IN THE MATTER OF:

TOWN AND COUNTRY PLANNING ACT 1990 – Section 78
AND
PLANNING AND COMPULSORY PURCHASE ACT 2004

AND AN APPEAL BY

Lioncourt Strategic Land Limited
Land At (Os 8666 5944) Dilmore Lane Fernhill Heath
Residential development for up to 130 dwellings (Use Class C3), including vehicular access from Dilmore Lane, pedestrian and cycle links, public open space, car parking, drainage, landscaping and other associated infrastructure. All matters reserved except for access.

LPA Reference: W/23/01323/OUT
PINS Reference: APP/H1840/W/24/3346731

CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT

PI – Mr Paul Instone JT – Mr Jason Tait JPF – Mr John-Paul Fried PL – Mr Paul Lishman Xx – cross-examination eic – evidence in chief FH – Fernhill Heath MG – Mike Glaze SoC – Statement of Case NP – the North Claines Neighbourhood Plan	DP – Development Plan RFR – reason/s for refusal RTC – report to committee BMVAL – best and most versatile agricultural land Planning and Compulsory Purchase Act 2004 – the 2004 Act GF – Greenfield Land SoCG – Statement of Common Ground

Introduction

1. As stated in opening submissions, this is a very straightforward case. The Council's one RFR, and the arguments it puts forward in support of it, are untenable, and it should not have been necessary for this matter to proceed to appeal. It speaks volumes that none of the statutory consultees objected to this proposal, and that the planning officers made a clear and unequivocal recommendation for approval.

2. In its written evidence, eic, and in xx the Council raised a whole host of points that cloud and obfuscate the real issues, no doubt in a vain effort to throw a cloak over the fact that its case lacks any planning merit. Our aim in these closing submissions is not only to explain why planning permission should be granted, but also to simplify matters as much as possible by concentrating on the most salient points.

Conformity with the Development Plan

3. The starting point is the DP. Section 38(6) of the 2004 Act tells us that determinations should be made in accordance with the DP unless material considerations indicate otherwise. Policy SWDP1 says the same thing at Criterion B:

   'Planning applications that accord with the policies in the SWDP (and where relevant, with polices in Neighbourhood Plans) will be approved unless material considerations indicate otherwise'.

4. This is reiterated in the NPPF at para.11(c) – it adds proposals which accord with the DP should be approved 'without delay'. The Appellant submits that this application accords with the DP, the reasons it does so are clear and obvious and accordingly this application should have been granted without

delay.

5. PI confirmed that the RFR were complete and precise, and that all of the policies said to be breached were set out in RFR1. He further confirmed that the Council were no longer relying on, and there was no breach of, policies SWDP13 (BMVAL) and SWDP6 and SWDP24 (heritage assets). That only leaves two policies: SWDP2 and and SWDP25.

SWDP2

6. IP was at pains to clarify and confirm that the Council relied only on SWDP2(C), a policy that prohibits development outside of settlement boundaries unless one of the exceptions listed in that policy apply. He confirmed that it was no part of the Council's case that FH was unsuitable for the proposed scale and type of development, that it fully accepted and agreed with the planning officers' (and Appellant's) assessment that FH had sufficient services and facilities so as to represent a sustainable settlement for this level of development, and that the site itself was located so as to be fully accessible to those services and facilities by a range of modes of transport (as also confirmed by MG).

7. He further confirmed that despite raising Principles iv and vi of SWDP2 (use of PDL and focusing most development in urban areas), it was no part of his case that any and all proposals on g/f land and/or outside of the urban areas would conflict with the DP. Why these matters were brought up in the first place remains a mystery, given that the RFR, the Council's SoC and the SoCG are all crystal clear that the Council's case insofar as SWDP2 is concerned relates solely to the fact that the site lies outside of the settlement boundary.

8. It is agreed that this proposal conflicts with SWDP2(C) because it lies outside of the settlement boundary and does not fall into any of the exceptions listed in that policy. However, it is trite law that breach of a development policy does not necessarily equal breach of the development plan – the plan has to

be read and applied as a whole. It is common-place for policies to pull in different directions and a judgement has to be made whether a proposal conforms with the DP as a whole.

