

Land East of Elsenham, North of Henham Road,

Appeal Reference: APP/C1570/W/19/3243744

LPA Ref: UTT/17/3573/OP

Appeal by Fairfield (Elsenham) Ltd

**CLOSING SUBMISSIONS
ON BEHALF OF THE JOINT PARISH COUNCILS
OF HENHAM AND UGLEY**

1. In closing the case on behalf of the JPCs, I focus on the Inspector's main issues that were identified on the first day. I deal first with:

The effect on traffic and transport and on the safety and convenience of users of the network

2. It is important to note that, at the previous consideration of an application for housing development on this site, UDC offered no evidence and there was no objection by the local highways authority, ECC (or Highways England). The only opposition to the appeal was by the Parish Councils. The Parish Councils instructed an expert highways consultant, Bruce Bamber of Railton, but commissioned no alternative traffic surveys or highways modelling (CD 8.1, para 8.26). Notwithstanding all this, the Parish Councils were able to challenge and test the appellant's evidence effectively and were able to demonstrate to the Inspector that the appellant's proposed highways strategy

would not adequately mitigate the traffic impacts. As set out at IR15.86 (CD8.1), the Inspector there recognised that reliance on the position of ECC should be tempered particularly in circumstances where, as here, the highways authority had withdrawn its objections before hearing the detailed objections of the JPCs. It is submitted that the same approach should apply here.

3. As GC accepted in xx, it is totally legitimate for a rule 6 objector to test the evidence by expert opinion, without putting forward its own modelling or data. Indeed, the last appeal demonstrated that such a challenge to the position of the appellant and the public authorities deserves to be taken seriously and can (and did there) result in the dismissal of the appeal on transport grounds.
4. In that appeal, the Inspector found that *“the likely extent of shift in traffic from Stansted Road to Hall Road does not show that significant impact on SM would be averted. The probability is that this would amount to substantial harm. However, as there would probably be a useful modal shift, if not necessarily as great as claimed, and as there is limited evidence of increased risk to highway safety, the residual cumulative impacts on sustainable transport modes, highway safety and the transport network when taken as a whole would not reach the threshold of severe such that the development should be prevented on transport grounds alone”* (IR 15.98, CD8.1 p.100-101)
5. Notwithstanding the lack of a conclusive finding of ‘severe’, the Inspector stated *“Nevertheless, even if the increase in congestion would not amount to a severe impact, it remains the case that the scheme would bring significant volumes of additional traffic to a village at a significant distance from employment and services. It is unlikely that traffic could be accommodated on the surrounding roads, contrary to LP Policy GEN*

1. *This also weighs heavily against a conclusion that the scheme would amount to sustainable development.*” (IR 15.99, CD8.1 p.101).
6. These significant findings of adverse and substantial adverse impacts were reiterated in IR 15.104 *“The impact on Stansted Mountfitchet would probably be substantial”* and, in relation to the consideration of whether the proposal would represent sustainable development at IR15.105 *“the likelihood of a substantial impact on the highway network through Stansted Mountfitchet would weigh heavily against the scheme with regard to the environmental role.”* The conclusion in relation to this was *“For the above reasons, the harm to the road network, coupled with the harm to the character and appearance of the area, and the loss of BMV agricultural land, mean that the collective harms would significantly and demonstrably outweigh the benefits.”* (IR 15.106 at p.102 CD8.1).
7. This conclusion was unaffected by the position on housing land supply: *“Regardless of the conclusions on HLS, the substantial impact on the surrounding road network would still weigh sufficiently heavily against Appeal B so that the adverse impacts as a whole would significantly and demonstrably outweigh the benefits.”* (IR15.111 at p.103 CD8.1).
8. All these findings and considerations of the Inspector were adopted by the Secretary of State in his decision letter at paras 35-38, para 42 and paras 52-53 (CD8.1).
9. It is abundantly clear from all this that the traffic impact of the previous scheme, particularly on Stansted Mountfitchet and Grove Hill, was the main reason for dismissing the previous appeal. And this was the case notwithstanding that the impacts were not considered to be ‘severe’ in NPPF terms, and this was the case irrespective of

the position on 5 year housing land supply. Such impacts were clearly considered to be sufficiently substantial to justify refusal, not least by reference to the resulting conflict with development plan policy GEN1.

