RE: LAND OFF PACKSADDLE WAY, FROME

CLOSING SUBMISSIONS OF THE APPELLANT

INTRODUCTION

1. The context for this appeal is the national imperative to boost significantly the supply of housing (NPPF 61). There has been a longstanding recognition from Government that the planning system has simply failed to deliver sufficient homes for a protracted period of time and this can no longer be tolerated.[1] The housing crisis, exacerbated by inflation, repeated rises in interest rates and the cost of living (a daily news story), has been succinctly expressed by Rt Hon Angela Rayner MP (SoS HCLG and Deputy PM):[2]

> "***We are in the middle of the most acute housing crisis in living memory.*** *Home ownership is out of reach for too many; the shortage of houses drives high rents; and too many are left without access to a safe and secure home.*"

2. This is a national imperative which has a clear local expression.[3] This LPA claims **a mere 2.84 years supply**. The LPA is significantly failing to meet the *minimum* requirement of national policy (to deliver a 5YHLS) against a *minimum* LHN requirement. Considered properly, the HLS position is "dire"[4], especially given the unresolved issue of neutrient neutrality in 4 out of the 5 Main Towns (all of the Tier 1 settlements save Frome). The need for Affordable Housing (AH) is equally acute. It is clear that even

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[1] DD at 5.1 *et seq*

[2] See Written Ministerial Statement CD 9.12

[3] See evidence of DD, SoCG (CD 7.1) and LPA's latest 5YHLSA

[4] EiC of DD

modest housing has become unaffordable in this area for vast swathes of the local population.

3. In that context, the Mendip area (now part of Somerset Council) is significantly dependent on greenfield sites, outside the settlement boundaries of sustainable settlements, to meet their urgent need for more market and affordable housing (both now and in the next Plan period). This is a proposal which delivers the significant benefits of more market and affordable homes, with substantial economic benefits, on an accessible site surrounded on 3 sides by housing, immediately adjacent to the most sustainable settlement (Frome). It is an obvious development site. Indeed, the application was unequivocally recommended for approval on that basis (see CD 3.1).

THE APPEAL PROPOSAL

4. This appeal concerns a full application for 74 dwellings (of which 22% or 16 homes will be affordable) and a Children with Disabilities' Home. The application also provides for public open space (0.8ha), landscaping, drainage, a BNG and vehicular access. The proposal is set out in detail in the SoCG (CD 7.1 at 3.1 *et seq*). The delivery of the home has been requested by the Council, who support it. There is no policy requirement to demonstrate a separate need for it. If it is not delivered, it will provide further open space (secured by the s.106).

5. The proposal does not comprise EIA development. The plans for determination are agreed (SOCG at 3.6).

THE DECISION OF THE LPA

6. At the time of the determination, there were no objections from statutory consultees. There were no outstanding requests for further information and no technical issues which could not be addressed by conditions and/or a s.106 planning obligation. The Application was therefore recommended

for approval. The recommendation specifically took account of the objections from People for Packsaddle (PfP) and discounted them.

7. Nonetheless, the application was refused for 1 reason (CD 3.2):

The site is located outside of the housing development limit and is therefore contrary to the settlement strategy, as outlined in Policies CP1 (Mendip Spatial Strategy), CP2 (Supporting the Provision of New Housing) and CP4 (Sustaining Rural Communities) of the Mendip District Local Plan Part I. As the Council cannot currently demonstrate a 5-year housing land supply, the presumption in favour of sustainable development applies, as outlined in the National Planning Policy Framework. Although the site is adjacent to the settlement of Frome, the harms of the proposal would significantly and demonstrably outweigh the benefits. Harms include the principle of the proposal and being contrary to Policy DP1 (Local Identity and Distinctiveness), Policy DP4 (Mendip's Landscapes) and Part 1 of Policy DP16 (Open Space and Green Infrastructure) of the Mendip District Local Plan Part I. As such, the proposal is not considered to constitute sustainable development and is contrary to Policies CP1, CP2, CP4, DP1, DP4 and Part 1 of DP16 of the Mendip District Local Plan Part I and the National Planning Policy Framework.

8. In accordance with NPPG, the Council has considered whether such a position was reasonable/supportable. The SoCG (1.9) records that, following the appeal, the LPA no longer seeks to defend the following RFR:

- The impact of the proposal on local identity and distinctiveness (DP 1);
- The impact of the proposal on landscape character (DP 4).

9. Further, the LPA agree (SoCG at 1.9) that policies CP1, CP2 and CP4 are out of date and only "*limited weight*" should be attributed to them, in the application of the tilted balance. The LPA accepts that the benefits of the appeal proposals outweigh any land use planning harm which arises from any claimed conflict with policies CP1, CP2 and CP4. Indeed, this is consistent with a number of recent decisions of PINS.

10. TJ accepted that he did not consider that any part of Members' RFR was arguable/supportable save in respect of Open Space. It follows that the only remaining issue between the Appellant and the LPA concerns the impact to Open Space and claimed conflict with Policy DP16 (SoCG at 1.10).