9. In this case the matter is simplified by the fact that there is a policy in the DP that not only pulls in a different direction when it comes to the question of development outside settlement boundaries, but actually sets up a very different test or rule as to when such development will be permitted. Despite implied suggestions to the contrary in the council's eic and xx, the NP is as much a part of the DP as the local plan and its policies have equal weight and when s.38(6) asks us to make a determination in accordance with the development we must to so having regard to all DP policies, whichever part of the DP such policies are found (this is made clear by s.38 of the 2004 Act itself).

10. Policy NCH1A of the NP allows residential development outside of settlement boundaries if there is no 5 (4)YHLS and there are no other policies within the NP or SWDP that 'would **preclude** development **on the site** such as Green Belt, Local Green Space or locations at risk of flooding' (emphasis added). This policy is very different to SWDP2(C); the two policies are clearly not consistent because their application to the **same proposal** is **capable** of giving a different answer as to whether the proposal complies with or conflicts with the DP's policy on development outside settlement boundaries. For present purposes it does not matter whether in respect of this proposal they do in fact give a different answer; all that matters for explaining that they are in conflict is to appreciate that they are capable of giving a different answer in respect of the same proposal. If, for example, it was agreed by all parties that there was no 5YHLS and there were no DP policies which precluded development an out-of-settlement site, the proposal would accord with NCHIA, whilst at the same time it conflicted with SWDP2(C) because it did not fall into any of the exceptions listed in that policy.

11. The question arises in this case as to which of these policies should take precedence. The answer is provided by s.38(5):

    *If **to any extent** a **policy** contained in a development plan for an area **conflicts** with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan*

12. Note that the Council's arguments about conformity between the NP and DP are wholly misconceived. As the added emphasis shows, this section is not concerned with the question of general conformity between NP and SWDP (we accept that the NP would not have been made if it did not pass the test of soundness that it had to be in general conformity with the local plan).

    This section is concerned with an individual policy or policies that conflict, 'to any extent'. There can be no doubt that Policies NCH1A and SWDP2(C) are in conflict for the reasons explained above. In this case the NP policy post-dates the SWDP2(C) so the conflict must be resolved in is favour (i.e this is the policy that should be applied here to decide whether a site outside of the settlement boundary should be permitted).

13. The reason that the NP remains in general conformity with the SWDP is that SWDP1 is consistent with NCH1A – in the case of no 5YHLS both policies drop the objection to development outside of settlement boundaries for a much more flexible test. SWDP1 applies the tilted balance, in which the site's location outside of the boundary will be one of the factors to be weighed in the balance. NCH1A is more flexible still, permitting such development unless there is a DP policy that precludes it.

14. Applying NCH1A, it is necessary to identify a policy that precludes development on this site if it is to be said that developing outside of the settlement boundary represents a breach of the DP. SWDP2(C) cannot be that policy, because the whole purpose of NCH1A is to set out the

circumstances when this prohibition on developing outside settlement boundaries will not apply. PI accepted that for this proposal to fail NCH1A, Policy SWDP25 would have to be a policy that precludes development on this site as that phrase is used in NCH1A.

15. In interpreting this policy we cannot ignore the deliberate use of the word 'preclude', rather than the usual 'breach'. Nor can we ignore the reference to 'on the site', making clear that the focus is on policy that are specific to the site in question. The policy could have said 'unless it is demonstrated that there is no 5YHLS and the proposal would not be in breach of any other policies in the DP'. That would be a very different policy, but that is how the Council is seeking to read this policy. The policy gives examples of the types of policies that preclude development 'on the site', and the examples serve to limit the types of policies that can be used to prevent development outside of the settlement boundary in circumstances where no 5YHLS necessitates permitting development outside of settlement boundaries. The policy identified must be of similar type – i.e one that is site specific and precludes developing that site.

