriate assertions.

(v) There will be less material

193. Given the Members refusal, Mr Wilkinson has examined the land raising in more detail in preparing for the inquiry. He makes clear that only 86,100 cubic metres of material will be required to be imported. (see his proof 7.1.1.7). This was not challenged by the Council.

194. It means there will be less imported and less activity, whether that is over a shorter period of less vehicle movements. That will be up to the Principal Contractor. But overall it suggests noise levels will be less and the duration might be less as well.

Conclusion on the use of E5.

195. It follows that the use of E5 is not appropriate. In truth it is a contrivance designed to impose an unnecessarily low threshold for noise suitable for a much more permanent operation like a open cast coal mine or the building of a new port. People living near to such operations know they are largely permanent. That is wholly different from a temporary operation which people know will come to an end. Mr Owen cited no examples of a project of this kind when E5 had been applied.

196. Those lower standards in E5 can of course be met as Mrs Beamish table 5-1 shows. It just requires higher barriers, for which there is ample material on site to create bunds and then place acoustic fences on top. But that is not a reason to favour the E5 method. The reasons set out above explain why it is an inappropriately onerous threshold that is unjustified and unreasonable when the circumstances are properly looked at.

[41] See Louise Beamish, Proof of Evidence (§§2.3.3, 2.4.2, 2.4.3, 3.3.3, 3.4.6 (*inter alia*))

197. The Council is trying its best to trip the Appellant up. It is trying to show there is a need for fences higher than 1.8 metres as these require planning permission which has not been sought. Permission could of course be sought and there is no sensible reason it would be refused. But procedurally the Council are trying to say permission for higher fences means that planning permission should be refused.

198. To be clear no fences above 1.8m are required if the ABC method is followed based on Mrs Beamish's evidence.

199. The ABC method is the standard method of assessment in the context of construction activities – Mrs Beamish referred to it as "the preferred method" in her experience, and Mr Owen, in his evidence, stated that the ABC method is "commonly adopted". Indeed, this is not a position that RBWM can sensibly dispute – as Mr Owen accepted in cross-examination, RBWM *itself* explicitly refers to the ABC method in planning conditions relating to noise attached to a number of major proposals within its area.

200. That being so, the question before the Inspector is remarkably simple – is there any good reason to depart from the standard position, and to apply the method in Annex E.5 instead? There are at least three reasons that the answer to that question is plainly 'no'.

201. For all of these reasons, the Appellant's primary case is that the 'Annex E.5 method' is wholly inappropriate, and that there is therefore no need to consider it further. The proper limit is 65dB, to be determined by reference to the ABC method. That is the short route through all of the noise-related concerns now raised.

The Council's Other Arguments regarding Noise

(i) Timing of an assessment

202. Leaving aside what was agreed on 18 January at the first experts meeting, Mr Owen now contends that a detailed Noise Impact Assessment should be provided at the application stage. Mrs Beamish contends it is both more useful and more appropriate to secure this by way of condition, once more information is known about the nature of the construction activities to be undertaken. Mrs Beamish's position is supported by the Council's EHO.

203. No time should be wasted here. As noted above, a condition has now been agreed, referring to the need to produce a noise assessment – just as Mrs Beamish and the EHO both agree.

204. Very tellingly, this objection forms any part of the Council's Closing Submissions.

205. Once more, however, it is a point which has been abandoned without notice – although ***"the timing of the necessary assessment"*** is identified in paragraph 6 of the Council's Closing Submissions as one of the outstanding issues at the commencement of the inquiry, no submissions are advanced on it. Even now, the Council's case appears to be shapeshifting.

206. Were any evidence needed that this point should be resolved in the Appellant's favour, it comes directly from Mr Owen, who accepted during cross-examination that the Inspector ***"has what he needs"*** for the purpose of assessing construction impacts at this stage. During his cross-examination, when discussing the content of paragraph 1.7 of his Rebuttal Proof of Evidence, the following exchange occurred:

> ***Mr Owen: The point I make, which is not documented, is that it would be usual for that application for planning permission to be assessed by an assessment of some means, to see whether the works could protect amenity.***
> ***Mr Young KC: The Inspector has the benefit of the modelling of Mrs Beamish?***
> ***Mr Owen: Yes.***
> ***Mr Young KC: We know that incorporates the lorries on the haul road, we know it incorporates actual activity taking place, we know it takes account of topography, we know it takes account of mitigation, we know that the distance has been identified using an example. Essentially, the Inspector has what the Inspector needs for this purpose?***
> ***Mr Owen: Yes. The only thing in addition to that which I would say is that this was not information available to the members again.***

207. Despite this, in a further last-ditch attempt to save their case, in Closing Submissions RBWM put weight on the fact that Mrs Beamish agreed, during cross-examination, ***"that in the circumstances of this case a noise impact assessment must be before the decision-maker to assess whether the proposals accord with the development plan"***[42]. That point is superseded entirely by the agreement of a condition that the assessment *can* be produced at a later date, and by the answers of Mr Owen in cross-examination. The noise issue here is

[42] §9

not akin to a point about European protected habitats or the like. It does NOT need to be resolved before the grant of planning permission. The point must be resolved in the Appellant's favour. Neither is that what Policy EP4 requires. Added to which, the EHO did not require it at the permission stage. Nor has it been required at this stage in all the other cases where the Council has imposed a noise condition. The Council have not been consistent and they have not treated the Appellant fairly here.

(ii) Policy Compliance

208. The Noise Statement of Common Ground identifies no fewer than eight separate elements of the BLP with which conflict is said to arise, namely EP1(4) and seven different sub-elements of EP4[43]. No reference is made in the Council's Closing Submissions to three of these eight alleged conflicts[44], nor was any mention made in cross-examination of either Mrs Beamish or Mrs Ventham. It can be assumed these have fallen away (again without notice to the Appellant). The policy conflicts said still to arise are therefore as follows:

a. EP1(4) – "Residential amenity should not be harmed by reason of noise, smell or other nuisance".
b. EP4(2) – "Development proposals that generate unacceptable levels of noise and affect quality of life will not be permitted. Effective mitigation measures will be required where development proposals may generate significant levels of noise (for example from plant or equipment) and may cause or have an adverse impact on neighbouring residents".
c. EP4(5) – "The Council will require noise impact assessments to be submitted in circumstances where development proposals will generate or be affected by unacceptable levels of neighbourhood or environmental noise."
d. EP4(6) – "Where neighbourhood noise associated with a particular development is likely to cause unacceptable harm to existing or future occupiers, the Council will require applicants to submit a noise assessment."
e. EP4(7) – "Development proposals will be expected to demonstrate how exposure to neighbourhood noise will be minimised by the use of sound insulation, silencers, noise limiters, screening from undue noise by natural barriers, man-made barriers or other buildings and by restricting certain activities on site".

[43] CD F7, Section 2
[44] With EP4(1), EP4(4), EP4(8)

209. Taking those in turn, it is clear from the above that no hint of a conflict arises:

a. EP1(4) – There will be no harm to residential amenity by reason of noise. As highlighted above, Mrs Beamish's evidence demonstrates why

b. EP4(2) – The Proposed Developments will not generate unacceptable levels of noise, for the same reason. That reason also answers the second point: effective mitigation will be provided.

c. EP4(5) and EP4(6) – Mr Owen accepted in cross-examination that the Inspector ***"has what he needs"*** for the purpose of protecting against unacceptable noise. The same would have been achieved through a CEMP. The Council still want a CEMP, albeit with a different name. The Council's case has gone full circle.

d. EP4(7) – The Appellant has demonstrated comprehensively how exposure to neighbourhood noise will be minimised.

210. In national policy, reference is made only to paragraph 191(a) of the NPPF, which provides that developments should ***"mitigate and reduce to a minimum potential adverse impacts resulting from noise from new development – and avoid noise giving rise to significant adverse impacts on health and quality of life"***. Once more, as outlined above, with appropriate mitigation, the noise levels at all relevant sensitive receptors will be below both 55dB and 65dB, and as such will not cause significant adverse impacts, and will mitigate and reduce to a minimum potential adverse impacts.

(c) Noise at Building Façades

211. It is not clear how Mr Owen has derived the noise levels included in Table 1.1 noise at the façades of buildings and whether these are free-field or façade values. In any event it is assumed that they are presented to align with the ABC methodology, they are below 65 dB at 25 km/h. It is also to be noted that it is no more than 1dB above even at 8 km/h. The SCG on Noise confirms that the ABC method is agreed to be relevant where a receptor does not have a rear garden facing the site (paragraph 3.4.1).

Overall Conclusion on Noise

212. Overall, the Council case on noise has been a complete red herring and has been an utter waste of time. It is a matter which is, and always was, better addressed as a condition requiring a CEMP to be produced by the Principal Contractor when that firm has been appointed.

213. The Council's position has morphed from providing a RfR which (in the words of their own witness) was determined "without a scintilla of evidence", to attempting to clarify that RfR at a time when (in the words of their own witness) ***"they did not know what they were doing"***[45], to raising new highly technical issues in the course of joint experts' meetings just six weeks from the opening of the inquiry[46].

214. At the conclusion of this shapeshifting, it is regrettably clear that almost all of this effort has been wasted. First, the Council now appears to have accepted that the outstanding issues are capable of resolution by way of condition. Second, as Mrs Beamish has maintained from service of her Proof of Evidence onwards, even if one accepts the Council's case on all relevant noise 'issues', and adopts what Mr Owen himself described as "a worst case scenario", the Proposed Developments are still within the 65 dB limit of the ABC method.

215. Mr Owen's evidence is, as he very candidly accepted[47], limited in three key respects. First, he does not dispute any of the assessments or outcomes in relation to the noise produced by *on*-site construction activities. The only evidence before the Inspector on those noise levels is that of Mrs Beamish; it is unchallenged. Second, Mr Owen has not produced any model of his own to contradict that produced by Mrs Beamish. There is no issue between the parties, therefore, as to the approach taken by Mrs Beamish to the incorporation of the topographical data, or of any other element of the calculations undertaken or the model drawn up from which the Appellant's data is derived. Third, in the modelling which Mr Owen has produced, he has taken an extremely unusual approach to mitigation. While initially, it was not at all clear that Mr Owen had factored in any mitigation at all, as his further factual note shows, he has (a) modelled a noise barrier in a location never intended for a noise barrier (directly adjacent to the haul road), and (b) wholly omitted to include any

[45] Philip Owen, Cross-Examination
[46] Louise Beamish, Proof of Evidence (§2.4.2)
[47] Philip Owen, Cross-Examination

noise barriers at the site boundary, despite them being clearly flagged in the CEMP[48]. Accordingly, his calculations are based on a randomly cherry-picked picture of the mitigation which will actually be provided – it creates mitigation that will not be there, and removes mitigation which will be. It is for this reason that the Council is simply wrong to state that "the only reliable noise predictions from the haul road come from Mr Owen"[49].

216. Mr Owen's evidence shows in table 1.1 predicted noise levels below 65 dB as well. He has only looked at noise from the haul road, which is what the Council's case appeared to be. They in fact show only a marginal exceedance of 55 dB in one location at 25km/h (146 to 150 Aldebury Road) and this is with his inadequate mitigation. The ineffectiveness of the mitigation means his figures should not be relied upon.

HIGHWAYS AND TRANSPORTATION

Introduction

217. If the Council's case on noise is unsubstantiated, unfair and contrived, then its case on highway matters sinks to new depths. Once again, the Appellant's professional team was treated to a plethora of criticisms which had to be investigated, only for them to reveal they had no substance.

218. The Council's case has no foundation and no legitimacy for the following reasons.

a. The highway officers of the Council were satisfied with all aspects of the proposal appropriate and the level of detailed required at this stage.

b. Officers recognised, as did the auditors that further detailed design stages will follow as is always the case with new proposed highway works.

c. Members overriding focus related to traffic data from 2017 underestimated traffic flows, an utterly fallacious concern.

[48] Philip Owen, Additional Noise Note
[49] Closing Submissions, §13

d. Two members raised a concern about safety about the position of the new junction on Cookham Road which have not been substantiated at all.

e. All aspects of the proposals have in fact now been subject to Stage One Safety Audits ("RSA"), with detailed responses to the issues raised provided on each point by i-Transport, and the auditors satisfied on each point.

f. The Appellants are being criticised for seeking to improve existing pedestrian routes, as requested by the Council, even those not designed for residents of the development.

g. The main reason the informal route has a higher gradient is to retain an existing tree. This could easily be omitted.

h. There is no physical impediment and plenty of space to provide alternative pedestrian routes.

i. As such, whatever residual concern might possibly remains are more than capable of being addressed by way of condition.

j. Mr Gent imagines an accident risk, for which there is no existing evidence, and the new design will create an even lower speed cul-de-sac environment

k. Mr Gent is asking for parking surveys which are completely unjustified statistically.

l. The Appellant has even proactively offered to fund a TRO to deal with Mr Gent's unjustified concern.

m. Even if bins were taken from front door, it is stated to be a safety concern with it being imagined people could not cross a short 8 dwelling cul-de-sac for fear of passing traffic

n. The concern about the minor amendments to the refuse collection arrangements for a small number of existing residents is being dressed up as a safety concern which it is not

o. Criticisms such as bin carry distances rely on unjustified claims that distances should be measured from front doors and without any regard to what already happens on the Aldebury Road estate.

219. The Council's highway objection to this allocated site is a collection of painfully minor and petty points. Four are listed in closing, but even one of those is actually an issue about flooding repackaged to make it look like a highway issue. Three issues all of which were well capable of being addressed by conditions.

220. Again, it worth taking a step back to look at the timing and context of these concerns.

The Members Concerns

221. Highway and transportation matters are technical issues, as evidence by the fact both sides called expert evidence. Owning a car or being a driving does not make the Members experts. The Members had not a scintilla of expert or technical evidence to support their position to refuse.

222. The Members focussed on the date of the traffic data. They focussed on the traffic date being from 2017. They did not have the first idea what they were talking about. That is very obvious because the Appellant had already been asked to provide updated traffic data and did so in 2021. In truth, the Members were just casting around for anything.

223. Since 2017 we have had the Covid pandemic. It is common knowledge that both traffic volumes fell and behaviour has changed. There is now widespread use of Zoom and Teams meetings, there is more on-line shopping and more working from home.

224. So the members refused and the Appellant did a further traffic survey. And what did it reveal? It revealed the blindingly obvious. That traffic flows have in fact fallen on average by 10% since 2017. The Members managed to score the perfect own goal.

225. That is what we are dealing with here. A Member refusal on highway grounds, which was based on conjecture and no substance. It was a hopeless guess, without any foundation. The Members only other concern related to the new junction, which again has been found to be baseless, as if their own officers had not even thought to look at it over the course of 9 years.

226. It is not good enough to just set a whole series of tasks for the Appellant and claim they are necessary. The Appellant had already satisfied officers in respect of the proposals. But Mr Gent thought nothing of setting Mr Thomas an endless list of tasks as if the council's own highway officers were incompetent. The truth however, is none of this work was necessary.

227. Again, the Head of Planning and the planning case officer tried to warn the Members of their folly. Members would not listen. They tried to get the Members to adjourn so it could be explained to them again. But the Members were not interested.

228. Of course, none of this makes any sense. Not unless one appreciates that the sole reason refused this scheme is for solely political reasons. Huge delays following in which Officers could not articulate Members concerns, even in terms of which parts of the policies were said to be breached.

229. Enter Mr Gent. The expert instructed between Christmas and the New Year. He was unable to pursue the 2017 traffic point as soon as that data was provided. He asked for more information about the visibility from Cookham Road into the access. But that proved to be fallow ground as well.

230. What followed set out in the Statement of Case and then in subsequent meeting and correspondence were a series of snipping criticisms. Most were abandoned by the time he came to give evidence, but having put the Appellant to the trouble of addressing them. PINS Procedural Guide requires the LPA to have included with their statement of case, all factual evidence and documents the LPA relies on, including all data and analysis.[50] Repeatedly asking the Appellant to supply all the data and analysis for the Council to use as it's evidence is completely unreasonable.

231. The Appellant has held back from criticising this until now. But the way in which the Council sought to introduce new issues, well after it had submitted its evidence and ask the Appellant to provide the evidence was outrageous.

232. In it's Closing Submissions the Council has sought to criticise the Appellant for cross-examining Mr Gent on the remarkable number of discrete transport issues raised in his Proof of Evidence. Perhaps even more surprisingly, RBWM seek to defend their conduct of this

[50] PINS Procedural Guidance, 11 January 2024, 12.3.2.

appeal in relation to highways and transport matters as "reasonable"[51]. Without covering ground already laid out in the Appellant's costs application, it is obvious that the Appellant would not have needed to cross-examine Mr Gent on quite so many points, had such a melee of points not been made afresh and withdrawn within weeks of the inquiry commencing. To seek to criticise the Appellant for a lack of clarity in RBWM's own case is difficult to understand, and betrays clearly the total absence of focus, proportion, and reasonableness in RBWM's transport case. Raising whatever you can think of which might trip the Appellant's up is unreasonable.

233. Ultimately, following the raising of a flurry of late points of detail in objection to the Appellant's transport evidence, and following the service by Mr Thomas through the Appellant of yet more updated modelling and drawings to counter those late points, the outstanding issues are now just three. The raft of issues raised has been reduced down from at least 18 issues at the time of Mr Thomas' Proof of Evidence[52], to four[53], the scope of which are very narrow.

234. Most of what remains are nothing more that regurgitating observations from the Road Safety Audits. Regurgitated but ignoring the response of the designer (Mr Thomas) and the safety auditor's final position which in the main accepted the designer's justifications or suggestion it was a matter for detailed design.