10. GC does not and could not dispute this. But the appellant's response is to seek to argue that circumstances have changed; that the 2012 NPPF has been superseded by the 2018 and 2019 frameworks; that there is now no 5 year housing land supply; that the scale of development is now much less and that there is now mitigation in place in the form of the ECC upgraded traffic signals at Grove Hill (see App Opening para 13).

11. I deal with those matters in turn:

12. First, the reference to a new version of the NPPF does not support the appellant's case. The 2019 NPPF has not materially changed from the 2012 version in any relevant respect. The emphasis on boosting the supply of housing was equally present in 2012 (as accepted by NF).

13. Second, whilst it is plainly the case that the housing land supply position has worsened since the previous appeal decision in 2016, as set out above the housing land supply position was expressly stated as being of no consequence to the conclusions of the previous Inspector and Secretary of State in relation to highway impacts and the weight to be accorded to those impacts in the decision making process.

14. As to the scale of the development, the previous scheme was for 800 homes plus a school, some employment and retail. In addition to that, trips from a further 208 dwellings were considered as committed development (bringing the total number of dwellings considered to 1,008). The current scheme is at a lesser scale (350 dwellings and a school), but with additional committed development in Elsenham and Henham of

548 dwellings, making the total number of dwellings as from 2014 to be 1,106 (350 + 548 + 208). This is all set out at paras 3.1.2 to 3.1.5 of SW's proof and was accepted arithmetically by GC in cross examination.

15. Because the additional committed development in Elsenham and Henham (set out at SW table 1, para 3.1.3) is located so as to be similarly reliant on the Grove Hill route through SM, the likelihood is that the total cumulative impact on Grove Hill to be considered now (at 1,106 dwellings in total) will be greater than that considered at the previous appeal (1,008 dwellings) (see 3.1.2 to 3.1.5 SW proof which updates the Railton report and table 2.2 at 2.5 – 2.9, SW Appx A).

16. GC's response was that this was a 'crude' exercise. But he could point to none of the sites listed in SW table 1 (at para 3.1.3) as being irrelevant or outside the area that would affect the route through Stansted Mountfitchet. Nor did he attempt to demonstrate empirically that the traffic generation from the employment development proposed in the previous scheme would outweigh the impact of the additional 98 dwellings that will now cumulatively come forward with this proposal (if allowed) over and above the cumulative development considered previously (see para above paras, 1,106 – 1,008 = 98). Self-evidently the other housing sites that have been constructed since 2014 or that have yet to come forward (set out in SW table 1) are in similar locations to the appeal site such that their traffic generation levels are likely to impact Stansted Mountfitchet, and particularly Grove Hill, to a similar extent as the appeal proposal.

17. Furthermore, the previous Inspector, whilst not accepting the 'Hall Road strategy' in its entirety, still considered that a significant proportion of the traffic travelling towards Bishops Stortford would use that route. So, whilst the 90% / 10% split (diverting traffic

from SM to Hall Road - see IR 15.79, CD 8.1) was rejected by the Inspector, he still based his assessment on a significant proportion of traffic using Hall Road and a correspondingly lower proportion (than now) using SM (see para IR15.90, CD8.1, where 50% of the bulk of the development traffic (i.e the traffic using the southern access, which GC pointed out would be the bulk of the traffic) was considered still to use Hall Road).

18. The position now of course is that it is accepted by the appellant that Hall Road is not a realistic strategy; the link road is no longer proposed and it is accepted that *all* the traffic travelling towards Bishops Stortford would travel through Stansted Mountfitchet and the Grove Hill junction (see CD 1.4, TA para 6.3.4 and see 6.3.5 and table 6.3). This means that proportionally more traffic from the current development is projected to travel through SM and Grove Hill. And this 'proportionally more' is a comparison not just with the proportion that the appellant was projecting in the previous appeal (see figure comparison at table 2.1, Railton SW Appx A) but also (albeit to a lesser extent) with what the proportion that the Inspector actually considered would use Grove Hill as indicated in IR 15.90 referred to above. Further, in terms of actual figures, the projected (2-way) vehicle movements (2-way) from the proposed development alone through Grove Hill and SM is certainly significant, being 95 in the AM peak and 102 in the PM peak (table 2.1 at para 2.3 Railton, Appx A to SW proof).

19. It follows from all this that the additional committed and built development since 2014, together with the changed distribution assumptions of the appellant (abandoning Hall Road and relying entirely on Grove Hill for routes to Bishop's Stortford and beyond), mean that the likely cumulative traffic impact on SM and Grove Hill is at least the same

and probably greater for this appeal than for that which was considered by the previous Inspector and Secretary of State in the previous appeal. And this remains the case notwithstanding the fact that the scale of development at the appeal site itself is now lower than previously.