16. SWDP 25 is not a policy that 'precludes' development 'on the site'.

17. As regards 'preclude', at no point does the policy use the language of precluding, prohibiting or banning, nor does it set out a general rule of 'no' subject to exceptions (as do GB, LGS and flood risk policies). To extend the proviso within NCH1A to all development-control type policies would be to ignore the examples given in NCH1A; they would no longer be serving the purpose of de-limiting the application of the proviso, which is the whole reason for listing them. The proviso bears some resemblance to footnote 7 to the NPPF para.11(d)(i): policies that protect areas or assets of particular importance and provide a clear reason for refusing development. The examples listed in NCH1A show that the intention of the policy is to protect areas of particular importance, not all countryside beyond settlement

boundaries.

18. That last point links with the phrase 'on the site'. The policy in question has to be one that is geared towards and applies to a particular site, seeking to protect it from development. SWDP 25 is not a policy that seeks to protect this site (or any site) from development. It sets out what a development must demonstrate in order for it to be acceptable. A breach of SWDP25 would be a breach of SWDP25, and that would have to be taken into account in deciding whether there is breach of the development plan as a whole, but its breach does not set up an in principle objection to developing outside of the settlement boundary because its breach would not amount to a breach of NCHIA.

SWDP25

19. For the Council's case to proceed further, it is not sufficient merely for it to show that SWDP25 is a policy that precludes development within the meaning of policy NCH1A, it also has to establish that SWDP25 is in fact breached by this proposal. If there is no breach of SWDP25, there is no breach of NCH1A and no breach of any DP policies at all since this is the only policy left to consider from the policies cited by the Council in its RFR.

20. It is the Appellant's case that policy SWDP25 is not breached, because this proposal is appropriate to, and integrates with, the character of the landscaping setting, as required by this policy. In explaining this submission, we cannot emphasise enough this is not a policy that requires there be no landscape and visual harm whatsoever. The policy is directed at 'development proposals', so by definition contemplates the delivery of development, and must contemplate the delivery of development on g/f sites. The development of any g/f sites will inevitably result in some landscape and visual harm, and this policy must not be interpreted and applied in a manner that renders all g/f development as being in conflict with it. The test in the policy is whether the proposal is appropriate and integrates with the surrounding character,

not whether it causes some degree of landscape and visual harm.

21. In support of our submission that this development is appropriate to and integrates with its setting, we rely on the following matters:

    a. There was no objection from WDC on landscape grounds, and these judgements were made by a qualified, in-house, landscape architect.

    b. The same professional similarly did not object to the Suffolk Way Development on landscape grounds, which effects the same landscape and visual receptors, and is similar in scale and layout to the Proposed Development.

    c. The settlement of Fernhill Heath already influences the character of the landscape, and the proposed development would be perceived in the context of the existing settlement edge.

    d. The Proposed Development would not extend the built-up area of Fernhill Heath any further north or west beyond its existing extents.

    e. The scale, extent and design of the Proposed Development would be similar in nature of that to the adjoining Suffolk Way Development.

    f. In terms of visual effects:

        i. the effects on views will diminish with distance from the Appeal Site with the proposed development being visually contained in the wider landscape.

        ii. The settlement of Fernhill Heath already influences views of the Appeal Site.

iii. The Proposed Development would be viewed against the backdrop of existing settlement in Fernhill Heath.

22. By way of conclusion on this the first overarching question, it is submitted that this proposal accords with DP because (a) via NP Policy NCH1A the DP permits development outside of settlement boundary policies unless there is policy that precludes development of the site and there is no such policy, and (b) even if policy SWDP25 is such a policy it is not breached. This is a case that falls within SWDP1(B) – all DP policies are complied with.

The Tilted Balance

23. If, contrary to the above, the Inspector finds that there is a breach of SWDP2 and/or SWDP25, it is not necessary to have resort to the tilted balance set out in NPPF para. 11(d)(ii) because the DP incorporates this same balancing exercise at SWDP1(D). If the proposal passes the balance, it would accord with the DP and should be permitted without delay.

24. The correct approach to decision-taking in such a case (where the tilted balance is incorporated in the DP) is set out in *Basingstoke and Deane Borough Council v SoSLUHC and Bewley* [2024] EWHC 1916 (Admin). As that case made clear, an Inspector is entitled to attach little importance to policies which are out of date and, even if they are breached, find that the proposal is in conformity with DP applied as a whole (see para.96).