235. Crucially, as with the noise, Mr Gent has absolutely no authority to make all these points. His concerns have not been taken back to the Members to see if they support them.

236. They are, in short:
    a. The waste collection arrangements for existing residents of Aldebury Road;
    b. The impact of the proposed site access on car parking on Aldebury Road;
    c. The changes to gradients on the footpaths to the north of Cookham Road;
    d. The usability and acceptability of the Westmead access in emergency situations. But this last point is actually just a flood issue reheated as a traffic one.

[51] §39
[52] Ben Thomas, Proof of Evidence, Section 2
[53] Chris Gent, Rebuttal, Section 2

237. We will deal with these detail, save for the last one which is a flood risk issue. Before doing so, however, it is necessary to turn to the local and national policy governing highway safety. That is so because, at times during the course of the highways evidence before this inquiry, one could be forgiven for thinking that any and all technical objections to any element of the Proposed Developments giving rise to highways issues of any severity would lead to these appeals being dismissed. That is simply not the case.

238. The NPPF, and local policy, set a deliberately high bar for highways and transport issues to surmount, if they are to prevent development. That is for good and obvious reasons. The issues maintained by RBWM do not come close to that threshold.

National Policy

239. Although the point is not at all clear in RBWM's Statement of Case, it is understood that objection is taken to the Proposed Developments on the basis only of paragraphs 114(b) and 115 of the NPPF. Paragraph 114(b) provides as follows, so far as material:

> *"In assessing…specific applications for development, it should be ensured that…safe and suitable access to the site can be achieved for all users".*

240. Paragraph 115 provides as follows:

> *"Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe."*

241. It is important to be clear and precise about the thresholds set by both paragraphs. When considering paragraph 114(b), the correct question to ask is whether "safe and suitable access *to the site*" can be achieved for all users. The threshold is accordingly "safe and suitable", but more importantly, applies in relation to access "to the site". Two points can be made about this:

    a. First, no part of paragraph 114(b) imposes a wide-ranging duty on developers to provide a safe and suitable road and pedestrian network in the area of the site

generally. Such a duty would be extraordinarily far-reaching, and supersede the primary duty on the Council to maintain an adequate and accessible road network.

b. Second, paragraph 114(b) does not require that every access to the site be safe and suitable for all users. It requires simply that safe and suitable access to the site be available for all users. Some sites will, of necessity, includes routes which involves steps. Nothing in policy suggested there cannot be steps within a development.

242. Paragraph 115 sets two high thresholds. In respect of impacts on the road network, the impact must be "severe" to prevent development. In respect of highway safety matters, the impact must be "unacceptable". It is plain from the structure of paragraph 115 that these were intended to be high thresholds. Paragraph 115 is clear that development should "only" be prevented where those thresholds are cleared; evidently, the use of the word "only" indicates an intention that such instances are in a residual category, and therefore relatively rare.

243. In this connection, the Council's Closing Submissions draw attention to the fact that, in cross-examination, Mr Thomas advanced the position that impacts on highway safety must also be "severe" in order to prevent development[54]. The Council describe this as "of concern". That is a misplaced criticism, for the simple reason that the evidence submitted by Mr Thomas does not rely on any such approach or conclusion and he does apply a test of whether the highway safety aspect of the proposals are 'unacceptable'. He has approached the matter on the basis that safe and suitable access to the site can be achieved for all users. Which is plainly does and has done to the satisfaction of the highway officers of the Council.

244. Moreover, this is not a case which turns on being able to show the Appellant's highway proposals are unacceptable but not severe. This is a case in which the Appellant's clear, consistent and straightforward position is that all objections raised on highways grounds are fundamentally misconceived, and that any impact on safety which arises is negligible, or can be dealt with by way of condition.

[54] §38

Local Policy

245. It is necessary briefly to address local policy too – RBWM's case on the BLP in a highways context is not clear. Within the letter of 3rd November 2023[55], RBWM highlight IF2(3) and IF2(4) as relevant. IF2(3) includes 7 different sub-requirements. In RBWM's Statement of Case, five of those sub-requirements were highlighted "inter alia"[56]. Beyond that, no clarification has ever been provided as to which elements of IF2 are said to create conflict. No point on IF2 was put to Mr Thomas in cross-examination, save in relation to the Borough's Design Guide being referenced in the explanatory text. There is no mention of any local policy within RBWM's Closing Submissions. It is therefore manifestly unclear what (if any) point the Council pursues in relation to IF2. We therefore do not reference it further.

Outstanding Issue 1: Waste Collection Arrangements on Aldebury Road

246. This is a wholly insignificant objection. RBWM must demonstrate that the impact on highway safety as a result of the new waste collection arrangements is "unacceptable". That position is undermined from outset by the fact that RBWM's highways officers and RBWM's planning officers were perfectly content with the arrangement suggested by the Appellant – they viewed it as eminently "acceptable"[57].

247. Indeed, this issue did not even trouble the Council members in refusing permission; Mr Gent accepted in cross-examination that there was no reason for refusal linked in any way to waste collection, and it is a matter of record that the issue of refuse collection was not discussed, even once during the Committee meeting at which the proposals were rejected. Mr Gent is, therefore, entirely out on his own in considering that these arrangements raise "unacceptable" safety concerns.

248. Primarily, Mr Thomas' evidence demonstrates that the waste collection strategy proposed by the Appellant allows for the collection of waste in a manner wholly compliant with Part

[55] CD F1b
[56] §7.24
[57] Ben Thomas, Proof of Evidence, Section 4

H of the Building Regulations[58] and with British Standard BS 5906:2005. That strategy is set out most clearly in drawing ITB4215-GA-035 Rev A[59].

249. Waste operatives are meant to only wheel a bin 25 metres. The rationale for seeking to minimise bin carry distances is purely to achieve an economical and efficient waste collection service. There is no suggestion in either the Building Regulations or BS 5906 that residents are not able to carry waste greater distances or doing so would lead to highway safety concerns. As a consequence, we are literally considering just 3 properties here, on an estate of hundreds of people where it is self-evident that many existing residents pull their bin significant distances in excess of 25 metres to the road already.

250. We shall assume the bin lorry driver has stopped at the exact end of a 12m measuring tape, the maximum recommended distance as set out in BS 5906:2005.

1. No.240 - is right next to where the rear of the bin lorry reverses to
2. No.238 - is right next to where the rear of the bin lorry reverses to
3. No.236 is 8 metres away from the back of the bin lorry
4. No.234 is 19 metres away form the back of the bin lorry
5. No.228 is 25m away from the bin lorry on Aldebury Road
6. No226 is right next to the bin lorry on Aldebury Road

251. That leaves only No.230 which 30 metres away from the bin lorry on Aldebury Road and No.230 which is slightly more than 30m away from the rear of the bin lorry. A small bin collection point within the cul-de-sac off the carriageway would suffice. Residents can be expected to pull their bins 30 metres. Having been provided such a location would offer a closer option for Nos 230, 232 and also 234. With the addition of the two bin collection points (outside 238 Aldebury Road, and adjacent to 226 Aldebury Road) there is no property within the cul-de-sac which would generate carry distances of more than 25m to a waste collection point even from their front door.

252. There is therefore no safety issue at all; the Building Regulations and BS 5906 are complied with. Mr Gent does not demur from any of this, save that he calculates ‘distance’ from the

[58] Part H6, Paragraph 1.8
[59] Ben Thomas, Proof of Evidence, Volume 2 (p.7)

front doors of the relevant properties, rather than the curtilages. There is no basis for this approach anywhere in the Building Regulations, or BS 5906. It is a completely unjustified criticism.

253. Even if there was not total compliance with those regulations, it is clear there is no highway safety issue. The only safety issue is the reversing of the lorry. The refuse collection vehicle will visit the cul-de-sac for a matter of minutes once a week. This refuse collection strategy serves just 8 dwellings. It is a cul-de-sac. It will be extremely lightly trafficked. The driver will be reversing in a dead straight line. They are likely to have the assistance of a banksman – just one of the other refuse collection personnel[60]. It is utterly unrealistic to suggest that a driver reversing a few extra metres, or a resident carrying their bin a few extra metres, creates a highway safety issue let alone an "unacceptable impact on highway safety". Clearly, it does not.

254. For completeness, Mr Gent placed significant weight on the fact that the previous refuse collection arrangements were compliant with the relevant regulations. This is totally irrelevant. Neither the Building Regulations nor BS 5906 place any store by the compliance or otherwise of previous arrangements. It is nonsense (not to mention wholly speculative) to suggest that residents or refuse operatives will be at greater risk because the arrangements have now changed.

255. Mr Gent failed to mention that his own firm does not consider the distances are to be slavishly adhered to. By pure good fortune, Mr Thomas was able to find an instance when Mr Gent's firm put forward proposals which sought a apply flexible approach to this matter. This was a scheme in Barnet. Mr Gent says that it is different because it is a new development, whereas the residents on Aldebury have an existing kerbside collection. That is completely irrelevant. Either you believe the distances are a maximum or you don't. And Mr Gent's firm plainly does not.

256. In Closing Submissions, the Council refers to concerns being raised by the Road Safety Auditors in this regard[61]. Crucially, those submissions fail to mention that those same auditors are now content with the proposals. The updated Stage1 RSA clearly reads as follows: "***the Design Organisation Response provided a method for collections to be***

[60] Ben Thomas, Examination-in-Chief
[61] §48

undertaken without the need for a RCV to turn along the cul-de-sac which addressed the concern"[62], before going on to discuss concerns about supermarket delivery vehicles, which is no part of the Council's case.

257. The Council also refers to a failure to consult with the waste operator[63]. But fails to mention that the waste operator is not a statutory consultee, and that had RBWM's highways officers had any concerns from a waste management perspective, they were perfectly entitled to speak to the operator themselves. It seems they did not. This objection is wholly unfounded. More importantly, raising this point about consulting the waste operator underlines the fact the concern here is not one of highway safety.

<u>Outstanding Issue 2: Site access impact on car parking on Aldebury Road</u>

258. Mr Gent's next complaint concerns the potential safety implications of on-street parking in the vicinity of the proposed site access junction. He relies on the potential for "sideswipe style collisions" as raising an unacceptable impact on highway safety[64]. This is genuinely difficult to understand.

(i) The road is already used by cars with parked vehicles sometimes on the corners, yet there is no history of accidents. [65]

(ii) That is because it is a low speed environment, partly as a consequence of the road width and the presence of parked cars themselves.

(iii) The lack of accident relates to 5 years of data, and will have involved over hundreds of thousands of existing movements 365 days a year.

(iv) The new arrangement creates an even lower speed environment: a short 8 house cul-de-sac and Aldebury Road starting and terminated at a new right angle junction just metres away from the cul-de-sac entrance.

(v) There will be new traffic calming introduced.

(vi) There will be a raised platform at the junction with the cul-de-sac

(vii) Following the RSA, there will be a centreline road marking across the raised platform.

[62] BT4, p.7 (Ben Thomas Proof of Evidence, Volume 2, PDF p.34)
[63] §49
[64] §45
[65] Ben Thomas, Proof of Evidence, §5.3.11

(viii) [66]The highway officers of the Council have not identified a problem.

(ix) With new sections of highway being introduced and the creation of a large cul-de-sac there will in fact be more space for parking not less.

(x) That will make compliance with the Highway Code easier for residents.

(xi) Parking associated with the school, if it is built, is much more likely to be done within the new housing rather than on Aldebury Road.

(xii) The officers did not consider it necessary to require double yellow lines anywhere.

(xiii) But if they are ever judged to be necessary, the Appellant has proactively sought to provide an obligation to fund all the work necessary to bring that into effect under a TRO.

259. In short, therefore, there is no evidence of any highway safety problem at present as a result of the on-street parking, and there will be no loss in available on-street parking space as a result of the Proposed Developments. This is entirely concordant with the conclusion of the Road Safety Auditors, who confirmed that the provision of road centrelines markings on the raised table, as well as the demonstration that a supermarket delivery vehicle can turn within the facility provided, addresses the road safety concerns at this stage[67].

260. Mr Gent advance two main challenges to this proposition. First, it is suggested that Mr Thomas places too much store by likely compliance with Rule 243 of the Highway Code. The Highway Code is plainly material and something many people abide by. But to the extent some chose to ignore it, there remains no evidence this gives rise to a safety concern created by the new development. Added to which what is being created is actually a new, very slow-speed environment, serving a cul-de-sac of just 8 dwellings. As Mr Thomas highlights, the junction would operate safely regardless of where cars park, as (as is recognised in the Manual for Streets), cars on the minor arm will tend to nose out carefully until they can see oncoming traffic[68].

261. Second, it is suggested that no analysis has been undertaken of where the cars that currently park on the bend would park, if compliance with Rule 243 is assumed. Once again, that point goes nowhere. As Mr Thomas explained in cross-examination, that would apply to, at

[66] See Mr Thomas Apdx BT4, page 8, Section A3
[67] BT4, pp.8-9 (Ben Thomas Proof of Evidence, Volume 2, PDF pp.35-36)
[68] Ben Thomas, Proof of Evidence, §§5.3.4 and 5.3.5

most, four cars, which is well within the daily variation of cars already at the location. It is the equivalent of criticising the Appellant for conducting their parking analysis on a Monday as opposed to a Tuesday. As highlighted, there is not in any case any evidence of an accident problem.

262. In Closing Submissions, the Council suggest that "the proper approach" would be to undertake parking surveys to analyse the proposed impacts of the displaced cars having to find on-street parking elsewhere on Aldebury Road[69]. But as Mr Thomas explained[70], that would be to require a wholly disproportionate and unreasonable study to be carried out on a statistically insignificant number of cars in a statistically insignificant number of spaces.

263. Accordingly, it is simply unarguable that any "unacceptable highway safety impact" arises. But the reality is that, even if the Inspector finds against the Appellant on every point raised up to here as regards parking arrangements, any outstanding issue is still eminently capable of resolution by way of planning condition, or by way of planning condition combined with section 106 obligation in respect of funding a Traffic Regulation Order which can, if necessary, provide for the installation of double-yellow lines.

Outstanding Issue 3: Gradients

264. Much reference has been made to the Inclusive Mobility Guidance produced by the Department for Transport, and the maximum recommended gradients for accessible footpaths highlighted within that document. Primary focus, however, must remain on national policy, and on paragraphs 114(b) and 115 of the NPPF. Whatever is said in the Inclusive Mobility Guidance, what is ultimately required in planning terms is the provision of "safe and suitable access to the site" and the avoidance of "unacceptable impact on highway safety".

265. We deal first with 'the informal footpath' (i.e. the informal trodden path along the northern side of Cookham Road between Aldebury Road and the road-over-rail bridge). This is a complete non-issue for the more than a dozen reasons.

[69] §47
[70] Ben Thomas, Examination-in-Chief

(i) As Mr Thomas identifies, the Proposed Developments will not increase footfall along the route presently covered by the informal footpath. There is no reason for residents form the development to use the footpath in order to access or egress the Site[71]. It does not, therefore, provide "access to the site" of any kind.

(ii) The footpath is at present wholly inaccessible from an inclusive mobility perspective. There can be no sensible dispute about this. The current informal footpath is inconsistent with more or less every relevant element of the Inclusive Mobility Guidance – it requires users to cross 15m of carriageway to access, has no dropped kerbs or tactile paving at Aldebury Road, is entirely unsurfaced and therefore frequently muddy and/or wet, and already reaches a gradient of approximately 1:11 at the eastern end[72].

(iii) It was the Council, the very body who makes these complaints, who asked for a new path to be created in this location, even though it is not necessary to make the development itself acceptable.

(iv) The only reason for the steeper gradient close to what was the entrance Aldebury Road is because the Council wanted the route of the footpath diverted to retain a small tree.

(v) The steeper section of the new route leads to and from the new cul-de-sac which is an incredibly low level of traffic movements in a low speed environment.

(vi) Pedestrian guard railing, of the kind seen throughout the country to stop people entering a carriageway can be erected at any location.

(vii) Safety warning signs too can be erected to highlighted gradient issues and direct users to the alternative route around the edge of the open space.

(viii) As Mr Gent accepted in XX, there is ample space within the existing open space to create pathways which comply with Inclusion Mobility Standards

(ix) Such works, if they had to be secured now, could of course be secured by condition notwithstanding what has been submitted.

[71] Ben Thomas, Rebuttal Proof of Evidence, §2.1.7
[72] Ben Thomas, Rebuttal Proof of Evidence, §2.1.2

(x) All of this is capable of being addressed at the detailed design stage[73], which are necessary for any highway works.

(xi) The highway officers of the Council did not consider any of this necessary at this stage

(xii) There is an alternative route for wheelchair and mobility scooter users along the existing path next to the main part of the site.

(xiii) That path too can be designed with lower gradients given the large area of open space available.

266. The consequence is there is no issue here at all: all the Appellant is doing is offering to improve the present position for a path which does not provide access to the site. It is an issue that could be addressed at the detailed design stage, or by way of condition.

267. It is frankly outrageous that the Council did not raise these issued until a very late stage and then complaints about the fact the Appellant seeking to resolve these late issues by way of condition. The resistance to condition if of course offers the Council no defence to costs, because where a matter can be dealt with by way of condition, it should be rather than refusing the application.

268. Moreover, it is important to recognise that that the Appellant's amendments to the path represent a significant improvement from an accessibility perspective. The Appellant proposes to actually surface the footway (a significant improvement on its own terms), as well as adding dropped kerbs, tactile paving, and a realignment of the footpath at the point at which it joins Aldebury Road[74].