20. Indeed, substantial adverse effects are predicted by the appellant's own modelling in the current case. It is shown that, unmitigated, the effects on Grove Hill of the committed development to 2023 (both with and without this proposal) would lead to the junction being significantly over capacity with severe impacts. See the conclusions of the appellants' analysis at TAA Appendix D paras 4.3 – 4.4 (p. 88/225 in CD2.8 and see the Grove Hill row in Table 15, Appx F at p. 116/225 in CD2.8). GC accepted the significance of the adverse impacts (although would not quite accept 'severe') in relation to both the AM and PM peak periods.

21. The appellant's response to this is to rely on the ECC signal upgrade works that were undertaken in April/May 2019. These works will supposedly provide adequate mitigation, not just for the pre-existing situation, but for all the committed development to 2023 plus the effects of the proposal. No other mitigation to Grove Hill is now proposed as part of the scheme.

22. Having previously required surveys, modelling and mitigation strategies from the appellant (as set out in the TAA, CD 2.8), ECC's now position (albeit in relation to this site only – see para 27 below) is that their own upgrade works detect the secondary queue and achieve the *same* mitigation as was proposed by the appellant in the 'submitted application' (TAA (mitigation A)) and that nothing further is required (see

last para of email dated 9 Oct 2019 at GC Appx K and consultation response at CD 3.19).

23. This position of ECC is not reliable for the following reasons:

24. First, ECC initially agreed that their improvement scheme “would not detect the secondary queue of traffic waiting to enter the Grove Hill signals.” It was agreed that “the ECC scheme by itself would do little to mitigate the westbound queuing at the signals” (para 9 of meeting note dated 26 November 2018 at TAA Appx E, p.95/255 of CD2.8). Notably, the appellant remains of the view that the upgrade scheme does not in fact detect the secondary queue (GC rebuttal para 3.4.6).

25. Second, ECC’s more recent assessment of its own upgrade works is based only on observations from a few site visits (in circumstances where GC pointed out in oral evidence that little could be appreciated by site visits alone). In her email dated 13 February 2020 (at GC appx K), Katherine Barnes of ECC confirms that other than site visits “*we haven’t carried out any more formalised performance assessment of the signals as this was not part of the original brief for the scheme.*”

26. Third, ECC has not seen or assessed the appellant’s modelling results (or survey results) relating to the ECC upgrade mitigation (as accepted by GC in xx). And the only aspect of that modelling before this inquiry (at GC rebuttal para 3.6.5) shows that the ECC upgrade does *not* achieve the same mitigation as that proposed by the appellant (contrary to the fact that it is *that* level of mitigation relied on by ECC in not objecting – see para 22 above).

27. Fourth, it is plain that ECC is not now confident that its own upgrade/improvement works are sufficient to mitigate even the other smaller planning applications in Henham or Elsenham that are currently being determined. The information at SW Appx G, together with the additional documents submitted at the beginning of the inquiry, show that ECC is objecting to three other housing developments in Elsenham and Henham, specifically in relation to impacts on Grove Hill in SM. They are objecting to a site for 220 dwellings at land north of Bedwell Road, a site for 45 dwellings at South of Vernon Close, Henham and a site for 99 dwellings at land to west of Isabel Drive (see locations on plan at NF, Appx A). None of the impacts of those have been assessed as part of the cumulative impact of this scheme. And, in relation to the latter, Isabel Drive, it is important to note that ECC have submitted a proof of evidence to the inquiry (due to open next week) which clearly states (at para 2.4) that *‘one fundamental issue remains between the applicant and the highway authority and that is the cumulative impact of traffic generated by the development on Grove Hill junction’*.

28. This last point demonstrates a clear lack of confidence from ECC in relation to the efficacy of the ECC upgrade works and their ability to mitigate additional traffic at Grove Hill. Indeed, it is difficult to understand how the highways authority are able to say with any confidence that this 350 dwelling scheme will be within the capacity of the mitigation but that a 99 dwelling scheme heard a week later will not be. The lack of granularity in their consideration (from a few site observations and no formal or empirical assessment) simply does not support such a specific or granular view. Further, this inconsistent position by ECC begs the question of the fairness of allowing this 350 unit scheme to take up any remaining capacity of the Grove Hill signals (if any

exists, which is not accepted), whilst requiring a scheme that is to be heard at inquiry a week later to demonstrate its own mitigation.