25. It is necessary first of all to identify the benefits of this development, and decide what weight should be accorded to them.

Benefits

26. In accordance with JT's evidence, the Appellant invites the Inspector to attach very substantial weight (top of his scale) to the delivery of market,

affordable and self-build housing.

27. Weight to the delivery of housing is a matter of planning judgment, but in exercising that judgment it is important to have regard only to material considerations, and to ignore considerations which are not material. In this regard, the case of *Phides Estates (Overseas) Ltd v SoSCLG and Others* [2015] EWHC 827 (Admin) continues to provide the best guidance (see para. 60).

' It [national planning policy] *does not, however, prescribe the weight to be given to the ability of a particular proposal to reduce a shortfall in housing land supply as a benefit to be put in the balance against "any adverse effects". This is a matter for the decision-maker to judge, and the court will not interfere with that judgment except on Wednesbury grounds. Naturally, the weight given to a proposal's benefit in increasing the supply of housing will vary from case to case. It will depend, for example, on the extent of the shortfall, how long the deficit is likely to persist, what steps the authority could readily take to reduce it, and how much of it the development would meet. So the decision-maker must establish not only whether there is a shortfall but also how big it is, and how significant*

28. Here the extent of the shortfall is very grave indeed; the supply stands at a mere only 2.78 years a shortfall of 1,085 homes that need to be contructed. It is agreed that this is a very substantial shortfall. We have not sought to burden the inquiry with previous Inspectors and SoS decision letters, but even someone with only a passing familiarity with these (including many issued in the SWDP area) will know that top of scale weight is routinely attached to the delivery of housing in cases where, as here, the shortfall in supply is found to be significant.

29. Next, how long is this deficit likely to persist, and are there any steps the authority could 'readily take to reduce it'? The answer is that it is going to persist until a new plan is adopted, and that is a long way off. We have no idea when the hearing sessions will start, if indeed they will start at all. We have no idea whether the plan will be found sound given the extent of

objection. There are no other steps that can be taken to rectify the shortfall than to grant permission on otherwise sustainably located sites (and this site is agreed to be sustainable in terms of its location/accessibility).

30. PI was right to have regard to how much of the deficit the development would meet in deciding what weight to attach to the delivery of housing, but staggeringly wrong to conclude that it justified reducing the weight attached to it. This is not a development for a handful of houses; it is 130 houses, amounting to more than 10% of the overall deficit that needs to be made up.

31. Finally, PI's argument that the 'success' of the plan in terms of past housing delivery is a relevant consideration is not supported by *Phides,* and is quite clearly an immaterial consideration for fairly obvious reasons. The govt.'s policy on 5YHLS, and its insistence that this minimum level of supply must be maintained at all times, borders on absolute. So much so, that it is even prepared to put its support for the plan-led system to one side when there is no 5YHLS, and declare that in such cases permission should be granted unless the harms significantly and demonstrably outweigh the benefits – breach of the plan in and of itself is no longer a reason to say no. It is a policy which focussed solely on the *future* – whether there is a sufficient supply in the pipeline. What has been delivered in the past has no logical bearing on this question. Even if the SWDP had delivered everything it was supposed to deliver and more, it would not detract from the fact that it is now agreed between the parties that there is a very significant shortfall in housing land supply. To have regard to what has been provided in the past would be a clear legal error, because it is has no logical bearing on the matter under consideration, which is how to address future supply. The council is confusing not just apples and pears, but apples and fish.