269. It is quite wrong to suggest that the question of gradients been ignored. As Mr Thomas explained[75], a lower gradient was proposed by the Appellant. But the Council took the

[73] Detailed design here does not refer to Reserved Matters: it refers to the stages of highway design and implementation which follow planning permission which all highway works must undertake precisely because of the need to consider safety issued in the final design of roads and footpaths etc: see for example the response to the Road Safety auditors concern about appropriate drainage strategy for the new junction to be addressed at the detailed design stage: BT4, page 6 – bottom of the page

[74] Ben Thomas, Rebuttal Proof of Evidence, §2.1.5

[75] Ben Thomas, Rebuttal Proof of Evidence, §2.1.6

decision that the proposed layout was the best available compromise for increasing accessibility as far as possible, whilst also retaining tree 7006, and providing the perpendicular dropped crossing already described.

270. In his rebuttal Proof of Evidence, Mr Gent accepted that there is "proposed improvement" in certain respects, but concluded that this represents "an unacceptable missed opportunity to provide a more accessible route"[76]. That, unintentionally, is precisely the point. To be policy-compliant, the Appellant is not required to seize every opportunity to provide total accessibility. The proposed amendments result in a manifestly more accessible path as a whole.

271. Mr Gent also refers to a specific safety issue relating to the gradient, and the prospect of a wheelchair or similar "toppling over", as was put to Mr Thomas in cross-examination. But for the reasons explained by Mr Thomas, to the extent that there is any lingering concern about such a possibility, it can be addressed by way of condition in relation to a guardrail, signage, appropriate surfacing materials or other appropriate mitigation.

272. Add to that, it is common ground between the parties that, if required at the detailed design stage, a more circuitous route could easily be accommodated within the available land, which is why the officers were not troubled by such matters of detail: they know there are more detailed safety stages to follow. Again ample land makes that a non-issue.

273. Moreover, if necessary a condition requiring that, notwithstanding the informal route shown on the access plan, the outline permission can be the subject of a specific condition now requiring such as an Inclusive Mobility design: and the Appellant has even drafted that – because the Council refused to be helpful or offer a solution to the problems of which it now complains.

274. Finally, the Council's Closing Submissions seek to suggest that it is "inexplicable" why the Appellant continues to propose the design of the informal footpath advanced, particularly in light of the Road Safety Auditors drawing attention to the highway safety risks[77]. On the contrary, it is eminently explicable; the Appellant has sought to assist the Council by improving the path despite the fact it is not necessary to make the development acceptable,

[76] Christopher Gent, Rebuttal Proof of Evidence, §2.17
[77] §41

in doing so, it has offered to make it more not less usable by wheelchair and other mobility impaired users, it has increased the gradient to assist the Council's desire to retain a small tree. In respect of the Auditors, the short point is that they were content with the suggested mitigation at this stage of the design process[78].

275. A separate gradient-related concern is the 'formal footpath' (i.e. the path commencing broadly outside 150 Aldebury Road and continuing westwards to join the footway at the bridge). Although the footpaths are different, many of the concerns raised by the Council can be answered in much the same way as in relation to the informal footpath.

(i) This is an existing path which has currently been used extensively and apparently without any complaints.

(ii) While there are elements of this formal footpath which will be, in strict gradient terms, non-compliant, the overall package of proposals represents an improvement in accessibility terms: the path will be significantly widened and overgrown vegetation and trees will be stripped back.

(iii) On a 25m section, even the gradient will be improved[79].

(iv) The extent that any safety concerns remain in relation to the gradient, the measures necessary to render the gradient acceptable in policy terms could be secured at the detailed design stage: this is normal as gradients must be critically examined then.

(v) There is again ample space for this to be achieved.

(vi) A more gradual gradient could be achieved through a revised pedestrian access route, which it is common ground could be secured by way of condition.

(vii) It is notable that, despite accepting that the route is not *currently* Inclusive Mobility compliant, the Council have not felt it necessary to implement signage.

[78] BT4, p.10 (Ben Thomas Proof of Evidence, Volume 2, PDF p.37)
[79] Ben Thomas, Rebuttal Proof of Evidence, §2.1.8

276. One final concern raised by Mr Gent in relation to gradient relates to the gradients of the cycleway provision within the site itself, utilisable as part of access to the site[80]. This appears to have fallen away during the course of the inquiry, but again without any clarity in that regard. As Mr Thomas explained in his evidence-in-chief, this is a straightforward error on Mr Gent's part; the elements of the cycleway in respect of which the gradient is currently indicated to be 1:20 (or thereabouts) are internal access roads. No part of either appeal seeks a determination on such matters at this stage. The extent of the proposals for which the Appellant seeks permission at this stage can be seen most clearly on drawing ITB4215-GA42-A[81].

277. Accordingly, all gradient-related concerns are without foundation, have been raised prematurely as detailed design work for all highway works will follow, or can be addressed by way of condition.

278. Not one of these concerns, and the attempt to have an allocated site found acceptable by the officers refused, has the backing of the Members.

Outstanding Issue 5: Westmead Access

279. It is, once more, important to appreciate the context for RBWM's objection to the Westmead access. Following the service of evidence, and rebuttal proofs of evidence on both sides, it appears that the only outstanding concern is as to the usability of the Westmead access in circumstances where the emergency services will have no option but to use it, owing to an inability to use the main Cookham Road access to the Site. This is therefore a flood risk issue.

280. What is not in issue is that the Council accept this as an emergency access route, despite complaints from some local residents about parked cars and the narrowness of the roads. Aldebury Road is a circular route and so access can be obtained to Westmead from either route, the longer route said by local people to be wider and easier to navigate.

281. There it appears that no objection is taken to the usability of the Westmead access in any situation except when it is subject to flooding. So this is just a flooding issue.

[80] Christopher Gent, Rebuttal Proof of Evidence, §§2.19-2.21
[81] Ben Thomas, Appendix B, Proof of Evidence Volume 2, PDF p.60

Conclusion on Highways and Transportation

282. The Council's case in these issues is hopeless. The concerns raised are late, unsupported by Members and to the extent that there is anything to consider all capable of being dealt with at the detailed highway design stage or by way of condition. Overall,

    a. It is absolutely plain that the new refuse collection arrangements do not result in an unacceptable impact on highway safety.

    b. It is equally plain that the parking arrangements on Aldebury Road do not result in an unacceptable impact on highway safety.

    c. There is no breach of policy as regards the footpaths along Cookham Road. "Safe and suitable access to the site" is provided by reason of the main access on Cookham Road, and the pedestrian/cycleway at Westmead. The fact that the formal footpath is not entirely mobility compliant does not alter that position. The informal footpath does not provide access "to the site". None of the amendments create an unacceptable impact on highway safety; the net position is a considerable improvement.

283. Some of what the Council argues is frankly outrageous: the Council sought to amend the route of the informal path to protect a small tree and then complain about the gradient that creates.

FLOOD RISK

Introduction

284. The Council's case here is not about the flood risk to the houses and the school. The land raising means that is not in issue. The open space area and flood defences are water compatible development.

285. The Council's case is solely about the emergency access, save for one point about pluvial flooding.

286. A bewildering amount of points are taken by the Council about this access. But it is therefore worth starting by considering the context here.

Context 1: When will the emergency access be required in this case

287. The Appellant has provided the emergency access because it can physically deliver it and for a housing scheme of this kind it is generally accepted that a second access into a site is sensible in case the main access is blocked by a vehicle on the entrance road. There is no national design guidance at what number of houses such an emergency access is required and Manual for Streets suggests that it is best to consult the Fire Service.

288. Indeed, the Fire Service has been consulted and they have confirmed that no emergency access is required in order for the proposed development to be acceptable in terms of response times in the event of an emergency and in their view a single access via Cookham Road meets the fire appliance access requirements under Building Regulations.

289. Whilst the emergency access has been provided, it is worth recognising its location in this case. It is in an isolated and discrete location, tucked away at the end of Westmead which is itself tucked away down the end of Aldebury Road. It is well removed from Cookham Road and the site access.

290. The most direct route to all of the housing and the school site is down the Cookham Road access. It is very obviously the most direct route by vehicle, pedestrians, and cyclists. Emergency vehicles in the form of fire engines, ambulances and police cars will access the site using this access.

291. The Council's sole concern here is about flood risk. So, it is important to note that the Cookham Road access into the site is also on much higher ground than the emergency access. It is on land well elevated out of the fluvial floodplain, near to the bridge that crosses over the top of the railway line. The site access then progressing onto the site again on higher ground.

292. The proposed land raising will mean that the housing and the school will be on land which is on average 1-2 metres higher than it is now.

293. Therefore, not only will the emergency services looking to access the site at speed in an emergency very obviously use the Cookham Road access, but in times of flood risk they will inevitably use the Cookham Road access. There is no predicted flood risk associated with the Cookham Road access even in a 1 in 1,000 year flood event – demonstrated by its location in Flood Zone 1. As is the case with all the houses and the whole school site following the proposed land raising.

294. Crucially, and this is the main point, it is at this point in time that both Westmead and the lower part of Aldebury Road will both already be affected by floodwater in the 1 in 100 year plus 35% addition for climate change. As a consequence, this is the very last place the emergency services will want to go.

295. Indeed, if they did use that route in the 1 in 100 year plus 35% climate change event, they would be adding to the problems in the area. They would be added vehicles movements through floodwater: the "bow wave" from any vehicle will send waves of water towards the properties and any parked vehicles. That would be especially true if they were travelling at speed to an emergency.

296. So what is the Members case here? That is a reasonable question given that the available evidence demonstrates their case looks completely unreasonable. As far as it is possible to say, Members seem to be arguing that

    a. the emergency access needs to be available in the 1 in 100 year plus 35% increase for climate change event, at precisely the same time
    b. as an emergency requiring emergency vehicles to attend on site; and
    c. at precisely the same time as the main access is completely blocked.

297. It is at this point that the Council's case enters into the realms of fantasy.

298. The main reason cited for the provision of an emergency access is if a development has a single access road and it is blocked. Imagine for example, a garden land development in which new housing is created down the side of existing houses or one house is removed to create a new access. How do cars and the emergency services get in/out if that access is blocked by another vehicle?

a. If the access is very narrow (i.e. single lane working) then that could be a problem and the car will have to be pushed or dragged out the way.

b. If the access is wider in the sense of having two-way carriageway, then it is plainly much easier to get past a car.

c. If it is a large lorry and it has jack-knifed across the accessway that could be a problem: but in residential areas where the speed limit is 30mph that will rarely if ever be a problem because HGVs don't jack-knife at 30 mph.

d. It could be that a large lorry has slipped on ice and is now blocking both sides of the carriageway or toppled over. If that happens then emergency vehicles might have to mount the pavement and or a verge to get past.

299. A single access can be acceptable and as the Oxfordshire County Council document shows, this can be acceptable not just for a small backland development, but acceptable also for up to 150 homes without any emergency access.

300. But none of the above applies in this case. The access into the site is not remotely narrow. That is because not only is the main access road and adjacent pavement 8 metres wide, but there is a parallel highway route into the site in the form of the 5m wide segregated cycleway and pedestrian access route. It is an alternative route in for the emergency services. It has not been labelled as an emergency access. But that of course is what it is.

301. Added to which all that lies between both of these access points is a 2.5m grass verge. So the combined width of this 'neck' into the site is 15.5 metres. Compared that to a single carriageway or even just a two way carriageway which is only 5 metres wide.

302. Police cars are normal car width (1.8m); UK ambulances are 2.1m wide and, fire engines are 2.3 metres wide. But here we have an access which is over 15 metres wide made up of two separate accesses (i.e. vehicular and pedestrian/cyclist) into the site.

303. True it is that this double access arrangement is not available until one gets to the newly aligned section of Aldebury Road. But if the short section from Cookham Road to that

newly aligned part of Aldebury Road were blocked, one could use Aldebury Road itself as it is a circular route with two entrances.

304. In short, the risk of emergency vehicles not being able to access this site because it is blocked by other vehicles is close to non-existent.

305. The Council singularly fail to acknowledge or appreciate the fact there are actually two highway access routes into the site from Cookham Road. And the Fire Service when consulted were perfectly content with the proposed arrangements.

306. Given the inherent implausibility of the Member's argument, Mr Saul is left arguing not about vehicles blocking the access. But instead seeking to convey concern about something else. The only thing he was prepared to suggest in writing was a fallen tree. The trees here have all been examined. That includes all the trees around the access. There is no evidence to suggest any are in such a condition they are at risk of falling over. If they were, they would be earmarked for removal. Mr Saul did not identify any trees which are large enough to block both sets of accessways into the site. So there is no evidence of trees at risk to substantial Mr Saul's concern.

307. Yet even if a tree did fall over, the fire service can remove such trees. As everyone knows, they have cutting equipment that tears through solid metal. A tree is definitely not going to present a problem.

308. Mr Saul's other suggestions were not things he was prepared to commit to writing. He suggested that what might open us is a sink hole, despite there being no evidence of subsidence or anything of its kind in the area. He also suggested a utility company might need to do emergency work. But he provided no details about why this would cause both access routes to be blocked.

309. But what really kills off the Council case is the fact that the extraordinary event has to coincide with both

    (i) an emergency on site; and

(ii) a flood event which is predicted to happen on average only once in one 100 years.

310. The 1 in 100 year flood event is an event where the probability of it being exceeded in any one year is 1%. As a consequence on average it is likely to occur once in 100 years. On top of this, climate change must have caused the peak flood flows that cause the event to be 35% greater to generate that highlighted flood depths. The housing and school are higher than the anticipated flood levels and therefore as the aforementioned emergency would not be flood related, the combination of the events would be an incredible rare event.

311. So, to imagine that this incredibly rare flood event happens at exactly the same time as the sink hole event and also at the same time that an emergence vehicle must access the site and one is into the realms of pure fantasy. The Council's inquiry team embarrasses itself my making these points. Worst still is that these dismiss the need to consider the probability of what they are arguing as the work of actuaries. Yet planning for flood risk is actually all about probability.

312. Added to which, the reason Manual for Streets directs highway engineers to consult the Fire Service on this issue, is that it is only really Fire Engines that need to get to houses and schools because of the heavy equipment, ladders and water they carry. Police officers needing to visit the houses, school or open space can do so on foot. The same is for paramedics who can, if necessary, carry patients to a waiting ambulance.

313. Yet in this case, the Fire Service are content with the emergency access and even the presence of 0.8m of floodwater, which is the highest the Council now puts its case in terms of the flood water depth on the emergency access. That height derives from the partial breach of the EA flood defences (no matter how unlikely that is, it being an flood defence asset maintained by the EA itself). The Council no longer pursues the idea there might be a full breach. So the 1 in 100 year flood plus 35% CC would not prevent a fire appliance from being able to access the site via the emergency access.

314. So in truth, the Council have no case left whatsoever in terms of emergency access because the Fire Engine, the one emergency service which does need to get as close as possible to

the edge of a building, would be able to get through. However, as noted above, the concept of a Fire Engine taking that route (rather than the main access or the pedestrian/cycle access) when there is already 420mm of water on both Westmead and Aldebury Road is absurd. And that would only happen if the sink hole etc emerged at exactly the same time. This is all just fantasy and absurdity. None of the professional officers of the Council were prepared to support it.

315. Decision makers should not be seeking to cater for any eventuality no matter how fantastical. That would be perverse. It is certainly unreasonable.

Context 2: The Members made up a case as they had no evidence to support them

316. Of course, all of this has had to dreamt up out of nowhere. There was no professional or technical evidence to support the members concerns. As with the Members concerns about noise and highway safety, even trying to identify which parts of the relevant policies in the plan were breached took 10 weeks. The transcript of the committee meeting revealed members were confused about the difference between evacuation routes and an emergency access. Officers tried to explain, but members would not listen. Officers tried to seek and adjournment but that did not work either.

317. The Council's Statement of Case introduced various new fantastical concerns for the first time. New concerns were raised through the statement of common ground meetings and in Mr Saul's proof. It is all highly implausible and has been a complete wild goose chase.

Context 3: Deliberately Misunderstanding the Exception Test

318. Turning to the exception test, the Members were intent on arguing it had to be passed in respect of this application. They would not listen to professional advice. The basis for their assertion was founded on a misunderstanding of the facts, which looks on the evidence to have been deliberate.

319. The housing and school site is allocated in the Local Plan as allocation AL25. The open space is allocated separately under a wholly different allocation AL28. For the avoidance of any doubt:

a. AL25 is allocated for ***"Approximately 330 residential units and educational facilities"*** across ***"13.51 ha"*** of land.

b. AL28 is allocated for ***"A Green Infrastructure site providing sport's facilities, public open space, habitat are and flood attenuation"*** across a separate area of "6.43 ha" of land.

320. The second sentence of criteria 16 in allocation AL25 states ***"This will need to demonstrated that the exception test can be passed and that safe evacuation route can be provided"***. As the Council's Closing correctly identifies, this was inserted as the request of the local plan inspector Lousie Phillips. But what the Council fail to highlight is the first sentence! The first sentence reads ***"Consider flood risk as part of a Flood Risk Assessment as the site is partially located within Flood Zones 2 and 3 and larger than one hectare."*** The first sentence explains the reason for the second sentence. The second sentence is contingent on the first sentence.

321. It therefore follows that the whole reason the Local Plan inspector considered the exception test needed to be passed for AL25 was because part of AL25 is in Flood Zone 3.