29. Furthermore, as previously indicated, any reliance on ECC's position should be tempered by the fact that they have not considered the detailed challenge to their position made by the JPCs (as in the previous appeal – see para2 above and IR 15.86, CD8.1).

30. So, if ECC's position is itself unreliable and inconsistent, what, I ask rhetorically, is left for the Appellant to rely on? Not their TA (CD1.4) - we know that the Grove Hill data in the TA (from the 2017 surveys) was found to be defective (see TAA CD 2.8 (p.8/225) at paras 2.1.1 – 2.1.6).

31. Nor can the modelling results in the TAA itself be relied on as they were assessments of the appellant's previously proposed Mitigation A and Mitigation B, neither of which are part of this current scheme. Those results show precisely nothing as to the effectiveness or otherwise of the 2019 signal upgrade works now relied on.

32. In fact, the only evidence from the appellant as to the effectiveness of the Grove Hill upgrade comprises (1) the comparison of before and after queue surveys at appendix O of GC's proof and (2) the modelling of journey times set out at section 3.6 of GC's rebuttal (and, as already stated, neither of these have been reviewed by ECC).

33. As for the modelling results, on the face of it those show that the ECC upgrade works reduce journey times through the junction, although not to the extent of Mitigation A relied on by ECC. Indeed, the journey times shown to be achieved are still twice as

long as the 2018 base in the AM peak and three times as long in the PM peak and there is no way of knowing whether that outcome is one that is sufficiently mitigated to be acceptable to ECC.

34. In any event, the above modelling results are only as reliable as the modelling calibration and inputs. Significant doubt is cast on that reliability by the following factors:

35. First, the model is calibrated by survey data from a single day in June 2018 (TAA, Appendix D at CD2.8 p.86/225 – the second July date was discarded as unreliable), in circumstances where it had been agreed with ECC that the survey would comprise neutral days in consecutive weeks in the neutral period (see TAA Appendix C, at CD2.8, p.83/225). It is impossible to know whether, and the extent to which, that single day in June 2018 was representative of traffic conditions generally at Grove Hill.

36. Second, the maximum queue in the model outputs is significantly shorter than the maximum queue recorded in the survey data (see maximum queue of 29 vehicles recorded on 27 June 2018 at CD2.8 p.86/225, which GC accepted equates to 174m and see table of maximum queues from the modelling (at table 15, p.116/225) which shows a maximum modelled queue of only 141.8m (115.3 + 26.5) or 23.6 vehicles). This shows that the modelling tends to underestimate actual maximum queues.

37. Third, there is a partly constructed zebra crossing on Lower Street that is being provided under a s.106 agreement in relation to a development there. That zebra crossing, which is on a particularly busy part of the network close to Grove Hill (SW para 3.3.1-3.3.3) and which may well impact on the operation of the junction, has not been factored into the model at all.

38. Third, the model is unable to replicate or deal with the real life gridlock situations that often occur at the congested junction that is Grove Hill, such as where vehicles are required to take evasive action by reversing or mounting the pavement (as shown in SW photos at Appendix C). Where gridlock type situations occur in the model, they do not track such driver behaviour and the model stalls (see App proof appx I). Those model runs are then simply discarded (see TAA Appx F para 8.3, CD 2.8 p.114/225) meaning that the real life situations that actually occur are not represented in the modelling results.
39. Finally, the degree of improvement supposedly shown by the modelling results (GC rebuttal) is not corroborated by the queue survey information at GC proof Appx O. That queue data in fact shows a worsening in queue lengths in the PM peak between the pre-upgrade situation (June 2018) and the post-upgrade date (March 2020). And in relation to the AM peak, only a marginal overall improvement is shown. (And GC accepted in xx that both the (unmitigated) AM peaks and PM peaks were problematic and required mitigation).
40. Against this unreliable evidence from the appellant, other available evidence includes SW's photographs at his Appendix C, all of which are post-upgrade and show significant secondary queuing, reversing and mounting of the footway on Grove Hill. Also available is the evidence from Elsenham Parish Council (including a large number of similar photographs, of which 'hundreds' more could have been provided) and the oral evidence of a number of residents who live in Stansted Mountfitchet, including Diane Macfarlane who lives on Grove Hill and whose property has been damaged by a bus near the junction. Whilst GC advised the Inspector to be 'sceptical' about evidence

from residents who he suggested may have ‘vested interests’, he begrudgingly accepted that their views and experiences should be treated with respect. More than that, it is JPCs’ case that the evidence and experiences of those residents day in and day out over a prolonged period is valuable evidence of how the ECC upgrade works are working (or not). It stands in contrast to the modelling which has been calibrated by reference to a single day’s survey data (see above).