32. The Council indicated a reliance on the Tewkesbury decision. It is not relevant at all to the issue of how much weight to attach the delivery of housing when there is agreed to be no 5YHLS. Tewkesbury was concerned solely with question of whether past oversupply could be taken into account

to when calculating future housing requirements, in particular the 5 year requirement. The court said this:

'47. It follows that for all of these reasons the claimant's primary submission under ground 1, that the Framework required the oversupply from earlier years to be taken into account in the five-year housing land supply calculation, cannot succeed. The claimant contends that this primary submission proceeds on the basis that it is not the claimant's case as to the interpretation of the Framework that paragraph 73 of the Framework prescribes how an oversupply should be taken into account, but rather that whether to take it into account at all cannot be simply a matter of planning judgment but is required by the Framework. Again, similar points arise in relation to the absence from the Framework of any policy text which would justify such an approach. The Framework does not say, nor does the PPG, that oversupply must be taken into account in all circumstances. For the reasons already given it is not for the court to supplement or add to the existing text of the policy. The question of whether or not to take into account past oversupply in the circumstances of the present case is, like the question of how it is to be taken into account, a question of planning judgment which is not addressed by the Framework or the PPG and for which therefore there is no policy. No doubt in at least most cases the question of oversupply will need to be considered in assessing housing needs and requirements. The fact this may be the case does not require the court to provide policy in relation to this issue which the policy maker has chosen not to include.'

33. In the present case there is no dispute about how to calculate 5YHLS – it is agreed that the supply stands at 2.78 years. If the Inspector was being asked to calculate what it was, it may be relevant to have regard to the above debate. But you are not, and it is not. That is even before we take account of the fact that in the SM formula past delivery plays no part in calculating future needs, a material change to the formula that was under discussion in the Tewkesbury case.

34. Although wholly irrelevant for the reasons set out above, the Appellant notes by way of parenthesis that the Council's case on 'success of the plan by virtue of past delivery' is, in any event, factually incorrect and bordering on the delusional. The SWDP has been a failure of epic proportions, as evidenced by the stream of appeal decisions emanating from this area where in case after case inspectors have granted permission for alternative sustainable g/f development outside of settlement boundaries precisely because the plan has failed. As JT explained, it will not meet its central objective set out in SWDP2 Principle ii of providing sufficient homes to meet objectively assessed needs to 2030. It will fall short by thousands of homes. Focusing on this district alone is not permissible, because the numbers allocated to this district were influenced by the numbers that were directed elsewhere, in particular to the WWA. The success of the plan has to be measured by reference to the plan area, not parts of the plan area given it was a joint plan.

35. Finally, having regard to and measuring housing delivery by the targets set out in the plan ignores completely that the target set out in the plan is out of date, because it has been overtaken by the formula of local housing need (aka Standard Method, 'SM')). We are obliged to meet and work out housing need by reference to the SM, and if we do that we are all agreed as to the need and agreed that as against the minimum five year requirement there is a significant shortfall. This whole foray into what an out-of-date plan did or did not do is a complete waste of inquiry time, and has no bearing whatsoever on deciding how much weight to attach to the delivery of housing in a scenario where there is agreed to be a significant deficit against the 5YHLS requirement.

36. Added to the very substantial benefit of housing supply (market, affordable and self-build) are all of the other benefits identified by the JT. Whilst there may be a dispute about how much weight to attach to the benefits, there is no dispute that they are benefits and they all get positive weight. Even on PI's evidence, BNG gets moderate weight and the economic benefits (combined immediate and long-term) averaged out at significant weight. JT argued for

substantial weight for economic benefits (one step down from his top of scale very substantial) given the Govt. policy set out in the WMS to boost the economy through planning in general and housebuilding in particular. Whatever view you take of this minor disagreement, there is no doubt that even of PI's weighting, all of these other benefits, when added to the weight attached to the delivery housing, cumulatively amount to further substantial benefits.

Harms

37. Against that baseline, for permission to be refused there would have to be harms that significantly and demonstrably outweigh very substantial benefits. What are those harms?

38. Firstly, loss of BMVAL and harm to heritage assets get little weight (as endorsed by PI).

39. Secondly, assuming that there is breach of SWDP2(C) by virtue of developing outside of the settlement boundary, the question is what weight should be attached to breach of such a policy in a context where there is no 5YHLS and even PI accepts that the supply cannot be made up by building outside of existing settlements? The answer is obvious – very little weight. The restrictions placed on housing development by these boundaries has prejudiced the ability to deliver a 5YHLS, and is not in accordance with either the Framework of the SWDP itself which has as one of its objectives meeting objectively assessed housing needs. To continue to attach moderate weight (as IP suggests) to a settlement boundary policy when the plan itself (through SWDP1) directs us to apply the tilted balance would be circular and self-defeating.