322. It is vital however to note that the Local Plan inspector also considered and found sound allocation AL28. Crucially, this does not require an exception test. That is despite the fact the Inspector was plainly aware of the concept and relevance of an exception test given what had been actively discussed and agreed in respect of the adjacent allocation AL25.

323. AL28 is of course for sports facilities, public open space, habitat area and flood attenuation. All of these uses are ***"water-compatible development***" in accordance with the definitions in Annex 3 of the NPPF.

324. Both the Council itself and the Local Plan Inspector were therefore drawing a very clear distinction between the different components of the schemes in terms of flood risk and the exception test.

a. The housing and the educational facilities were one form of development, which in accordance with the NPPF Annex 3 are classified as "More vulnerable"

development; in accordance with Table 2 in the PPG (Part 7) such development requires an exception test if it is in Flood Zone 3a.

b. The Green Infrastructure open space, sports facilities, habitat area and flood attenuation which is classified as "water-compatible development": in accordance with Table 2 in the PPG (Part 7) such development does not require an exception test.

325. The application is for 330 residential units, a primary school and open space.

a. The housing and educational facilities are the same development that is proposed in Policy AL25 but covering a slightly different area. The crucial point being the housing and educational facilities do not include any land which is Flood Zone 3. That is the whole point about why the housing and school are located where they are in the planning application. The housing and school are "more vulnerable" and by locating them out of FZ3 there is no need to do the exception test. That is precisely what Table 2 in the PPG explains.

b. The application also contains the open space, habitat area and flood attenuation. These are located in FZ3 but as water compatible development, the exception test is not required. That again is precisely what Table 2 in the PPG explains.

326. So as a matter of both common sense and pure logic there is no need to demonstrate the exception test can be passed. The Council accept the housing and the school are not in FZ3.

327. It also demonstrates beyond peradventure that in this case, when considering flood risk issues, the proposal is very clearly two distinct components. That is the whole point as to why AL25 and AL28 are separate allocations. They have been treated different because they have different functions.

328. The Council try to argue that the Local Plan Inspector was unaware that there was an emergency access passing through AL28. But that is not true. The Local Inspector was

aware of this. She was given and considered the Vision document.[82] Page 20 has a heading '***Access and Movement'*** which contains this bullet point ***"Pedestrian, cycle and emergency access via Westmead".*** This is opposite the facing page which has Figure 10 on page 21 showing the pedestrian and emergency access connecting to Westmead.

329. The Local Plan Inspector was therefore aware the emergency access went through allocation AL28. But she did not require an exception test for AL28. In exactly, the same way as the professional officers of the Council who considered the application knew that the exception test did not need to apply to the emergency access and hence they did not require it. Indeed, when the Members seized on this point, the officers tried to explain to the Members, on more than one occasion, that exception test did not need to be considered in respect of the applications.

330. The Council's inquiry team try to suggest the emergency access cannot be separated from the housing (and the school). They suggest it is integral to the housing and therefore cannot be considered separately. The logic of this argument is that everything to do with the housing is integral to it and therefore cannot be seen as a separate component. The problem with that argument is that one could make that claim for any part of a scheme, and that would render pointless the guidance in the PPG in Notes to table 2 which expressly allows decision makers to separate component parts of a development. The inspector will make no error of any kind if he does treat them as component parts in this case.

331. It is easy to demonstrate why the Council's argument is wrong in this case. One only has to look at the open space. It clearly is an integral part of the housing proposal:

    a. It will be used by significant numbers of residents on a daily basis, for activities like children playing, dog walking, running, cycling etc,

    b. It is inextricably linked to the housing in AL25 in policy AL28 itself:

[82] Mrs Ventham, Proof, Apdx 5, page 20 – Access and Movement ***"- Pedestrian, cycle and emergency access via Westmead"*** and Figure 10 on page 21 showing the pedestrian and emergency access.

i. criteria 1 of allocation AL28 is to ensure it will ***"[d]eliver green and blue infrastructure, including public open space to serve the new residential and educational uses development on adjoining site AL25"***

ii. criteria 8 ***"Provide flood attenuation areas as a defensible buffer for proposed development on adjoining site allocation AL25"***

332. Yet, there is absolutely no requirement for the exception test in AL28.

333. So being an integral part of the housing proposal it does not generate the need for the exception test. The proper textural analysis and understanding of AL25 and AL28 illustrates and explains the point very clearly indeed.

334. Indeed, save for the exceptionally rare occasions when the emergency access is needed, if ever, it functions night and day for 365 days of the year as a pathway within open space. That means that for nearly all of the time that route is a water-compatible development. Arguable this is the right categorisation given that is its primary day to day use. Mr Wilkinson took that view.

335. But he was prepared to consider it separately as just an emergency access. It was on that basis he considered it to potentially fall within the "less vulnerable" category. His approach is as follows. An emergency access is something where vehicles are routed. It is not a categorisation listed in Annex 3 but a car park is recognised as a category. The only thing you will find in car parks are pedestrians and vehicles.[83] People do not tend to live in vehicles, you will not find a teacher conducting lessons in them and there is definitely no open heart surgery. So that would seem the most comparable example in terms of categorisation.

336. A car park is in the "less vulnerable" category. This category does not require an exception test for FZ 2 or 3a. This is consistent with everything that both the Local Plan inspector and the Council's professional officers concluded.

[83] and sometimes supermarket trollies and recycling areas if they are supermarket car parks

337. In contrast, Mr Saul tried to argue that the emergency access was a mass evacuation route, until a helpful example of that definition was provided to him by Mr Wilkinson he abandoned that argument. He did still stick to the idea that it is essential transport infrastructure. But that seems equally far fetched as it is a pedestrian pathway doubling up as an emergency access with only very occasional use.

338. On the very rare occasion, if ever, that it is used as an emergency access it will not fall within the "More vulnerable" of Annex 3 of the NPPF. That is because not only is it not included in the list, but also, it does not sit comfortably within anything in that list. It is not a house, a caravan or a campsite. Nor is it a school. It is an emergency access. It is not somewhere where people live, nor where they sleep. It is not an educational establishment where people go to school and nor is a health service like a hospital. It is a section of hard surfacing. You would be hard pressed to live on it, education your children on it or perform open heart surgery there.

339. The Council's final argument on the exception test is to say that the emergency access should be seen as part and parcel of the housing development because of various appeal decisions where inspectors have decided that the access to housing is in the "more vulnerable" category. But those cases, where relevant, relate to an individual home or housing site where the access under consideration is the sole or primary access. This is important because all homes need an access of some kind, otherwise people cannot get to and from there home at all, ever. The access being referred to in each of those instances is the sole or primary access.

340. In direct contrast, the emergency access on this site is an access which will be used by emergency vehicles very rarely, if ever. Emergency vehicles accessing the housing or the school on this site will us the left hand carriageway of the access road, or if that is blocked, the right hand side carriageway, or if both of those are blocked the adjacent pavement, or if all those are blocked then it will use the dedicated pedestrian/cycleway and if, miraculously, all of the above are blocked there is the dedicated footway. And obviously so because all of these options are available as the most direct route into the housing and school sites.

341. Only if all the above are blocked will there be need to consider the emergency access via Westmead. And if the 1 in 100 year flood event plus 35% climate change event occurs,

then for the reasons outlined above, the very last place the emergency vehicles will want to go is through the floodwaters present on Westmead and Aldebury Road. So to draw a parallel, as the Council do, between that scenario and the sole or primary access to a house or a housing estate is utterly unconvincing.

342. The Appellant has provided an Exception Test assessment. The inspector can rely upon this if he considers it necessary to do so. But Mr Wilkinson, along with the professional officers of the Council, has made clear that there is absolutely no need to go down that path in this case because an exception test is not required. Mr Saul has argued this because the Members thought it was necessary. But again, the Members position had nothing to do with evidence and a proper understanding of policy and guidance. It was solely a political refusal.

343. Finally, it is important to note the transcript of the committee meetings reveals that Members kept getting the phrases evacuation route and emergency access confused. The first is the crucial route out of the flood from the homes, which is why the planning appeal relied upon by the council don't apply here. In some instances they concern the only route to a property or group of homes through Flood Zone 3. But the homes and the school in the appeal scheme have a safe access solely in Flood Zone 1. An emergency access is different. And for the avoidance of any doubt there is no requirement for an emergency access to be an evacuation route, when an evacuation route already exists. This may be why Mr Saul floated his claim that this pathway is a mass evacuation route. An argument, as we have seen, he had to abandon.

344. Of course, it suited the Members purpose to get this confused, which would explain why they not willing to listen to professional advice.

Context 4: the Gradient of a Small Section of the Emergency Access

345. Absent of any convincing policy based objection, the Council seem to have become obsessed with the potential need to improve the gradient on a short section of the emergency access.

346. To be clear this has nothing to do with the emergency access being used as an emergency access. It is to do with its use as a footpath. The argument being this footpath needs to have a gradient of 1:20. That is plainly not an issue related to emergency vehicles like fire engines.

347. The plans of the emergency access are only in plan form. They are not concerned with the height of the access, so that is a matter for detailed design. But the Council say that to deliver that access would involve land raising in the floodplain and the EA might object. The problem for the Council however, is that seems implausible in the extreme because it is only a very short section of the new pathway (most of which is a matter for the Reserved Matters application) and is only 12cm in height (one third of the height of a school ruler). Its laughable to imagine the EA or LLFA will object to that. It is that height based on Mr Wilkinson's drawings. The Council say it is slightly more. But not much more. The difference is Mr Wilkinson has looked carefully at the design of the end of the pathway by Westmead and how it can drain efficiency without landraising.

348. But whatever the precise amount, it's a tony amount of material. And that is important because it can very obviously be compensated for. Compensation is a very simply concept. If land is to be raised in a floodplain it must be compensated for to ensure the floodplain remains the same. The floodplain of the River Thames here is vast – it stretches hundreds of metres across the bottom of the valley. It can hold vast quantum of water measured in terms of millions of cubic metres even in the section between Cookham and Maidenhead. The tony amount of material to be raised to lower the gradient here can be compensate directly and locally from the large area of open space within the site which is at the same height as the path.As Mr Wilkinson explains it must be compensated by reducing the level of land in the same level band depth (i.e. same height within the floodplain). Mr Saul could not deny that such compensation is possible. And in any event, it could be secured by way of condition or even a Grampian condition, notwithstanding the submitted plans. But in truth, it is a complete non-point. The EA will have no objection to this. The best time to do this is when the detailed Reserved Matters are submitted which cover the whole of the path. It may be that gradient increase can be accommodated simply by lower another section of the path itself.

349. That the Council think this is a good point to try and block 330 new homes is a useful measure of how ridiculous its case has become. The Council have become so blinded by the desire to trip the Appellant up over point of minute detail that they are prepared to try and block the deliver of a low gradient for people with disability. All the Council are doing is trying to find some way to defend itself from a costs application. The answer to that was to submit no evidence to the appeal – like many other council's are doing right now when new Members start make decisions for purely political reasons.

350. The proposal could of course come forward without a gradient that is compliant with the 1:20 gradient. Would such a shortcoming on a single section of just one pedestrian path in a public park be a reason to turn down hundreds of houses and affordable homes when the Council has a severe shortage of both? The answer is no. And it is that ultimate question about whether a shortcoming such as this could outweigh all the benefits of the scheme, let alone overcome the tilted balance which applies in this case, which reveals the Council is being unreasonable and delaying a proposal which is allocated and should have been granted planning permission without delay.

Context 5: The New Modelling done during the Inquiry

351. The Council's Closing submissions seek to suggest that the Appellant carried out the new modelling to try and address matters which it should have looked at before. That is wrong.

352. The Appellant modelled the development within the EA flood defences upstream in place and without them in place. Despite this, Mr Saul in his evidence pursued an argument that the Appellant should have modelled a partial breach of the EA flood defences. That makes no sense whatsoever. Modelling a scenario where there is no such defences gives the worst case scenario. Mr Wilkinson made this point in his evidence. It was yet another example of the Council making the Appellant do work for which there was no justification.

353. Yet Mr Saul continued with his point. Leading Counsel for the Appellant took the view at the start of the inquiry that despite this, it would be better to just do the work so that it would stop the Council complaining even though the work was unnecessary. Mr Wilkinson did this. And sure enough it showed that the flood waters in the breach were no worse with the partial breach than as if the defences were not there at all.

354. The result of the breach scenario is flood water on the access of 0.8 metres and 0.4 metres Westmead and Aldebury Road. Mr Saul focussed on the breach scenario because in the fully undefended situation the water is even higher on Westmead and Aldebury Road, which undermines the Council's case yet further at 0.6 metres.

Context 6: Professional Advice

355. Finally, it is worth remembering that neither the professional officers of the Council, nor the Environment Agency, nor the Local Lead Flood Authority, nor the Fire Service have identified any concerns here. The members had no technical evidence to support their position. They were simply flying a kite.

356. We now turn away from the context to look at the Council's individual arguments which are legion. But it is important to bear in mind the context on respect of each of these, because what the Council has been arguing on behalf of the Members is often devoid of common sense and at times illogical and unfair. Mr Saul has been brought in to defend the members position but his arguments such as claiming the path is a mass evacuation route or ignoring the existing floodwater on Weadmead and Aldebury Road are unconvincing.

The Council's Evidence

357. Once more, it is unfortunately necessary to examine closely the RfRs, the letter from RBWM to the Appellant from November 2023, and Mr Saul's proof of evidence in order to ascertain precisely what issues are still taken as regards flood risk. The full chronology of RBWM's shifting case on these points is detailed in the Appellant's application for costs, submitted separately. For **present** purposes, we focus on the case which the Appellant **is** now, at the end of the inquiry, actually required to meet.

358. Despite the relative simplicity and bareness of the flood-risk-related RfRs on this appeal, Mr Saul's proof of evidence identified an astonishing 32 different issues between the parties, which when listed covered four full pages.

359. Mr Saul's evidence is, by implication, that the expert officers of the Environment Agency ('EA') and expert officers at the Lead Local Flood Authority ('LLFA') missed all 32 issues

in the course of their examination of this case. Some of these issues had been raised in the course of the RfRs or the Council's Statement of Case. A number were entirely new.

360. Remarkably, there is no acknowledgement anywhere in Mr Saul's proof that any of those new points are, in fact, new – they are simply presented as part and parcel of the case which the Appellant is required to meet. It hardly needs stating that this is a manifestly unreasonable way in which to run a case.

361. In oral evidence, Mr Saul stood by the vast majority of the 32 points which he raised. There is no indication in the Council's Closing Submissions that any of the 32 points are no longer taken. As a result, regrettably, and despite considerable overlap and vagueness within the list, it is necessary for the Appellant to address each of the 32 issues raised in turn.

362. There is, however, a far shorter route open, in order to dispose of the main body of the Council's case. That is simply to determine (as is plain on the evidence) that the presence of an emergency access in Flood Zone 3a (against a development of 330 homes and a 3FE primary school entirely in Flood Zones 1 and 2) does not require the Appellant to undergo an exception test. Rather, it is open to the Inspector (and indeed, manifestly appropriate) to reach the obvious conclusion that the Westmead accessway cannot plausibly be described as "essential transport infrastructure" nor as a "mass evacuation route", and thus dispose of the point entirely. It is to that point which we first turn as it is fundamental part of many of Mr Saul's 32 points.

Need for an Exception Test

363. The Council's case is the exception test applies in this case because the development plan says one is required a proposal on AL25. To address this point in detail, it is first necessary to resolve a short point around the construction of the relevant policies in the BLP. That is because RBWM's primary case on the applicable flood risk policies appears to be[84] that, in analysing policy compliance with AL25(16), one can dispense with national policy altogether, such that whatever application for development is made on AL25, an exception test is required.

[84] Closing Submissions, §61

364. There is no dispute between the parties that *national* policy provides that an exception test will only need to be undertaken if proper analysis of the vulnerability of the site and the development proposed mandates it[85], with reference to Annex 3 to the NPPF. At local level, in policy NR1(7), the same applies. NR1(7) provides that "the exception test will need to be applied *in accordance with national policy and guidance* in the NPPF and PPG, including on sites allocated in the development plan". Plainly, NR1(7) imports the same considerations as are present in NPPF paragraph 169, and therefore in Annex 3. Were it otherwise, NR1(7) would amount to a carve-out from paragraph 169, applicable only to Windsor and Maidenhead, requiring an exception test to be conducted in all circumstances. That is plainly absurd. Despite this, RBWM nonetheless maintain that the equivalent provision in AL25(16) does *not* require consideration of national policy at all.

365. This is wholly unsustainable. RBWM suggest that national policy and NR1 offer ***"generally applicable policies to determine in any case whether an exception test is required"***, and that the question is answered "specifically" in AL25's case by AL25(16)[86]. Inadvertently, this submission is exactly right – the generally applicable policies require determination "in any *case*" whether an exception test is required, not "on any *land*". It is necessary to consider the specific case, and the specific development proposed, rather than simply to take a parcel of land as a whole, and determine that *all* applications for development, regardless of what they seek to put forward, must undergo the exception test.

366. Plainly, AL25(16) did not envisage such a situation. The better reading is that it must be read in light of NR1 (the specific policy on flood risk) and national policy (to which NR1, in turn, adverts). RBWM's Closing Submissions fall into this trap on a number of occasions, most notably in paragraph 62 where the remarkable position is advanced that the cycleway is ***"the most vulnerable development"*** on the Site – even vague consideration of the proposal, rather than the land, exposes this as utterly unjustifiable. RBWM's point is not assisted by pointing to the fact that AL25(16) was added by the Local Plan Inspector at the examination stage[87]. That step was undertaken at a time at which it was not clear whether residential or educational development would **take** place on Flood Zone 3a, as

[85] NPPF paragraph 169
[86] Closing Submissions, §61
[87] Closing Submissions, §61

Mrs Ventham explained[88]. Plainly, that would have required an exception test. However, the proposals have been carefully designed so as to avoid so doing.