41. Additionally, many of the photographs show problems caused by HGVs using Grove Hill and exacerbating the congestion caused. It is clear that the existing TRO is ineffective to prevent this. It regulates HGVs only in one direction and is subject to significant exceptions, meaning that it is effectively unenforceable and not enforced in practice (SW Appx H). Whilst GC suggested that the highways authority could put in place a better and more effective TRO, it is clear that they have not done so yet despite their awareness of the many problems at Grove Hill. Any such future change is not before this inquiry and this Inspector cannot rely on any prospect of such a change being either possible or probable.

42. In conclusion on all of this, the Inspector can have no confidence at all that the upgrade works relied on in this case have effectively mitigated the Grove Hill junction, nor that there is sufficient capacity in those works to enable the traffic from this scheme and the committed development to 2023 to be adequately accommodated on the network without causing the junction to be over capacity. In short, the Inspector can have no confidence that the resulting situation would not be severe in NPPF terms (see the appellant’s own modelled impacts without mitigation referred to above), nor that it would not be as substantially adverse as the position considered by the previous Inspector and Secretary of State. The proposal is in clear breach of GEN1 and, whether

severe or not in NPPF terms, as in the previous appeal, this should weigh heavily against the scheme and against any conclusion that it might represent sustainable development, Again, as in the previous appeal, this is irrespective of the five year land supply position (see extracts from CD8.1 quoted above).

43. Further, for the avoidance of doubt, the other mitigation that was previously on offer has not been examined and cannot be relied on. Mitigation A would have been needed to be provided by a s.106 agreement and has in any event been rejected by ECC for physical and maintenance reasons (see 13 Feb 2020 email at GC Appx K). As for Mitigation B, ECC has shown no interest in implementing this. This is probably because ECC has concerns about giving too much green time to the southbound queue in the PM peak (see TAA, Appx E CD 2.8 p.97/225). Furthermore, if Mitigation B was the free and effective solution that is claimed by the appellants, it surely would have already been implemented by ECC. Or, at the very least, ECC would have considered it in relation to the other schemes to which it is objecting. There is simply no evidence that ECC considers it an effective solution that is in play at all.

Site Access

44. The location of the access on the inside of a sharp bend is contrary to the DMRB guidance (para 2.1.1 in SW Appx E and definition of ‘major road’ at p.8 and email). The reason stated for that advice is that such a location restricts visibility and can cause blind spots.

45. A consequence of the poor location of the access and the topography of the surrounding land is the extent of releveling works and retaining structures that will be required (as set out in SW appendix I). This evidence was not challenged and was accepted by CG.
46. The road safety audit at TAA Appx G para 2.3.1 p.205/225 highlights the location of the access on the inside of a bend and requires sightlines to be cleared to kerb together with street lighting. This all has consequences in landscape terms set out further below.

Connectivity by non-car modes

47. Further, because of the awkward location of the site, the development will not be well integrated with the rest of the village. The main pedestrian access will follow the route of the vehicular access along the main Henham road. Whilst a cycle and pedestrian link is to be provided to the station, this will often be cut off from the rest of the village by the railway itself which represents a real barrier: The level crossing is frequently closed (for 20 minutes per hour at peak times), and sometimes for long periods at a time (see GC Appx E). The bridge crossing is high and steep, representing a significant impediment for both cyclists and anyone but the fit and active.
48. Presumably because of this barrier that the railway represents, the appellant seeks to downplay this cycle and pedestrian connection into the village and instead places more emphasis on the main pedestrian access that will follow the route of the vehicular access along the main Henham road (GC proof and rebuttal). However, this emphasis and the lack of any link into the Hailes Wood development only goes to show how poorly integrated and disconnected the development will be from the rest of the village.