40. Thirdly, IP wanted to attach weight to 'harm to the plan-led system' (indicating at his para. 5.16 that this amounts to significant demonstrable harm). This is simply wrong, and amounts to double counting. The correct

approach is to identify which policies are breached, and then decide what harm to attach to the breach of those policies. IP identifies two policies only, SWDP2 (C) and SWDP25. The weight that should be attached to the breach of the first of these has been addressed above, and weight to landscape harm will be addressed below. What is causing harm to the plan-led system is not granting permission to meet pressing housing needs, but having and operating a plan that is out of date and which frustrates our ability to meet our housing and other development needs. As NPPF para. 12 makes clear, govt. policy is centred around respecting 'up to date plans'.

41. As part of his harm to the plan-led system, PI wanted to attach weight to harm to the breach of the emerging plan. The emerging plan is a material consideration, it is not the DP, and therefore breach of this does not amount to harm to the plan-led system. As a material consideration, little weight can be attached to it (as agreed in the SoCG). The examination is a long way from being concluded (assuming it continues), and the plan may or may not be found sound (it has hundreds of outstanding objections).

42. That leaves landscape harm – for the reasons set out above the Appellant does not accept that there is a breach of SWDP25, but accepts that there will be some landscape and visual harm. Given that it is agreed that existing settlements will have to expand to meet housing needs, that FH is a suitable settlement to expand, and that the development of any g/f site will inevitably cause some and landscape and visual harm, only moderate weight can be attached to this harm. That is further re-enforced by the following matters:

    a. This is not a valued landscape, has no other protective designation;

    b. The appeal site and the study area are agreed to have medium-low sensitivity to development;

    c. The effects on landscape character would be at most moderate adverse, and restricted only to the appeal site and its immediate

environs;

d. The visual impacts are restricted to a very short distance from the site, and would be no more than slight adverse at the operational phase.

43. As far as the evidence of JPF is concerned, it was not possible to verify or interrogate the his judgments on visual effects due to a lack of any detailed assessment or methodology. Further, having agreed that the landscape is medium-low sensitivity, that effects are at most moderate adverse, and that these effects are generally contained to the Appeal Site / not widespread, it is impossible to see how JPF reached the conclusion of substantial landscape harm.

44. Other errors in JPF's approach were also evidence. There is no justification for his claim that a number of hedgerows will be removed as a result of the Proposed Development. It is matter of agreement that the vast majority of hedgerows can be retained and enhanced, and JPF's conclusions were also based on his misunderstanding that as a significant amount of hedgerow would be lost at the entrance to the site. In forming his judgment, JPF appears to have had little regard to design approach and benefits arising in terms of landscape structure and green infrastructure. This is despite it being a matter of agreement that proposals have been informed by prevailing landscape character/green infrastructure guidance; and that the proposals allow for proposals allow for the retention of existing/creation of new landscape.

45. It was PI's task to have regard to all of the above, and form a planning judgment as to the level of weight to be attached to landscape and visual harm. He failed to discharge this duty. He simply picked up the reference to 'substantial harm' in JPS's evidence and equated this to substantial weight. He had no regard to the bigger planning picture that this is a development that extends an existing settlement into a non-protected, non-valued landscape that has a medium-low sensitivity to development and will create at most

moderate landscape harm. There was no evidence of any calibration in his scale of harm, with him accepting that he would attach the same level of harm if the site were a protected landscape, with a high sensitivity and causing substantial landscape harm.

46. It is submitted that even if, contrary to the Appellant's case that this proposal accords with the DP because all of the DP policies are complied with, recourse must be had to the planning balance set out within SWDP1(D), this balance is clearly passed. This is a proposal where the benefits far exceed the harms, and certainly not one where it can be said the harms significantly and demonstrably outweigh the benefits. Accordingly, it complies with SWDP1, and the development plan as a whole.

Conclusion

47. For all of the above reasons, the Inspector is respectfully requested to allow the appeal and grant planning permission.

Satnam Choongh
Number 5 Chambers

24 October 2024