367. The nonsense of RBMW's position is demonstrated most clearly by way of example. Were the proposed development in this case to be to turn the entirety of AL25 into amenity open space, on RBWM's case, an exception test *would* be required, purely on the basis that the open space sits on AL25. The same would go for a proposal to turn AL25 into a car park, or a water pumping station. Those examples need only be stated to see that they are unsustainable.

368. In short, RBWM's case is that one must have no regard at all to the nature of the development actually being proposed on AL25.

369. The Council's argument is that by virtue of the fact that 'it is where it is', an exception test must be undertaken. That is to divorce the proposal from reality and it is pretty desperate stuff. Such a reading of of AL25(16) actually ignores national policy and the governing flood-risk policy in the BLP. That being so, it *is* necessary to determine whether an exception test is required, with reference to national policy.

370. Before doing so, it is necessary briefly to address a point made in the Council's Closing Submissions, to the effect that the Appellant gave "no consideration" to the need for an exception test until the appeal[89]. That is factually inaccurate. It betrays precisely the error into which the Council have fallen throughout this inquiry. The Appellant considered the need for an exception test throughout the application process, and reached the conclusion that one was not needed[90]. That is based on what is plainly the correct interpretation of national and local policy. The professional officers of the council agreed and tried to explain this to the Members.

371. Turning to national policy, it is common ground that reference is required to the vulnerability classifications in Annex 3 to the NPPF, in combination with Table 2 of the relevant section of the PPG, in order to ascertain whether an exception test is required. As the notes to Table 2 indicate, developments frequently contain elements of differing vulnerability, and if so, the question arises whether the development should be considered

[88] Kathryn Ventham, Examination-in-Chief
[89] Closing Submissions, §60
[90] Kathryn Ventham, Evidence-in-Chief

in its component parts. It is common ground that the residential aspects of the development are 'more vulnerable' in Annex 3 terms.

372. It is not at all easy to pin down the Members case on the question of 'component parts'. In Mr Saul's proof of evidence, and in his oral evidence to the inquiry, the Members case was that the Westmead emergency access was best classified either as "essential transport infrastructure" on its own terms, or as a "mass evacuation route", and therefore in the highest vulnerability category (two categories which are in fact *higher* than the residential development)[91]. Mr Saul's fallback position[92] was that the access should carry the same classification as the residential development. Accordingly, Mr Saul's primary view appears to be that the development *should* be considered in its component parts (and be treated as *more* vulnerable than the residential development), and it is only his fallback position that the development should be treated cumulatively.

373. In Closing Submissions, the Council take the exact inverse of that position. Their primary case[93] is now that the development should *not* be disaggregated, and their fallback position[94] is that the accessway is 'essential transport infrastructure' (and therefore disaggregated from the residential development). Mr Saul's reliance on 'mass evacuation routes' appears to have been jettisoned entirely – that may not be surprising, following cross-examination on the point, but nonetheless makes it difficult to ascertain precisely what Council's case actually is. The Council appear to have got cold feet over Mr Saul's claim this route is an essential transport infrastructure. Mr Saul may have abandoned his case on claiming it is a mass evacuation route but, of course, a mass evacuation route that is a subset of "essential transport infrastructure". It give us an indication of what scale of development a "essential transport infrastructure" might be as if it were not entirely obvious anyway. The NPPF is a national document. Essential transport infrastructure in this sense will be railways and major roads like motorways and trunk roads.

374. The Appellant's case, on the other hand, is abundantly clear. First, it is manifestly clear that the development should be considered in its component parts – the Westmead accessway and the residential development could scarcely be more different in terms of vulnerability.

[91] Ryan Saul, Proof of Evidence, §2.1.4
[92] Ryan Saul, Proof of Evidence, §2.1.19, "even if…"
[93] Closing Submissions §63
[94] Closing Submissions §66, "even if…"

Second, it is wholly unarguable that the Westmead accessway is 'essential transport infrastructure', a 'mass evacuation route', or any other formulation of the Member's case. We deal with these in turn.

Should the development be considered in its component parts?

375. It is important not to answer this question in a vacuum. The PPG is not asking whether elements of the development are capable of disaggregation in a general sense. The PPG asks that question in the very specific context of developments containing different elements of vulnerability in relation to flooding. In that context, there are four clear reasons that the Westmead access should be considered on its own terms, disaggregated from the residential development.

a. The vast majority of Site allocation AL25 sits in Flood Zones 1 and 2, and only a very small proportion in Flood Zone 3a[95]. Accordingly, it is clear from the outset of the analysis that the vast majority of the AL25 Site and indeed the entirety of the residential and educational development areas are neither at high risk of flooding or qualify as development in Annex 3 that would require an Exception Test.

b. It is common ground that, absent of the Westmead access, there would be no concern about flood risk in respect of any of the remainder of the development, as all more vulnerable development is outside Flood Zone 3.

c. The development proposals have been designed taking great care to ensure that all residential and educational development is *not* in Flood Zone 3a. Throughout the design and application phase, the development has been considered in component parts, with all vulnerable development carefully placed outside areas at risk of flood, with the approval of RBWM[96].

d. While the development will benefit from two accesses, they are not remotely equivalent in nature. The main access to the site from Cookham Road is a large, wide access road, flanked by a separate pedestrian and cycle access, designed to link the Site to the main B-road passing through the area. The Westmead accessway

[95] Andrew Wilkinson, Proof of Evidence, §8.2.12
[96] CD E1, §10.18

is primarily to achieve compliance with AL25(6); it is a much narrower access, primarily for use by pedestrians and cyclists, which can also be used as an emergency access if required.

376. In response, RBWM's case hangs entirely on the suggestion that the Westmead access is "integral" to the development[97]. That is a meaningless description – no part of the NPPF, PPG, or any other local or national policy or guidance places any store whatsoever by whether or not something is "integral" to the development. Put simply, whether or not the Westmead access is "integral" is not the question. The question is whether it falls properly to be disaggregated. This submission also falls into precisely the trap described at above – it seeks to answer the question of disaggregation in general terms, rather than in the specific context in which it is asked.

377. The proper position is clear: as a matter of flood risk vulnerability, the Westmead access is different in almost every conceivable respect from the remainder of the development. It would be an unjustifiable triumph of form over substance were it not to be disaggregated from the residential and educational development on a different part of the Site.

378. It is puzzling why the Council suggests its position was ***"the approach taken by the Examining Inspector"***[98]. The examining Inspector considered an allocation for housing and a school, part of which was in Flood Zone 3a. She did not have any specific proposals for development before her, and so could not possibly have made any comment on the necessity of treating accesses either compositely or as disaggregated.

379. Secondly, as noted above, the Inspector was dealing with two separate allocations for two separate sites – AL25 and AL28. A site-specific requirement for an exception test does appear in AL25, but does not in AL28. Plainly, the two were not treated as one and the same. Third, the only formal 'plan' which the Inspector *was* aware of was the Vision Plan produced in support of the Site's proposed allocation, which does reference the Westmead access in its current location in FZ3[99]. Despite this, no exception test appears in AL28.

[97] Closing Submissions §§53, 54, 62, 63 (*inter alia*)
[98] Closing Submissions, §63
[99] Kathryn Ventham, Proof of Evidence, Appendix 5 (p.20)

380. It also does not assist to point to the *Needham Market* appeal decision[100]. At paragraph 29 of that decision, Inspector Jordan characterised the access under consideration in the following manner: ***"without the access there is no proposed means for vehicles to enter or leave the site and the sole purpose of the access is to serve the proposed development".*** Neither of those can be said of the Westmead access. It is simply not an analogous case, before one even considers the fact that it was a case in which the main access was in FZ3.

How should the Westmead emergency access be treated?

381. The second question is accordingly the proper classification of the Westmead access. Mr Wilkinson's took the view it is water compatible development and because it will function as a path in parkland. 365 days of the year every year it will perform that function. He has been prepared to look at its function as an emergency access separately though. On this his considered view is that the access ought to be treated as "less vulnerable". This reflects the fact that the access is, in terms of physical vulnerability and likelihood of damage following a flood, essentially indistinguishable from a car park or other footways in the vicinity, but recognises that it will have pedestrian, cyclist, and emergency services users.

382. This contrasts starkly with Mr Saul suggestion that the access is properly to be treated as 'essential transport infrastructure' or as a 'mass evacuation route'. Two matters are immediately notable as to those points.

    a. Mr Saul's classifications would place the accessway two categories *higher* than the residential development and the educational development.

    b. Mr Saul's classifications would place the accessway at the same level of vulnerability as power stations and water treatment works, and (somewhat ironically) at a higher level than the fire, ambulance and police stations at which the vehicles using the emergency access would be based full-time. This is difficult to understand.

In any case, neither suggestion is credible on its own terms.

[100] CD J3 (referenced in Closing Submissions §63 and 68)

383. It appears from the Council's Closing Submissions that the point taken by Mr Saul in relation to the accessway being a 'mass infrastructure route' is not pursued. This is eminently sensible. Even if one leaves aside the contention that the evacuation of a 3FE school is, in some form, on a par with the evacuation of 100,000 people[101] from the nation's capital, it is difficult to conceive of a situation whereby the school would be evacuated (a) off the development site altogether, and (b) through deep floodwaters rather than down the wide, dry main access. It is clear that the 'mass evacuation route' line was unjustifiable from the moment it was suggested, and it is wholly unclear why it has taken RBWM so long to jettison it.

384. RBWM's case as regards 'essential transport infrastructure' seems to be based largely around the contention that the access is, separately, 'transport infrastructure', and 'essential' to the development[102]. Aside from being a peculiar salami-slicing of the definition, this approach again fails to recognise the context in which it is being asked – a national policy seeking to define the very highest level of vulnerability, nationwide. The heading to the relevant section of the NPPF is "essential infrastructure". The paragraph goes on to list varieties of such infrastructure: transport, utility, and power generation. It is narrow and specific. It is clearly dealing with matters indispensable to the ongoing operation of the country in the event of an emergency situation. The examples provided by Mr Wilkinson (the M4 and the West Coast Mainline)[103] are plainly much more apposite. RBWM seeks essentially to rephrase "essential transport infrastructure" as "transport infrastructure essential to the development". That is wrong in principle; it is not what the words on the page say, and entirely ignores the context of the question.

385. The absurdity of the point was best demonstrated in cross-examination of Mr Saul. It was put to Mr Saul that, on his definition, "every footpath serving every individual house on the development would be essential transport infrastructure". Mr Saul agreed: "it is essential for pedestrians to get from A to B, so yes". Little more need be said: on Mr Saul's definition, the 2m of footpath outside any single house on the development is "essential transport infrastructure". That is Mr Saul's case. It is just absurd. It is an absurd case sails

[101] Which the Greater London Authority considers the definition of a mass evacuation (Appendix AW7)
[102] Ryan Saul, Proof of Evidence, §§2.1.5-2.1.6; Closing Submissions, §67
[103] Andrew Wilkinson, Examination-in-Chief

over the bar of what amounts to an unreasonable case. Mr Saul has come here and presented evidence before a planning inspector which is just absurd. That must be sanctioned.

386. Accordingly, it is clear that neither of Mr Saul's definitions bear any scrutiny. That is not, however, the end of the point. It has been clear from the moment that Mr Saul's suggestions were made that they were entirely without credence. Considerable inquiry time was taken up exploring them. That being so, the fact that the suggestions were made in the first place, and the fact that Mr Saul continued to defend them in oral evidence, must be seen to undermine his credibility overall. It would not be a proper approach to the evidence simply to treat this point in silo – the suggestion betrays a clear failing of sound professional judgment on the part of Mr Saul, which ought to be taken into account when considering his evidence more broadly.

Conclusion on the Exception Test

387. The short answer is clear – the Inspector is fully entitled to reject the Member's contention that national policy is to be jettisoned completely in examining whether the exception test applies, to reject Mr Saul's absurd analysis of the vulnerability of the Westmead emergency access, and to conclude that an exception test is not required. Indeed, that is the only proper course. It removes very many of the 32 points.

<u>The 32 Points</u>

388. The longer route necessitates fine-tooth consideration of each of the 32 points raised by Mr Saul in his proof of evidence. Accordingly, it is to what which we now turn (proceeding in sequence). Many of the points raised by Mr Saul are extremely repetitious; accordingly, in the interests of brevity, those points are dealt with cumulatively below, and flagged as such.

389. *Point 1: Failure to undertake the Exception Test*. As set out above, this is not required. Nonetheless, an Exception Test has been undertaken, we deal with the substance of it below.

390. *Point 2: Failure to select an appropriate land use from Annex 3*. This is dealt with above.

391. *Point 3*: *Failure properly to consider the vulnerability of users when selecting an appropriate land use from Annex 3*. This is the same as Point 2, and is dealt with above.

392. *Point 4*: *Failure to consider the movement of users when selecting an appropriate land use from Annex 3.* This is further repetition, and is dealt with above.

393. *Point 5: Failure to consider the mass evacuation of the school when selecting a land use from Annex 3.* This is yet more repetition, and is dealt with above.

394. *Point 6: Failure to consider the mass evacuation of construction workers when selecting a land use from Annex 3*. Mr Saul abandoned this point in his oral evidence. To the extent it is still relied upon, it is dealt with above. Once it is accepted that the evacuation of a 3FE school is not "mass evacuation", nor is the evacuation of residents from a housing estate nor the evacuation of construction workers whilst both are being built. Once more, the question arises in what scenario construction workers would feel compelled to evacuate across deep floodwaters, as opposed to the dry main access (or simply to higher ground within the Site). Added to which as Mr Wilkinson has made clear the floodwaters in the flat Thames Valley would not appear overnight. The build up would be gradual over the course of a week. Evacuation from homes, if necessary, would be well planned. But in this case, the evacuation route is not the Westmead evacuation route. It is the use of the main route out of the site. Not understanding this is partly where Members got themselves badly confused.

395. *Point 7: Failed to meet the requirements of the Design and Access Statement*. It is not clear what this point is attempting to address. On the assumption that it relates to the inaccessibility of the Westmead access in the event of an extreme flood event, this is dealt with compositely below.

396. *Point 8: Failed to demonstrate whether the AL28 vision for flood attenuation is possible within the application boundary*. This is wholly misguided. Flood attenuation is being provided. It will be supplemented by the excavation of the outfall ditch[104].

397. *Point 9: Failed to demonstrate whether the Maidenhead Bund could be improved beyond its current 1:25 year level of protection.* Mr Saul appears to proceed on the basis that the Bund is "within the Applicant's control". It is not[105]. It is within the control of the EA. The EA have not required improvements to their bund as part of this application. It also makes

[104] Andrew Wilkinson, Rebuttal Proof of Evidence, §3.1.5
[105] Andrew Wilkinson, Rebuttal Proof of Evidence, §2.1.17

no sense in any event. The proposals have been examined with total loss of the Bund. The allocation remains protected in both instances. What does happen if the bund is lost is that parts of Westmead and Aldebury Road sit under about 0.6m of water. Not therefore a route for the emergency services to take into the site.

398. *Point 10: "Failed to recognise the requirements of Essential Infrastructure in Flood Zone 3 requiring the emergency, pedestrian and cycle access to raise above the flood level".* The proposal does not create essential infrastructure in Flood Zone 3. There is therefore no need to raise land levels above flood levels. It is Mr Saul who has suggested this. Something he confirmed in cross-examination. He suggested the whole accessway should be above the 1 in 100 year plus 35% CC level. That would involve raising the land along a long linear route. Yet, as Mr Wilkinson explained, to do so would likely be highly dangerous, as it would cause significant displacement of floodwaters[106]. That could potentially have an impact on Westmead residents. Mr Saul's arguments are not only wrong but potentially harmful. No one else, not the EA, the LLFA or the officers of the Council have considered this necessary or appropriate.

399. *Point 11: Failed to design the Westmead access to "a suitable level of detail (noting access is not a reserved matter) in accordance with the RBWM Highway Design Guide to confirm level raising is required".* This is again unclear. As regards level raising, Mr Wilkinson confirmed in his rebuttal that very minor level raising of the Westmead access would deliver the 1 in 20 gradient[107]. We deal with the limited effect of this cumulatively below.

400. *Point 12: Failed to create and test a combined pluvial and fluvial model.* As Mr Wilkinson explained (and as is, in any case, obvious) no professional body mandates the examination of every hypothetical modelling scenario. The industry standard design event probability is 1% AEP. But Mr Wilkinson has considered this and has pointed out that in this flat part of the Thames catchment, the likelihood of the peak of a pluvial flood (with a catchment area of about 1km^2) arriving on Site at the same time as the peak of a fluvial flood (with a catchment area of the entire Thames basin of around 8,000km^2) is negligible. That is his professional judgment. The circumstances here do not require a further modelling of a

[106] Andrew Wilkinson, Examination-in-Chief and Cross-Examination
[107] Andrew Wilkinson, Rebuttal Proof of Evidence, §2.1.15

scenario where the two events are very unlikely to happen at the same time. This is supported by the fact that the EA and LLFA did not require a combined model[108].