49. Whilst it is accepted that the proximity to the railway station itself will enable some non-car journeys, those trips have already been factored into the traffic assignments and there remains a very significant projected usage of the private car.
50. The bus service is of little attraction and according to residents often runs empty or with a handful of passengers. The funding offered for the improvement of that service, whilst a significant amount of money, will do little to improve the attractiveness of the service. The proposed increase in frequency overall will be offset by the proposed change in route, which will cut out the Henham loop for some of the journeys. This will mean that the site will not benefit from the increase in frequency as those buses will not travel along the Henham Rd and will not use the bus stops proposed by the development. Instead they will only stop at or beyond the Crown (depending on the constraints there), meaning that the usable bus stops will be at least 860m from the centre of the site, more than double the recommended desirable distance. This distance plus the inherent uncertainty of when a bus will arrive will deter any significant increase in bus use.
51. Finally, as for the appellant's reliance on the Travel Plan proposed with this scheme being superior to the 2013 Travel Plan which was doubted by the previous Inspector, that is misconceived. The three key features highlighted by GC (personalised travel planning, travel packs and taster tickets) were all measures included in the 2013 TP (see SW Rebuttal Appx R1 p. 14 and 16). And whilst, GC sought to argue that the current TP targets would be tougher and the co-ordinator would be more energetic, those points give little reassurance that anything would be different. The fundamentals of the

location of the site and the car reliance of the area (see census data, TA, Table 4.1, CD1.4 p.13 or 22/545) are the same. The same measures are proposed and the tougher TP targets are merely aspirational, not enforceable. Moreover, there is no guarantee that the co-ordinator (to be appointed by the unknown buyer of the site) will be anymore 'energetic' than previously proposed.

Effect on the character and appearance of the area

52. AF explained how the site sits on the gradual transition between two landscape character areas, the Broxted Farmland Plateau and the Stort Valley. For this reason, it is necessary to consider the characteristics of both.
53. The site is not uniform; the northern part is an open plateau requiring the consideration of topography and grain. The introduction of built development there will rise onto higher ground than was proposed with the previous scheme and will impose a straight edge of build development cutting across the landscape contours. There will be an incongruous effect of built development on the skyline to the north east. This will be uncharacteristic in Elsenham in circumstances where other rising development in the village is set against a wooded backdrop, which reduces the effect and the perception of it extending unconstrained into the countryside. No such constraining effect will be present here.
54. The southern part of the site that is close to Henham Road is more enclosed, reflecting the intimate valley character of the Stort Valley close to Elsenham Cross and the historic core of the village. The development will have a direct physical impact on this part of the site, with the access cutting through the embankment to Henham Road and

with intrusive and urbanising works required along the length of the visibility splay (requiring removal of significant trees and vegetation and level changes of more than 2m in places – see SW Appx I). Because of the requirement to keep wide visibility splays clear to ground for a considerable distance (due to the location of the access on the inside of a bend) mitigation of the visual effects will not be possible.

55. The effect of the introduction of street lighting and the works for a 2m wide footway on the northern side of the road will further impact the current rural, historic approach to the village, extending the gateway to the village further east. Retaining structures will be required and, because of the lack of width on this side of the highway, there will be damage caused to the root zone of the trees and hedgerow along the road causing their likely loss.

56. The introduction of built development further south in the site than was previously proposed (there now being less open space in this part of the site than previously) will only add to the impact on the Stort Valley and on users of the public footpath in this location. The sensitivity of this southern area was recognised in the previous application whereas in this proposal, additional built development is proposed in this location.

57. All parties accept that the landscape in this location is not a ‘valued landscape’ in NPPF terms. However, AF was clear that it is more than just ‘an ordinary landscape’ and that it does have value. This is not least because of the presence of the listed buildings which are nationally recognised. AF explained the requirement in the GLVIA (at para 5.10) for landscape professionals to understand the historic environment and to collaborate with historic environment specialists.

58. Elsenham Cross has a distinct character and the approach to the village has a strong local identity. As recognised in the heritage assessment, the proposed development would not conserve or enhance these qualities and the effects cannot be mitigated.
59. Development at the appeal site will not be in accordance with the pattern of the development of Elsenham which AF explained largely sits in the folds of the landscape, rather than extending onto the plateau. This is in contrast to the more elevated nucleated settlements of Henham and Ugley.
60. In Elsenham, modern development has largely been confined to the west of the railway. But where it has occurred to the east (or is planned to do so in the case of west of Hall Road) such development is on lower lying land and of smaller scale. The proposed development is in contrast to that. It also contrasts with the recently approved Rush Lane site which is in a much more enclosed location and of a much smaller scale than what is proposed here.
61. As AF explained, just because the site is adjacent to the settlement boundary, does not mean it is a good fit. The existing urban edge is well vegetated and at a lower elevation. The proposed development will extend up to 0.5km onto higher ground into the countryside and the location of its access will mean it is physically divorced and poorly integrated with the rest of the village.
62. All this contributes to the range of adverse effects set out in AF's proof and in the table of effects in the Joint Position Statement. It is clear that the overall impact on the landscape is significantly greater than was found in the previous appeal decision. It is important to note that in that inquiry, the only landscape evidence presented was provided by the appellant and there was no testing of that evidence by the other parties.

63. In conclusion on this topic, there is clear landscape harm. The character of this particular part of the countryside will not be protected or enhanced and the proposed development is in clear breach of policy S7.

Is the appeal proposal consistent with the development plan and what is the weight to accord to the relevant policies?

64. It is common ground between all three parties that the proposal is in breach of the development plan as a whole. Whilst NF faintly tried to suggest that it might be arguable that the scheme actually accords with the plan, he did not press this and to do so would plainly have been untenable for the following reasons:

ENV2

65. First, there is a clear, undisputed breach of ENV2 regarding the adverse impacts on the settings of the listed buildings on Henham Road (GG proof para 3.9 and accepted by NF in xx). The appellant's own documents identify that harm (CD2.9 Ch9 table 9.5-2 and 9.5-3). Both s.66(1) of the Planning and Listed Buildings Act 1990, together with case law including *Barnwell Manor v. East Northamptonshire DC* ([2014] EWCA Civ 137, at para 29) make clear that *any* harm to listed buildings and their settings are to be accorded considerable importance and weight in the planning balance. And this is reflected in the NPPF at paras 93 and 94 which require 'great weight' to be accorded to the conservation of heritage assets and this applies even where, as here, the impact is 'less than substantial harm'. Furthermore, *any* harm to the significant of a designated

heritage including from development within its setting should require clear and convincing justification (NPPF para 94).

66. Whilst, it is not the JPCs' case that the harm to the heritage assets in this case is sufficient *by itself* to disapply the tilted balance by operation of NPPF para 11(d)(ii), it is clearly the case as a matter of law that the heritage harm must still be weighed in the overall balancing exercise under para 11(d)(i) and that harm must be accorded considerable importance and weight in that balance. The appellant's planning witness who purports to advise the Inspector on the planning balance, has entirely failed to take account of the harm to the heritage assets as part of the weighing exercise. Neither his proof or rebuttal evidence refers to either ENV2 and his consideration of the NPPF (proof para 4.69) fails to take account of paras 93 and 94. These are serious omissions that render NF's judgements on the planning balance unreliable.

ENV5

67. Second, as in the previous appeal, there is conflict with policy ENV5 due to the loss of best and most versatile agricultural land. Also, as in the previous appeal, it is accepted that the weight to be accorded to breach of this policy is limited but it is nevertheless material and must be weighed in the balance (see paras 34 and 52, CD8.1).

GEN1

68. Third, in light of the highways evidence set out above, there will be a clear breach of policy GEN1, particularly in terms of the inability of the local highway network to accommodate the traffic generated by this scheme alongside the committed development. NF accepted that, if this Inspector finds that this proposal has similar effects on Grove Hill and SM, it would be consistent for him to find a breach of policy

GEN1 as was found by the Secretary of State and previous Inspector. And, as found by those previous decision makers, this breach weighs heavily against the appeal (CD 8.1 para 38 and IR15.98-99).

S7

69. It is indisputable that the appeal proposal is in conflict with policy S7, both in terms of being beyond the settlement boundary and in terms of the landscape and visual harm caused to the character and appearance of the area. Even CG does not contend that there would be *no* such harm.