401. *Point 13: Failed to model "a designed RBWM Highway Design compliant emergency access (which would require raising levels in the floodplain) in the post development models for fluvial, pluvial and combined models"*. This is manifestly unclear. It appears to overlap largely with Point 11. Modelling has been provided for fluvial flooding[109], as we detail below. As Mr Wilkinson explained, in this instance, there is negligible prospect of interaction between fluvial and pluvial floodwaters[110].

402. *Point 14: Failed to establish whether the necessary pluvial and fluvial level-for-level floodplain compensation plus 5% can be achieved*. This is wrong. This precise point is demonstrated in Drawing No. 70063905-WSP-XX-XX-DR-C-0022 P03 for fluvial flooding and in Drawing No. 70063905-WSP-XX-XX-DR-C-0015 P04 for pluvial flooding[111]. Albeit the pluvial flooding only needs to be compensated for on a volume for volume basis and it was conservatively assumed to all pond within the site.

403. *Point 15: Failed to establish the depth of flood waters along the emergency access (note: RBWM drawing Appendix B confirms over 1m depth of flood water)*. The drawing to which Mr Saul refers is the so-called 'undefended scenario' (that is to say, the scenario in which the Maidenhead Bund does not exist) for which the depths of flooding are included in the original FRA[112], alongside those estimated for the defended scenario. Mr Saul accepted in cross-examination that the undefended scenario was not the appropriate focus. Mr Wilkinson's modelling, which defines the aforementioned flood depths, demonstrates that the low point on the anticipated route of the Westmead access (24.45mAOD) would experience a depth of flooding of 760mm in a 1%AEP plus 35% climate change flood (the design flood event).

404. *Point 16: Failed to determine the hazard rating associated with various scenarios*. As Mr Wilkinson explained, 'hazard ratings' are simply a function of flood depth and flood velocity[113]. Depths and velocities were extensively modelled across a range of scenarios,

[108] Andrew Wilkinson, Rebuttal Proof of Evidence, §2.1.45
[109] Provided on Monday 11th March 2024
[110] Andrew Wilkinson, Examination-in-Chief
[111] Appendix B, FRA Addendum 2 (CD B8)
[112] Hydraulic Modelling Report, Appendix to FRA (CD A16-A19)
[113] Andrew Wilkinson, Examination-in-Chief

and the model provided along with various outputs as part of the application. With the benefit of Mr Saul's expertise, the hazard ratings could easily have been calculated by assuming the low velocities which would be expected at the edge of the floodplain. Nonetheless, Mr Wilkinson also provided the hazard ratings during the course of the inquiry, in order to join up those dots. No new points were raised; we deal with the impact of the hazard ratings cumulatively below in tackling the overall question of 'safety'.

405. *Point 17: Failed to undertake a breach analysis of the potential failure of the Maidenhead Bund*. As Mr Wilkinson explained, no 'breach analysis' was undertaken, because the Appellant determined it would be more effective and useful for the EA and LLFA to model the 'undefended scenario', a considerably more severe flood event[114]. Nonetheless, the Appellant again undertook to provide a 'breach analysis' as a middle ground between the two. Predictably, no new issues arose, as accepted by Mr Saul in cross-examination; the only identified concern related to velocity of floodwaters directly adjacent to the Bund, but as Mr Wilkinson explained, the Site is some 350m upstream of the Bund. The Council, in Closing Submissions, seek to suggest that this later modelling "further demonstrates the validity of the Council's objections"[115] with reference to the PPG[116]. It is manifestly unclear how this is so: the breach scenario was not considered necessary by the Appellant, EA, or LLFA. It was then requested by the Council, upon which it was conclusively proven to be unnecessary. If anything, this demonstrates the futility of the Council's objections.

406. *Point 18: Failed to consider "other sources of flooding" in the Exception Test*. This is exceedingly unclear. Both pluvial and fluvial flood risk are considered in the Exception Test Note[117], and all other forms of flooding are agreed as 'low risk' in the Flooding Statement of Common Ground[118].

407. *Point 19: Failed to identify the two trees (shown to be retained) needing removal and mitigation to facilitate the emergency access*. This is again very unclear. The trees have been identified (indeed Mr Saul identifies them himself). To the extent that this is a question about whether they can be removed, that is well beyond Mr Saul's purview as a flood risk

[114] Andrew Wilkinson, Rebuttal Proof of Evidence, §2.1.25
[115] §3
[116] §81(a)
[117] Appendix AW8
[118] CD F5, §3.6.1

expert, but in any case, Mr Wilkinson confirmed in examination-in-chief that, following consultation with the arboriculturist, the trees can be removed.

408. *Point 20: Failed to use the most recent hydrology data in the updated models.* The pluvial and fluvial modelling were both conducted prior to the release of the updated data (in December 2022), but was confirmed as acceptable after the data was released by the EA (in 2023). In addition, as Mr Wilkinson explained, for this geographical location there is a reduction when comparing the newly released FEH22 data with the previous rainfall data used in the pluvial model. And lastly the drainage model was run with the FEH13 dataset (which is greater than the FEH22 dataset) as opposed to the original use of the IH124 method, and there was no discernible difference[119].

409. *Point 21: Failed to use the most recent topographical survey in all drawings and models "(noting the application material refers to three different topographical surveys)"*. The application material does not refer to three different topographical surveys. As Mr Wilkinson explained, it refers to the baseline 2012 survey, a 2016 survey which added in some river cross-section surveys done on the Maidenhead Ditch, and a 2020 survey which added in some additional spot heights on the unchanged Site[120].

410. *Point 22: "Failed to consider local flooding issues and third party comments on the case"*. Perhaps unsurprisingly, as a flooding expert of 25 years' standing instructed to provide flood risk evidence on this appeal, Mr Wilkinson did indeed consider "local flooding issues" in his evidence. He also considered every single relevant third-party comment one by one in his proof of evidence[121].

411. *Point 23: Failed to consider the requirements of the Emergency Services with regard to the hazard rating*. Those requirements have been considered in two respects. First, a large, flood-free access to the Site is provided via Cookham Road. Second, in respect of the Westmead access, as outlined above, Royal Berkshire Fire and Rescue Service ('RBFRS') have specifically been consulted. They did not express any dissatisfaction or concern with the arrangements.

[119] Andrew Wilkinson, Examination-in-Chief
[120] Andrew Wilkinson, Examination-in-Chief
[121] Andrew Wilkinson, Proof of Evidence, Section 6

412. *Point 24: Failed to consider the Royal Berkshire Fire and Rescue Access for Emergency Vehicles Guidance*. In attempt to be of even greater assistance, the Appellant contacted RBFRS directly to obtain site-specific advice.

413. *Point 25: Failed to consider "the management and maintenance arrangements of the proposed swales, roads and basins proposed to cater for offsite surface water flows"*. These matters are considered in the original FRA [122]but clearly need to be detailed further for the reserved matters stage once the design has developed further.

414. *Point 26: Failed to "create and test the drainage strategy calculations to include the offsite surface water flows in the basins to model the extra head of water"*. Testing of the drainage model has been undertaken with the additional head of water generated by the pluvial floodwaters in the basins to assess the potential discharge rate. Due to the additional catchment area (from off-site) and the anticipated rate of infiltration within the low-lying area of the site, the discharge of runoff is not expected to be greater than existing conditions – thereby not increasing flood risk off-site. Notwithstanding this, the outline application only includes an outline drainage strategy which will be refined at the detailed design stage[123].

415. *Point 27: Failed to retain the offsite surface water flows and volume onsite to mimic the baseline scenario*. The demonstrated storage above the requirement for runoff from the Site itself will be accommodated, as demonstrated in Mr Wilkinson's proof and the FRA Addendum 2. The modelling assessment undertaken for pluvial floodwaters to inform the content of FRA Addendum 2 identifies a requirement of approximately 7,500m^3 of storage in the most extreme design flood event; the proposals are to provide 7,900m^3 of storage.

416. *Point 28: Failed to use the correct greenfield runoff boundary to exclude the existing onsite catchment which drains to the depression*. Although it is not clear on its face, it became clear during the evidence of Mr Saul that the concern in this regard is that the onsite realities of the greenfield runoff rate differ from those used in Mr Wilkinson's calculations. This is a bad point. First, the methodology used by Mr Wilkinson is the industry standard approach to calculating greenfield runoff rates[124]. Mr Saul did not demur from this. Second, as Mr

[122] Section 8.6, FRA (CD A11)
[123] Andrew Wilkinson, Examination-in-Chief
[124] Andrew Wilkinson, Rebuttal Proof of Evidence, §2.1.49

Wilkinson explained, the outline drainage strategy proposed by the Appellant actually involves a reduction in surface water runoff to the Maidenhead Ditch when compared to the calculated rate – it will accommodate runoff from a 1% plus 40% climate change flood event both on-site and off-site to the west at a maximum discharge rate of 1.88 litres per second per hectare (l/s/ha), which is extremely low. Industry standard guidance suggests that anything below 2l/s/ha will not increase downstream flood risk[125].

417. *Point 29: Failed to account for urban creep in drainage strategy calculations*. There is no national or local policy requirement to do this. Nonetheless, as Mr Wilkinson explained, the conservatism within the model will account for this more than adequately[126]. Mr Saul has not suggested otherwise.

418. *Point 30: Failed "to provide a comprehensive and co-ordinated approach prepared from one consultancy office and design team"*. This is a remarkable point to be taking at a public inquiry. It amounts to a criticism of the corporate structure of Mr Wilkinson's employers, and an implied allegation that it is incapable of producing comprehensive and co-ordinated evidence. No more need be said about it.

419. *Point 31: Failed to provide a planning statement which explains why there is a separate full application for enabling works.* This is the paradigm example of a planning matter. It has nothing to do with Mr Saul.

420. *Point 32: Failed to consider the mass evacuation of construction workers*. This is a direct replica of Point 6 above.

421. Before turning to the cumulative issues, the Appellant would note that a large number of these issues are essentially misunderstandings on Mr Saul's part. In particular in relation to Points 9, 14, 19, 20, and 21, it is manifestly unclear why Mr Saul did not simply seek clarification from Mr Wilkinson, but instead assumed basic errors on the part of a professional colleague, and wasted inquiry time having to deal with them.

<u>Policy Compliance</u>

[125] Andrew Wilkinson, Examination-in-Chief
[126] Andrew Wilkinson, Rebuttal Proof of Evidence, §2.1.55

422. It is necessary to draw these manifold threads together. As outlined above, RBWM's case is that the proposals conflict with paragraphs 170-171 of the NPPF, and NR1(5) and NR1(7) of the BLP[127]. Again, for the reasons outlined above, the Appellant's primary case is that no conflict with NPPF paragraphs 170-171 or NR1(7) arises, because no exception test is required.

423. Nonetheless, and without in any way accepting that it is required, the Appellants have conducted an exception test. As is well-established, paragraph 170 of the NPPF requires the demonstration of two matters:

a. That the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
b. The development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

424. It is clear on this appeal that the focus is on 170(b). There can be no realistic argument that the wider sustainability benefits of the delivery of 330 homes on an allocated site, with a considerable chunk of affordable housing, outweigh the limited flood risk in respect of the secondary pedestrian access to the Site, even taking the Council's case at its highest. Neither Mr Jarvis nor Mr Saul felt it was within their expertise to concede this point in cross-examination, but neither sought to challenge it. Accordingly, the focus, pursuant to 170(b), must be on whether the development will be "safe for its lifetime taking account of the vulnerability of its users" and whether it "increases flood risk elsewhere". We will address these in turn. In so doing, we will also cover all of the ground covered by RBWM's case on NR1(5). The Appellant has been unable to identify any separate strand of objection based on NR1(5), as distinct from the matters covered by national policy.

[127] Closing Submissions §94

Off-Site Flood Risk

425. It is convenient to start with off-site flood risk, as the points can be taken shortly. In Closing Submissions, RBWM identify only two "issues" that relate to off-site flood risk[128]. The second issue relates to the question of greenfield run-off rates, and is dealt with comprehensively at paragraph 128 above. The first relates to the Appellant's proposal to raise the height of the Westmead access, which RBWM contends "raises the prospect" of an increase in off-site flooding. RBWM do not go so far as to say that there will actually be any increase in off-site flooding, even on a speculative basis.

426. The short point in this regard is that Mr Wilkinson's evidence[129] is that, having modelled the very slight increase in height, there is no impact off-site. Indeed, Mr Wilkinson's evidence was that he was not surprised by this; in the context of a vast floodplain with $60m^3$ per second of floodwater running past the Site in a 1% AEP plus 35% climate change event, increasing the height of the Westmead access by approximately 12cm across just a 15m length of the path is highly unlikely to make any difference. That answers the point raised under paragraph 170(b) – there is no "increase in flood risk elsewhere".

427. In Closing Submissions, the Council raise three very different points in response to this clear evidential picture. First, they refer to a failure to consider alternatives[130]. There are two very good reasons for this, as Mr Wilkinson explained in the oral evidence. In the first instance, raising the Westmead access above design flood levels would likely form a dam to floodwaters, thereby *increasing* the risk of off-site flooding. Second, Westmead itself remains at a lower level (off-site) which cannot be raised due to the level of properties that it serves; during the design flood event, the corner of Westmead and Aldebury Road would be under floodwaters of approximately 300mm before one even considers the matters within the site.

428. Second, a discrete point is raised concerning consultation with the EA and LLFA about the raised access, with a *Grampian* condition suggested[131]. There are two short ways of resolving this issue.

[128] Closing Submissions §90
[129] Andrew Wilkinson, Examination-in-Chief
[130] Closing Submissions §84
[131] Closing Submissions §§58-59

a. As identified, it is wholly unnecessary: Mr Wilkinson's modelling demonstrates clearly that no impact arises as a result of the raising of the flood plain, such that there is nothing for the EA to review. Evidence of appropriate compensation solutions were provided as part of Mr Wilkinson's rebuttal[132], and during the course of the inquiry[133], and a condition has now been agreed to ensure that sufficient compensation is in place.

b. Mr Wilkinson was asked clearly and specifically in his oral evidence whether he could foresee, given his many years of experience in interacting with them, the EA having any concerns about such minor ground-raising. His answer was clear: 'no'. This is in no small part down to the fact that the compensation solutions provided were produced according to general EA standards.

429. Accordingly, while the Appellant holds no 'in principle' objection to its imposition if felt necessary, there is absolutely no basis for the imposition of the *Grampian* condition suggested. For completeness, it is wrong to suggest (as RBWM do[134]) that ***"none of the application documents – nor the FRA – deals with the flood risk to the Westmead access***". Modelled flood depths along the Westmead access were set out in the Hydraulic Modelling Report included in the original FRA, as was a copy of the Masterplan clearly showing the proposed access[135]. In any case, this point is only of limited relevance – as highlighted, there is simply no reason to believe that the EA would harbour any concerns about such a minor amendment to the scheme.

430. Third, the Council identifies concerns about the revised modelling in light of the raised access[136]. Indeed, it raises these concerns at the head of its case in Closing. In so doing, it makes a number of considerable factual errors.

a. The Council suggest that the additional modelling provided during the inquiry recognised "for the first time" the need for land raising at the Westmead access.

[132] Drawing 70063905-WSP-XX-XX-DR-C-0022 P02
[133] Drawing 70063905-WSP-XX-XX-DR-C-0022 P03
[134] Closing Submissions §§55 and 73
[135] CD A11 and A16
[136] Closing Submissions §3

This is simply not accurate – Mr Wilkinson raises the point expressly in his rebuttal Proof of Evidence, submitted weeks before the inquiry[137].

b. The Council states that the new modelling "supersedes" the modelling produced during the application stage. That is wrong. Each piece of modelling produced was for a very specific purpose. None of it purported to replace all other models produced to date.

c. The Council seeks to infer that the Appellant was acting unreasonably in not submitting drawings demonstrating 3D land-raising. Once more, this is inaccurate – as explained both by Mr Wilkinson and Mrs Ventham in oral evidence, it is standard practice when applying for access to provide 2D drawings only. 3D drawings do not usually appear until the detailed design stage.

d. Perhaps most importantly, the Council contend that the raised access ***"goes to the central flood risk consideration of whether the proposals may increase flood risk off-site"***. That is wrong on the evidence – Mr Wilkinson's modelling shows clearly that it has no impact.

"Safe for its lifetime"

431. In seeking to answer this question, it is necessary to be cognisant of three critical points of context.

a. It is common ground that, save in an extreme flood event, the Westmead access will be dry and fully usable. Indeed, it is common ground that, even in a 1 in 100 year flood event in the present day (i.e. no climate change allowance), the Westmead access will be dry and fully usable. It is only once one builds in an uplift for climate change that the access will be flooded in such an event[138].

b. It is also common ground that, no matter what modellable flood event strikes the Site, the main access at Cookham Road will be dry. Accordingly, save an alternative, speculative event which blocks it, the Cookham Road entrance will

[137] Andrew Wilkinson, Rebuttal Proof of Evidence §2.1.15
[138] Andrew Wilkinson, Proof of Evidence, §5.2.15.4

always be usable by pedestrians, cyclists and all anticipated vehicles (including Emergency Services).

c. As a matter of fact, it is simply very unlikely that the Westmead access will ever be necessary as an emergency access, particularly when it were affected by floodwaters. Mr Wilkinson calculates the probability of the events coinciding on any particular day as low as 1 in 70 billion (about 0.000000000014%AEP), for the reasons outlined above in relation to the highways evidence. Mr Saul does not provide any alternative calculation, nor does he challenge any element of Mr Wilkinson's calculation. Accordingly, it is essentially common ground that the circumstances in which the Westmead access will actually be required as an emergency access during the peak of such a flood event are vanishingly unlikely, to the point of being essentially negligible.

432. Against that background, it is necessary briefly to examine paragraph 170(b), and the phrase ***"safe for its lifetime, taking account of the vulnerability of its users".*** RBWM's case is that it is wholly impermissible to take into account any element of probability of use when assessing safety[139]. Accordingly, RBWM's case must be that paragraph 170(b) requires that a development be guaranteeably 100% "safe" (with no margin for error) "for its lifetime" (and in every conceivable eventuality), "taking into account the vulnerability of its users" (but ignoring the likelihood of them actually being users). The Appellant would observe that, given the statistics produced by Mr Wilkinson, RBWM had little choice but to pursue this case – the only route to demonstrating that the exception test is not passed is to contend that probability of use must be ignored completely. As soon as one accepts that probability *is* relevant, the unanswerable conclusion to be drawn from the statistics put forward is that the development *is* safe.

433. For at least three reasons, RBWM's case is utterly unsustainable:

a. First, it imposes an impossibly high bar on developers. Combined with the common ground that it is incumbent upon the Appellant to demonstrate that the requirements of paragraph 170 are met[140], RBWM's reading of the phrase would require an Appellant to demonstrate that the development is safe in every conceivable

[139] Closing Submissions §80
[140] Closing Submissions §70

eventuality, no matter how fantastical or implausible. That is an insuperable obstacle. The obviously better view is that "safe for its lifetime" must be read reasonably, with regard to the precautionary principle given the importance of the issue.

b. Second, it leads to absurd conclusions. It is necessary to face up to the logic of what RBWM is asking the Inspector to do: refuse permission for 330 homes on an allocated site on the basis that, in a 1 in 70,000,000,000 event, the secondary access to the site may be unsafe. That defies logic.

c. Third, on a more fundamental and theoretical level, it ignores the fundamental statistical and scientific basis of the analysis of flood *risk*. The following exchange from the cross-examination of Mr Saul makes the point perfectly:

> *Mr Young KC: What underlies flooding evidence is risk?*
> *Mr Saul: Yes.*
> *Mr Young KC: When we talk about events 'happening', we are talking about the probability of them happening. In the 1 in 100 year event, there is a 1% chance of that happening every year?*
> *Mr Saul: Yes.*
> *Mr Young KC: That is a probability?*
> *Mr Saul: Yes.*
> *Mr Young KC: Because flood risk is the science of probability?*
> *Mr Saul: Yes.*

d. That, in a nutshell, is the point – it is utterly impossible to approach flood risk analysis without assessing probability; probability is integral to the concept of "risk". It is manifestly not, as RBWM seek to suggest, "a task for actuaries"[141] – RBWM's own witness made that abundantly clear in the above exchange.

434. Accordingly, it is clear that probability of use *is* relevant. Once one accepts that, RBWM's case falls away very swiftly. Properly analysed:

[141] Closing Submissions §51

a. The access clearly is "safe for its lifetime" as regards the emergency services. In all except the most severe flooding incidents, it is undeniably available. In severe flooding incidents, it will not be used by the emergency services, except in a 1 in 70,000,000,000 event. Taking a reasonable and balanced approach to "safe for its lifetime", that is entirely reasonable and compliant with paragraph 170(b). Indeed, it is notable that even in that scenario, it will be safe for fire engines, as RBFRS have confirmed that its engines are capable of traversing floodwaters in excess of those experienced in the design flood event, as outlined above.

b. The access is also clearly "safe for its lifetime" as regards its other users: pedestrians and cyclists. As above, in all scenarios save an extreme flood event, it is entirely safe. In those extreme flood events, as Mr Wilkinson explained[142], and as Mr Saul accepted[143], a Flood Management Plan could be put in place, pursuant to which signage could be erected, a plan could be devised with the council and emergency services in the event of an extreme flood, and consideration could be given to particular surfacing of the pathway to minimise vulnerability. As Mr Wilkinson explained[144], the access is not unsafe for pedestrians or cyclists in an extreme flood event, because it will not be used by them in that event. They will simply choose another route. Indeed, presumably for these reasons, there does not appear to be any substantive challenge in the Council's Closing Submissions to the proposition that the access is "safe for its lifetime" as regards other users.

435. Precisely the same points can be made in respect of the Council's reference to paragraph 7-047 of the PPG[145]. The PPG suggests that access consideration should include "voluntary and free movement during a design flood". That is achieved by reason of the main Cookham Road access, which will be dry in such a scenario. Furthermore, paragraph 7-047 also expressly provides that, "wherever possible, safe access routes should be provided that are located above design flood levels and which avoid flow paths. Where this is not possible, limited depths of flooding may be acceptable, provided that the proposed access

[142] Andrew Wilkinson, Examination-in-Chief
[143] Ryan Saul, Cross-Examination
[144] Andrew Wilkinson, Examination-in-Chief
[145] Closing Submissions §81(b)

is designed with appropriate signage etc to make it safe." This is precisely what the Appellant is suggesting. As Mr Wilkinson referenced frequently in his oral evidence, the fact remains that Westmead itself is also vulnerable to flooding, a fact which will be immediately apparent to any emergency services seeking to use the access in design flood conditions.

436. Nor is any different conclusion reached with reference to the hazard ratings provided by Mr Wilkinson during the course of the inquiry. As Mr Wilkinson identified in his oral evidence, it there was "never any doubt" that the hazard ratings along the Westmead accessway would be 'significant'. As Mr Wilkinson also explained, hazard ratings are a function of both depth and velocity, and given the peak flood depths of 700-800mm that are predicted during the design flood event, a 'significant' hazard rating was inevitable. The maximum velocity, however, will be extremely low, as Mr Wilkinson's modelling has consistently identified and should have been expected given the location of the accessway; in the region of 0.14m/s[146]. Clearly, no new concerns arise – the hazard rating simply adds a badge to the evidence already before the inquiry in relation to depth and velocity.

Exception Test Conclusion

437. That all being so, it is clear that even if the Inspector does reach the stage of considering the substantive merits of the exception test, the Proposed Development passes that test. The Development would clearly provide enormous "wider sustainability benefits to the community" which outweigh the flood risk, even on the Council's case. Furthermore, on a proper reading of NPPF paragraph 170(b), it is clear that the development "will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall".

<u>Conclusion On Flood Risk</u>

438. Accordingly for these reasons:

    a. There is no breach of NPPF paragraphs 170-171, either because the exception test is not required at all, or because the Appellant passes the test in any event.

[146] Which equates to taking 7 seconds to travel through 1m.

b. There is no breach of NR1(7) for the same reasons.

c. There is no breach of AL25(16) for the same reasons.

d. There is no breach of NR1(5), because for all of the reasons outlined above, the development does not materially increase the number of people, property or infrastructure at risk of flooding. For completeness on this point, Mrs Ventham is entirely right to observe that, in order to achieve compliance with NPPF paragraph 167, it is necessary to add "where possible" to NR1(5), to avoid creating a substantially higher barrier at local as opposed to national level. Accordingly, to the extent that it is thought that there *is* a material increase, it is clear that the Appellant has done everything possible to avoid this, and as such there is no conflict.

AFFORDABLE HOUSING

439. In an inquiry replete with technical data, complex modelling, and intricate calculations, it is easy to lose sight of the dire position in relation to affordable housing in the Borough as 'just another set of statistics'. It is not. The Proposed Developments would provide 132 real-life households with an affordable house in Windsor and Maidenhead. They would provide 58 real-life households with social rent homes. They would provide 48 real-life households with affordable rental homes. They would provide 26 real-life households with shared ownership homes. Not a shred of this evidence is disputed by RBWM.

440. It is important not to lose sight of the human beings at the heart of this appeal. There are, at present, 516 households on the Council's housing waiting list, all of whom have been assessed as having a demonstrable housing need according to stringent local criteria[147]. Households in need of affordable housing who are unable to access it suffer considerable real-world impacts – physical and mental health decreases, concerns about safety increase, impacts on the education and development of children increase, and households can ultimately be forced to choose between unaffordable rent and putting food on the table[148]. The Proposed Developments offer an opportunity for 132 households' worth of human

[147] Jamie Roberts, Proof of Evidence, §§11.3-11.5; Appendix JR1
[148] Jamie Roberts, Proof of Evidence, §5.27

beings to be lifted out of that kind of precarious life, and into sustainable, affordable, long-term accommodation which meets their needs. That must be centrally in mind when assessing the extent to which the aforementioned technical issues ought to prevent this development from coming forward.

441. All of this is true across the country, but it is particularly true in this borough. RBWM needs affordable housing to be delivered, and it needs it quickly. That is so for three central reasons.

442. First, as was outlined in opening, RBWM is an exceptionally unaffordable local authority area. The lower quartile affordability ratio in RBWM (which is representative of the 'entry level' of the housing market) is the tenth highest in the country outside London – the lower quartile home costs 14.44x more than the lower quartile salary[149]. That is an astonishing figure on its own terms, and makes it almost impossible for first-time buyers to get onto the housing ladder. The situation is no better for those seeking to rent; lower quartile private sector rent in 2023 was a staggering 72% higher than the national figure[150]. Even more alarmingly, as Mr Roberts highlighted in oral evidence, that rental figure has jumped by £96 per month in the last year alone. Accordingly, the affordability problem in RBWM is not just difficult at present, it is getting worse.

443. Second, that affordability problem has been exacerbated by the pitiful rate of delivery of affordable housing in RBWM in recent years. Over the last 10 years of the BLP period from 2013/14 to date, the Council has delivered an average of just 46 net affordable dwellings per annum, which is just 10% of net overall housing completions[151]. Within the Local Plan, HO3 makes delivery of 30-40% affordable housing per scheme a policy requirement in the Borough; the Council's rate of delivery over the last 10 years is nowhere near that figure. The consequence of that under-delivery is, unsurprisingly, a vast shortfall, when assessed against need. As Mr Roberts explained during oral evidence, the Council has produced two assessments of need in recent years – the Strategic Housing Market Assessment ('SHMA') in 2016, and the Local Housing Needs Assessment ('LHNA') in 2019. The latter of the two picks up amendments to the NPPF in 2018 which significantly expanded the definition of affordable housing. Both assessments make for bleak reading. Against the SHMA need

[149] Jamie Roberts, Proof of Evidence, §§11.18-11.19
[150] Jamie Roberts, Proof of Evidence, §§11.24, 11.31
[151] Jamie Roberts, Proof of Evidence, Figure 9.1 (p.61)

figure over the last ten years, the Council has delivered an average of just 46 net affordable dwellings per annum, resulting in a huge overall shortfall of 3,884 affordable dwellings by the end of 2022/23, with only 11% of its needs being met[152]. Against the LHNA need figure over the last three years, the Council has delivered an average of just 57 net affordable dwellings per annum, already resulting in an accumulated shortfall of 2,825 affordable dwellings by the end of 2022/23, with only 7% of its needs being met[153].

444. Third, there is very little by way of light at the end of the tunnel. Mr Roberts has undertaken an analysis of deliverable supply of affordable housing across the next five years. On the figures adjusted for delivery in accordance with the evidence of Mr Paterson-Neild, deliverable supply is just 623 affordable dwellings across a five-year period, which is just 125 dwellings per annum[154]. Against a shortfall of as much as 3,884 dwellings, which is growing every year, that is plainly woefully short.

445. More concerningly, as Mr Roberts explained in his oral evidence, even that delivery figure is heavily reliant on allocated sites in the local plan. RBWM is a borough with a very considerable amount of Green Belt land, and on Mr Roberts' calculations, were one to remove allocated sites from deliverable supply, the figure would drop to around 342 dwellings over the next five years[155]. Put shortly, in order even to scratch the surface of the affordable housing need in RBWM over the next five years, the Council is reliant on affordable housing on allocated sites coming forward in a timely fashion.

446. In sum, therefore – it is often said at inquiry that a local authority is in the midst of an affordable housing 'crisis'. In RBWM, that description could scarcely be more accurate. The Borough is one of the least affordable areas in the country, currently meeting 7% of its affordable needs. The urgency for the provision of affordable housing simply could not be more stark and obvious.

[152] Jamie Roberts, Proof of Evidence, Figure 9.2 (p.62)
[153] Jamie Roberts, Proof of Evidence, Figure 9.3 (p.63)
[154] Jamie Roberts, Proof of Evidence, §10.16
[155] Jamie Roberts, Proof of Evidence, §10.14

HOUSING LAND SUPPLY

447. Surprisingly, in their Closing Submissions, RBWM assert that it is "not necessary for the Inspector to resolve the housing land supply position to a greater level of precision than a range of 3.69 – 4.69 years"[156]. The contention is that, as this is an allocated site and both parties give at least 'significant' weight to the benefits of housing delivery, it is not necessary for the Inspector to go any further than assuming that the housing land supply is somewhere within a range of a full year.

448. While perhaps an understandable position given the weakness of the Council's case as explored at the roundtable session, it is not a defensible one. The Court of Appeal has been clear on a number of occasions that extent of shortfall *is* directly relevant in the planning balance. That is clearly all the more so when the difference between the two parties is a full year's worth of housing land supply. As Davis LJ observed at [83] of *Hallam Land Management Ltd v SSCLG* [2018] EWCA Civ 1808[157]:

> *"The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is borne out by the observations of Lindblom LJ in the Court of Appeal in paragraph 47 of Hopkins Homes. I agree also with the observations of Lang J in paragraphs 27 and 28 of her judgment in the Shropshire Council case and in particular with her statements that "…Inspectors generally will be required to make judgments about housing need and supply.""*

Policy Position

449. The policy position is common ground[158]:

a. In respect of so-called 'Category A sites' (sites with permission which are not major development, and all sites with detailed permission), they ought to be considered deliverable unless there is clear evidence to the contrary.

[156] Closing Submissions §98
[157] CD K3
[158] Housing Land Supply Statement of Common Ground (CD F4), §§2.6-2.7

a. In respect of so-called 'Category B sites' (sites with outline permission for major development, allocated sites, sites with grants of permission in principle, and sites identifiable on a brownfield register), they ought *not* to be considered deliverable unless there is clear evidence that they are.

Disputes

450. There is no dispute between the parties as to the vast majority of the numbers sitting behind both parties' estimations of the five-year housing land supply. The only dispute between the parties is as to deliverability in a number of instances. We follow the agenda set by the Inspector for the roundtable session, for convenience. Accordingly, we address in turn:

a. General assumptions in relation to windfall allowance and lapse rate.
b. Disputed sites where permission has lapsed since 1st April 2023.
c. Other disputed sites.

General Assumptions

451. There are two issues with the Council's position on windfall allowances, which presently accounts for 486 dwellings over the five-year period under consideration. They are:

a. First, the Council has unjustifiably departed from the windfall allowance considered to be "realistic and modest based on compelling evidence" as recently as the conclusion of the Local Plan Examination in 2022[159]. In reaching that conclusion, the Inspector had the benefit of the same evidence of historic completions from windfalls as now forms the basis of the Council's assessment. The only difference is a change in definition in the NPPF. That is, in reality, a cosmetic point: the Inspector's evidence-based assessment remains sound.
b. Second, the Council has effectively double-counted deliverability as between its windfall allowance for years 3-5 of the monitoring period, and its stock of small site permissions, as Mr Paterson-Neild explained during the roundtable session.

452. On that basis, it is appropriate to remove 224 dwellings from the assessment.

[159] CD H3, §244

453. The other general issue relates to lapse rate. The Appellant's case is very straightforward: a lapse rate for non-implementation of 5% was accepted by the Council at Local Plan Examination stage, and was ultimately approved by the Local Plan Inspector[160], and so should be applied here too. Mr Manktelow, on behalf of RBWM, disputes this. He did, however, very fairly accept that he had not conducted the more fine-grain analysis that Mr Paterson-Neild has conducted on lapse rates in practice (which, in a number of instances, actually produced lapse rates considerably higher than 5%). That being so, there is, in reality, no reason to prefer the evidence of Mr Manktelow to that of Mr Paterson-Neild, and that 25 dwellings ought to be removed from the supply.

Disputed Sites where permission has lapsed

454. This issue was extensively ventilated before the Inspector during the housing roundtable, and so we do not dwell on it at any great length here. In essence, the dispute between the parties is whether form should trump substance. We are, at time of writing, almost exactly 12 months down the line from the Council's last base date of assessment. The Appellant's position simply seeks to suggest that the proper approach is not to adopt a Nelsonian blindness to fresh evidence of deliverability which has arisen since that date. Indeed, the Appellant's approach rests consistently with the position expressed in the *Hanging Lane* appeal decision[161] which confirmed the importance of the use of a base date for the purposes of assessing five-year supply and articulated why it is important to have due regard to subsequently arising information which may inform the assessment of deliverability of sites:

> *"This requires a clear cut-off date as including sites beyond that date skews the data by overinflating the supply without a corresponding adjustment of need. A site granted planning permission after 31 March should not, therefore, be included in the sites with permission categories within the 5YHLS. However, this does not mean that all information gathered after the cut-off date is irrelevant where, for example, this serves to confirm that assumptions made when deciding what should be in the supply were well founded."*

455. That fresh evidence can cut both ways, but it is not proper simply to ignore it altogether.

[160] CD H3, §243
[161] CD J5 §14.48

Other disputed sites

456. *Clean Linen Services* (18/01269/FULL) – It is now agreed that a discount of 32 units at this site is appropriate.