70. The JPCs do not place any significant weight on the *per se* breach of S7, but do place significant weight on the conflict with S7 in terms of the harm to the landscape and the impacts on the character and appearance of the area set out above. This accords with the Secretary of State's approach to policy S7 (see CD8.1 para 31, which was to expressly disagree with his own Inspector's different view on consistency with the NPPF at CD8.1 para IR15.32 and see xx NF by JC). It also accords with the most recent Inquiry appeal decisions decided by two different Inspectors: 'North of Wicken Road' (paras 72 – 75 and 86 at AH Appx 3), and 'South of Wicken Road' at GG rebuttal Appx 2 (paras 22 -23), both listed in the tables produced by NF (at rebuttal, Appx B) and GG (at rebuttal, Appx 1). It is to be noted that both those cases were determined by Inquiry and so included cross-examination; both were for significant numbers of dwellings (150 and 74); both considered the full range of previous appeal decisions and both were determined in circumstances of there being no five year land supply. By contrast, the appeal decisions relied on by the appellant (Rush Lane and Street, Takeley) were for fewer dwellings (40 and 8); both were determined by the same Inspector at a hearing without cross-examination and both took a contrary approach from the Secretary of

State on the issue of consistency with the NPPF (see above) without explaining that change of approach (see NF xx by JC).

71. Furthermore, the JPCs' approach to the consideration of the weight to accord to S7 (in contrast to the appellant's approach) has the benefit of not representing a perverse approach to the concept of deemed out datedness (see below) and of not illogically triple counting the lack of five year land supply (in circumstances where that supply position is factored in already by increasing the weight (twice) to the other side of the balance) (also see below).

General principles about assessment of weight to policies

72. The effect of a lack of five year land supply, together with the deeming provision in footnote 7 NPPF, is to render the 'most important policies for the determination of the appeal' as 'out of date' for the purposes of triggering the tilted balance in favour of development in para 11(d)(ii). However, the deemed out of datedness does not, and cannot, *automatically* affect the weight to be ascribed to conflicts or accordances with those policies. Out of datedness does *not* determine weight. Weight is a matter of planning judgement purely for the decision maker (see *Gladman* CD9.4 at para 97 and see *Peel* CD9.6 at para 71).

73. It follows that NF's approach of ascribing 'limited' or 'very limited' weight to the conflicts with many of the development plan policies on the basis of them being deemed out of date is misconceived. This is for two reasons: First, to apply such an approach has perverse effects as the 'most important policies for determining the appeal' are then automatically downgraded in terms of weight due to the deeming provision in fn7,

whereas other policies that are not identified as ‘the most important’ (but which are still important) to the determination of the appeal would not be downgraded to limited weight as the deeming provision would not apply to them. NF accepted the illogicality of such an approach, albeit that he had in fact applied such an approach.

74. Second, NF then sought to rely on the *reason* for the out of datedness, i.e the lack of five year supply (albeit that such reason only applies directly to the ‘most important policies’ which are rendered out of date by the lack of five year supply – see above). He put forward the lack of five year supply as being a primary basis for reducing the weight to the policies. On this basis, he reduced the weight he applied to conflicts with many of the policies considered in his proof (proof paras 4.14 to 4.42) and in xx he briefly sought to apply that logic to policies he had not considered in his evidence such as GEN1. Again, such an approach is illogical and misconceived in circumstances where lack of five year supply is already weighed in the balance by increasing the weight to the benefits of housing provision. The lack of a five year housing land supply, and the acuteness of the housing need, is plainly an important consideration. This is recognised by the fact that it tilts the balance in favour of development (i.e thus skewing the balance in favour of the benefit of housing/affordable housing). It is also recognised by all parties in this case by, when applying that balance, also according significant, or substantial weight, to the provision of housing and affordable housing as a benefit. To then use it as a factor to also reduce the weight accorded to other policies on the harm side of the balance (some of those policies, such as GEN1 and GEN2 having nothing to do with housing provision) would be to at least double count it, and probably to triple count it. Whilst addressing housing need is no doubt a principal important factor in the NPPF it does not appear to be the intention of national policy that it should automatically trump all other planning matters two or three times over.

Overall Conclusion

75. It is plain from all the evidence heard at the inquiry that the proposed scheme is in clear breach of the development plan. It will cause significant harm to the character and appearance of the landscape and great weight is required to be accorded to agreed adverse impacts on the settings of listed buildings. As with the previous appeal, it is unlikely that there is capacity in the local road network to accommodate the traffic generated and the cumulative impact on SM will likely be substantial or severe. Whilst significant weight is to be accorded to the provision of housing and affordable housing and whilst there are some other more modest benefits, in the particular circumstances of this appeal the collective harms identified will significantly and demonstrably outweigh those benefits. In sum, there are no sufficiently weighty ‘other material considerations’ to outweigh the breach of the development plan in this case and the Inspector is invited to dismiss the appeal in line with s.38(6) of the Planning and Compulsory Purchase Act 2004.

18th November 2020

JENNY WIGLEY

Landmark Chambers