457. *Shorts Waste Transfer and Recycling Facility* (18/00945/OUT) – The reality is that, on any sensible analysis, this site is a very considerable distance from deliverable within 5 years. It is, at time of writing, an operational waste facility. Accordingly, before thoughts can even turn to reserved matters, the facility will have to be decommissioned (not a straightforward process in the context of waste processing), the operator relocated, the site marketed, and a housebuilder involved. That is a huge distance from "clear evidence" of deliverability. 85 dwellings ought to be removed.

458. *Land off Harvest Hill Road* (AL13) – As Mr Manktelow confirmed at the inquiry, there remains no extant planning application in respect of this Site. Given completions were already expected to be late in the five-year period, and the admission of the agent himself that the question when development would come through "is not an easy question to answer"[162], it is very hard to see that clear evidence has been advanced for the inclusion of this site. That is before one considers the evidence supplied by Mr Paterson-Neild as to the lengthy nature of the application process at these sites. 25 units ought to be discounted.

459. *Land off Kimbers Lane* (AL13) – While an application for outline permission has been submitted in respect of this site, it is still at an extremely early stage, having been validated less than a month ago. The reality is that, on examination of the timetables on analogous developments, the developer on this site can realistically expect a considerable amount of time pass prior to resolution of the application, before a further lengthy period (perhaps, anecdotally, up to 6 months) before a section 106 agreement is signed. It is only at that stage that the question of reserved matters can be considered. Further, as regards this site and that at Land off Harvest Hill Road, as Mr Paterson-Neild raised, the likelihood of an SME developer delivering two developments on two independent land parcels concurrently is small. 34 units ought to be discounted.

460. *Maidenhead Golf Club* (AL13 24/00091/OUT) – There could be no serious dispute that this is the most complex allocation in the Local Plan, and so it has proven. The Council's

[162] Ian Manktelow, Proof of Evidence, Appendix 4.5

suggestion that this application is likely to reach committee in Summer 2024 is, as Mr Paterson-Neild identified, hopelessly optimistic. There is an objection from Sport England, a holding objection from National Highways (who have preliminarily indicated that more modelling may be required), no current response from the Environment Agency, and an objection from Active Travel. These are significant objections. They will not be resolved by Summer 2024. Beyond that point, as Mr Andrew Hill explained, the reality is that this site has raised enormous amounts of local objection. The likelihood of a High Court challenge is considerable. 64 units ought to be discounted.

461. *Land west of Windsor, north and south of A308* (AL21, 22/01354/OUT) – No reserved matters application has been submitted in respect of this permission. That is significant in circumstances where the permission gives the developer until the end of June 2026 to submit reserved matters applications, then two further years (i.e. to June 2028) to implement. Furthermore, while Mr Manktelow does reference the PPA in respect of this site, it is highly relevant to note that paragraph 1.9 of the PPA is explicit that it does not extend beyond the pre-application process. That aside, the only evidence of deliverability within the relevant period is the correspondence from the housebuilder, which during the inquiry Mr Mantkelow himself admitted was "inconsistent". 170 units should be discounted.

462. *Ascot Fire Station* (AL16, 22/01971/FULL) – This application was submitted in July 2022, and remains undetermined over 18 months later. There are still two considerable issues to be resolved prior to determination of the application. In the first instance, there remains an objection from Natural England, and while SANG provision has apparently been secured, the Council's approach to the use of SANG in an adjoining district (Bracknell Forest) to mitigate the impact on the Thames Basin Heaths Special Protection Area proposes that neither the owner of the SANG or the Local Planning Authority will be signatory to the S106, raising a serious concern regarding enforceability of the obligation to provide and secure the in-perpetuity management of the SANG. That is a fundamental point of principle, not easily resolved, and the Council is unable to demonstrate that Natural England agrees with their proposed approach. Second, there are real concerns about viability. As of 20th February 2024, the developer is proposing 30% affordable housing (which is below the 40% required in the BLP, albeit that there is dispute with the applicant about whether this is the proper metric), and suggesting that even on that metric, a residual profit level of around 10% is expected. These are very fine-tuned, significant issues which require resolution before this

application, which has already been pending for a very considerable period, is capable of resolution. Accordingly, there is no clear evidence that this site will deliver within 5 years. 117 units should be discounted.

463. *Ascot Centre, Land South of the High Street* (AL16) – No application has been submitted. A PPA has been entered into, but it is pre-application only. There is no agreed timetable for an application. It is of real concern at this stage that CALA still, in their own words, "aren't able to provide anticipated yearly delivery"[163]. There is no clear evidence. 85 units should be discounted.

464. *Ascot Centre, Land North of the High Street* (AL16) – There are a number of concerns about this site, which also has no application yet pending. Indeed, Mr Manktelow indicated during the roundtable that the developer is intending to wait until the publication of the applicable SPD prior to even submitting an application. The email from Savills appended to Mr Manktelow's proof of evidence indicates the scale of work to be done: there is no decision yet on the type of application to be submitted, and reference to delay of "several months" to identify a possible development partner who would then take the lead on the nature and timing of the application[164]. 36 units ought to be discounted.

465. *White House, Sunningdale* (AL34, 23/00294/FULL) – It is hard to understand why this site has been included in the Council's evidence of supply. Over a year ago, an application in respect of this site was refused, with 8 reasons for refusal provided. No new application has been submitted. There remain significant issues in relation to the layout and resultant capacity of the site, which call into question the ability to overcome a reason for refusal which relates to the alleged under development of the site, as Mr Paterson-Neild explained. 7 units ought to be discounted.

466. *Land east of Woodlands Park Avenue, Maidenhead* (AL24, 23/00834/OUT) – As Mr Manktelow identified, a resolution to grant permission was made in respect of this site towards the end of February 2024, but a number of significant obstacles still remain. There is no timescale for completion of a section 106 agreement, which will include a substantial package of measures including BNG, a number of highways improvements, and funding for two TROs and three bus stops. There are also nine pre-commencement conditions including

[163] Ian Manktelow, Proof of Evidence, Appendix 4.8
[164] Ian Manktelow, Proof of Evidence, Appendix 4.9

a Design Code. It is also clear that the main access to the site will need to be re-constructed prior to any further development occurring. These are significant obstacles, with no timetable for resolution. 110 units ought to be discounted.

467. *Land East of Strande Park* (AL38, 22/00343/OUT) – This site faces a plethora of issues. An application was submitted the day after adoption of the Local Plan, without any pre-application consultation of any kind. It has remained undetermined for over two years. The Council have suggested that it is likely to reach committee this summer, but there are at least three outstanding substantive issues, resolution of which is beyond the applicant's gift: drainage (given poor infiltration rates on site, the current plan appears to be to ask the highway authority if they can attenuate into the highway drain), BNG (given the applicants will need to look for offsite provision), and an ongoing issue in relation to a newt survey. Further, as Mr Hill indicated, this site is also the centre of intense local controversy, and legal challenge can be anticipated. 20 units ought to be removed.

468. *Land between Windsor Road and Bray Lake* (AL26, 22/01791/OUT) – Despite a resolution to grant permission from 20th December 2023, the section 106 agreement in respect of this site is still outstanding. The Council is unable to provide any timetable as to when this is likely to be resolved. Beyond that, as the developer's email indicates, reserved matters are likely to take until at least January 2025[165]. A further issue on the horizon concerns the necessity for sewer capability upgrades in conjunction with Thames Water, which can be an extremely lengthy process which will only be progressed once planning permission is obtained and the developer is unlikely to wish to start construction until there is a clear and deliverable timetable for the sewer works. There is, again, no clear evidence. 20 units ought to be removed.

Conclusion on Housing Land Supply

469. As identified in the course of the housing roundtable, and as summarised above, the reality is that RBWM's housing land supply is considerably worse than it accepts at present. That is not, contrary to the Council's submissions, an irrelevant factor. It is highly relevant. The proper figure is considered to be 3.69 years, placing the Council over 1.3 years short of having a five-year housing land supply. This shortfall is both serious and significant and

[165] Ian Manktelow, Proof of Evidence, Appendix 4.14

highlights a material declining trend in the supply position at precisely the same time that the stepped trajectory is accelerating upwards. That is plainly of real significance in the planning balance, to which we now turn.

THE PLANNING BALANCE

470. For the reasons given above, it is manifestly clear that there is no breach of the development plan, and as such primary legislation compels that this appeal be allowed without delay. Even if there is conflict with the development plan read as a whole, it cannot sensibly be disputed that the tilted balance applies, and given the enormous benefits of the delivery on an allocated site of 330 homes in the context of a housing crisis, no sensible argument can be made that the tilted balance is overcome. Even if there is conflict with the development plan *and* the tilted balance is displaced, there is *still* no plausible argument that the Proposed Developments ought to be refused permission, even on a 'flat balance'.

471. Regrettably, however, considerable time is spent in the Council's Closing Submissions dealing with a variety of different points said to be of significance in the planning balance. It is therefore necessary to deal with these points as they arise.

Compliance with the Development Plan

472. For the reasons outlined above, it is clear that there is no conflict with the development plan on any level. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that, in such situations, permission is granted unless material considerations indicate otherwise. Unsurprisingly, Mr Jarvis was not able to identify a single material consideration militating against the grant of permission, other than alleged breaches of the development plan. It is common ground that, if no breach is identified, this appeal must be allowed[166].

473. It is important to note that it is also common ground that the development plan must be read as a whole. That being so, it does not follow automatically that identified conflict with a one or more sub-elements of a much larger policy within the BLP results in conflict with the development plan *as a whole.* As identified above, a number of the points raised by RBWM in respect of the technical evidence are exceedingly minor. They often relate only to small sections of sub-paragraphs of individual policies within the BLP. When considering

[166] Closing Submissions §114.

compliance with the development plan *as a whole*, it is necessary to weigh any minor conflict identified against the fact that the BLP allocates the Site for precisely the development which the Appellant now seeks to bring forward. That allocation represents strong development plan support for the Proposed Development. It is vital to have that well in mind when assessing the validity of the numerous points raised by RBWM in respect of each technical specialism.

Conflict with the Development Plan

474. In the event that conflict with the development plan is identified, it is necessary to address three matters: (1) the application of the tilted balance, (2) the alleged harms said to arise from the Proposed Development, and (3) the numerous benefits. We take these in turn.

Application of the tilted balance

475. At times, RBWM through Mr Jarvis appeared to add unwarranted confusion to the evidence before the inquiry by suggesting that the tilted balance was not "engaged"[167]. That is, of course, wrong. Footnote 8 to the NPPF is crystal clear: the tilted balance is engaged where "the local planning authority cannot deliver a five-year supply…of deliverable housing sites". For the reasons explained by Mrs Ventham, that position is unaffected by the December 2023 NPPF changes, and by paragraphs 76 and 226 of the new Framework[168]. It has been common ground since the very early stages of this appeal that RBWM cannot demonstrate a five-year supply of deliverable housing sites[169]. Accordingly, the tilted balance is engaged. There can be no sensible dispute about this.

476. That has two consequences. First, unless there is a "clear reason" for refusing the development based on risk of flooding, permission should be granted. That is the effect of paragraphs 11(d)(i) and footnote 7. It is trite that the reason must be "clear" – for the reasons outlined above, it is not in this case. Second, "the policies which are most important for determining the application are out-of-date", as paragraph 11(d) makes clear. None of this is groundbreaking or surprising; it is, however, necessary to traverse this well-trodden ground in order to be clear about the effect of the NPPF, given Mr Jarvis' evidence.

[167] Nigel Jarvis, Proof of Evidence, §§7.3 and 8.5
[168] Kathryn Ventham, Proof of Evidence, §6.1.9
[169] Housing Land Supply Statement of Common Ground (CD F4), §5.1

Harms

477. Mr Jarvis identified just one 'harm' arising from the Proposed Development; the conflict with the development plan[170]. Mr Jarvis gives this 'very substantial' weight, the highest available categorisation on his scaling. That is an obviously flawed analysis, for at least two reasons.

478. First, it has no regard at all for the fact that national policy dictates that the policies in question are out of date. The Council do recognise this point in their Closing Submissions[171] (although Mr Jarvis did not initially appear to[172]), but contend that it cannot affect the weight to be afforded to any conflict, because the policies are "factually and substantially up-to-date". That may be so, but national policy could not be clearer – they are out of date. That *must* result in reduced weight. Mr Jarvis sought to suggest that the policies were not out of date, because "they do not constrain housing"[173]. This is a very peculiar position to adopt in circumstances where (a) the Council have refused permission for a residential development on the basis of these policies, and (b) the Council expressly relies on breach of a policy within the AL25 *pro forma*, which is part of a housing policy (HO1). Clearly, weight must be reduced.

479. Second, it fails to have any regard whatsoever for the nature of the policy breaches identified. As highlighted above, it cannot sensibly be disputed that a large number of the objections taken by RBWM are of an extremely minor nature. Mr Jarvis' assessment does not recognise this at all. It is trite that weight to be afforded to conflict with the development plan must be reduced in circumstances where that conflict is of a relatively minor nature. This (to the extent that there is any conflict at all) is a paradigm case to reduce weight for precisely that reason.

480. All that being so, for the reasons identified by Mrs Ventham, it is eminently more sensible to reduce the weight to be afforded to any conflict with the development plan to 'moderate'.

Benefits

481. The benefits of the proposal are vast, and largely agreed. For the reasons given by Mrs Ventham, very substantial weight must be afforded to the provision of market housing and

[170] Nigel Jarvis, Proof of Evidence, §§7.1-7.10
[171] §97, albeit that it is dismissed out of hand without affording proper weight to it.
[172] Nigel Jarvis, Proof of Evidence, §7.5
[173] Nigel Jarvis, Cross-Examination

the delivery of housing on an allocated site. That delivery aligns perfectly with the Council's spatial strategy, and makes an indispensable contribution to the very significant local and national housing shortfall. RBWM have, throughout this inquiry, made various overtures to the effect that the weight to be afforded to this should be reduced because the BLP has a built-in contingency, such that its housing target can still be met even if some allocated sites do not come forward. One need only look at RBWM's recent record of delivery to recognise that that is not an especially reassuring fallback position. It does not assist to refer to the current period as a "transition period"; that suggests only that the shortfall on the ground (which is of course wholly unaffected by any local plan 'transition period') will get larger in the interim. Very substantial weight ought also to be afforded to the delivery of 5% of open market homes as Custom Self Build.

482. Substantial weight should be afforded to the delivery of 40% affordable housing. In light of the evidence provided by Mr Roberts, as laid out above, it is almost impossible to contend otherwise. That being said, the Council do – they contend that the weight ought to be significant. That is odd on its own terms, and also inconsistent with the Planning Statement of Common Ground, which records agreement that it is 'substantial'[174].

483. Across the course of his proof of evidence and oral evidence to the inquiry, Mr Jarvis made two points which, it was suggested, reduced the weight to be afforded to this benefit. The first was that weight ought to be reduced because the 40% requirement is contained in local policy. That entirely ignores the scale of the crisis facing RBWM, both in terms of shortfall and delivery. To suggest that one can reduce weight to the delivery of affordable housing in the context of an affordable housing crisis simply because a policy dictates the necessity of affordable housing is circular, and nonsensical. It is noteworthy that the Council itself recognise the importance of the Site as having been allocated in order that it can play its role in the Council's Housing Strategy[175]. That Strategy is unequivocal in seeking more housing, and is clear evidence of the positive contribution which the Site can make. The second is that there is no evidence of deliverability; a point picked up in the Council's Closing Submissions[176]. This, again, is a bad point – it is nonsensical to argue that, given the magnitude of the affordable housing *now* it is sensible on deliverability grounds to refuse

[174] CD F3, §7.4.1
[175] Closing Submissions, §115
[176] §116

permission and wait for a different development to come forward, particularly where that development may be unallocated and thus outside the Council's spatial strategy.

484. Indeed, there is a further element of the Council seeking to 'have its cake and eat it' on the question of deliverability. It is simply internally inconsistent to suggest that the Proposed Developments are not deliverable (despite being on the market as an allocated site[177]), but that other developments such as Shorts Waste Transfer Facility (an active waste transfer facility) and Maidenhead Golf Course (which remains a golf course) *are* deliverable. There is far clearer evidence of the deliverability of the Proposed Developments than there is on many of the disputed sites included in the Council's housing land supply by Mr Manktelow. Simply put, one of those has to give.

485. As outlined by Mrs Ventham, the benefits do not stop there – significant weight ought also to be afforded to the delivery of land for a 3FE primary school and to increased commercial expenditure within the local area, and moderate weight to the delivery of open space and of BNG.

Conclusion

486. It is manifestly obvious that, whether assessed against a flat or tilted balance, the benefits of the proposal outweigh any perceived harms by a very substantial degree. The contrary cannot sensibly be argued.

487. It is worth noting, in conclusion, the Council's suggestion that "this inquiry does not alter the allocation", and that if the appeals are dismissed "the site remains allocated for the delivery of approximately 300 units"[178]. Given the Stakeholder Masterplan Document as agreed (with which the Proposed Developments are in full compliance) and the site allocation *pro formas* within the local plan (with which the Proposed Developments are in full compliance), it is difficult to see what differences the Council might expect from a different scheme. It is also worth questioning whether, were such a scheme to come forward, it would generate any further benefit from the fact of its allocation than the Proposed Developments have. It is difficult to see where, in the Council's case on this appeal, that matter has been factored in at all. It ought to have been central.

[177] Kathryn Ventham, Examination-in-Chief
[178] Closing Submissions §117

FINAL CONCLUSION

488. The Inspector is respectfully invited to grant planning permission in respect of both appeals.

9 April 2024

CHRISTOPHER YOUNG KC

DANIEL HENDERSON

NO5 CHAMBERS