11. That is not the position of PfP. They have raised a number of additional issues, which have no respectable evidential foundation. They are inconsistent with the Appellant/LPA's agreed position and unreasonable.

MAIN ISSUES

12. The Main Issues reflect the Inspector's CMC Note (CD 8.3):

- Whether the appeal site is in an acceptable location, having regard to local and national policies including what weight can be given to any conflict with the development plan;
- The effect of the proposed development on the character and appearance of the area;
- The effect on the availability of open space;
- Whether it would make acceptable provision for affordable housing;
- Whether it would make acceptable provision for the generation of renewable energy; and
- The effect on biodiversity.

THE STATUTORY TEST

13. This appeal falls to be determined in accordance with the Development Plan (DP), unless material considerations indicate otherwise (s.38(6) P&CPA 2004). So far as relevant, the development plan comprises:

- Mendip District Local Plan Part 1 (Strategy & Policies 2004-2029), adopted December 2014 (LPP1) - CD 4.1;
- Mendip District Local Plan Part 2 (Site & Policies Post JR Version), adopted Dec 2021) (LPP2) - CD 4.4; and

- Frome Neighbourhood Plan (2016) (FNDP) - CD 4.6

14. Art 35(1) DMPO 2015 requires the RFR to be full. However, in the light of the LPA's SoC and SoCG, **the LPA allege conflict with only a single policy (DP 16 LPP1)**. There is agreed compliance with all other policies (SoCG).

HOUSING LAND SUPPLY ASSESSMENT (HLSA)

15. In the light of the XX of TJ, the position on HLSA is expressly agreed. It is, however, a significant failure of the evidence of TJ and JD that they fail to assess the detail of the position and, therefore, fail to grapple with the enormity and implications of the housing shortfall.

16. The social role of sustainable development includes a requirement to boost significantly the supply of housing (NPPF 61). This requires LPA's to provide (as a minimum) for the objectively assessed needs (OAN) for market and affordable housing and to plan to meet them (NPPF 11(b), 23 and 36(a)).

17. The requirement for the LPA to demonstrate a 5YHLS is the very *minimum requirement* of national policy (NPPF 78), set against *a minimum housing requirement* (NPPF 61).

18. In that context, the LPA's latest 5YHLSA (July 2025) states:

- The relevant 5 year period is **1/4/25 to 31/3/30** (after the end of the Plan period);
- The 5YHLS should be calculated using the standard methodology (Dec 2024) (**877 d/pa**) because the housing requirement (420 d/pa in Policy CP 2) is more than 5 years old and has not been reviewed (NPPF 78 and Fn 39)
- The housing requirement has therefore *doubled* since 2014;

- A **20% buffer** must be applied because the LPA has failed the HDT (79%);
- The 5 year requirement is **5,287 homes** (1,057 d/pa);
- It follows that this LPA must deliver **1,057 new homes each and every year for the next 5 years** (from *now*) to meet the *minimum requirement* of national policy against a *minimum housing requirement*;
- The **deliverable supply is 3,003** (the Appellant has not tested it further);
- There is **a mere 2.84 year supply**;
- That is a shortfall of 2,284 dwellings (~ 7 years at current rates of completions (363 d/pa));
- On the basis of the submitted evidence, **it is agreed that the LPA does not have a 5YHLS**;
- **TJ conceded: There is a serious and significant shortfall of homes against the *minimum* requirement of national policy, which needs to be remedied urgently**.

19. In the context of annual average completions over the last 3 years of 363 d/pa, TJ conceded there is the need for an immediate step change in the delivery of housing in Mendip *now*. Housing delivery must immediately *treble*. However, given the issues of nutrient neutrality in 4 out of the 5 Main Towns in Mendip, such a step change can only take place in Frome.

20. It follows (and is agreed) *inter alia* that (SoCG at 5.6):

- The most important policies are CP 1, CP 2, CP 4, DP 1, DP 4 and DP 16;
- The most important policies are out of date;
- The tilted balance is engaged; and
- ***Significant weight*** must attach to the need to deliver more housing *now*.

21. It is in this context that the Development Plan policies can be considered.

THE DEVELOPMENT PLAN

22. **Policy CP 2** sets out a *minimum* housing requirement of **9,635 homes** (2006 and 2029) or **420 d/pa**. The Spatial Strategy of the Plan (Policy CP 1(1)(a)) is to locate the majority of new housing in the 5 principal settlements (the Tier 1 settlements) to re-inforce their roles as market towns serving their wider rural catchments.

23. The Spatial Distribution of Housing (Policy CP 2(1)) is for Frome is to deliver 2,300 homes (or 25% of the total), Glastonbury (1,000), Shepton Mallet (1,300), Street (1,300) and Wells (1,450). The LPP2 increases delivery at Frome to 2,880 (the largest increase of the 5 towns). Frome is therefore confirmed as the most sustainable settlement, which is to accommodate the most housing growth in Mendip to 2029. It follows that the growth of Frome is a *planned* outcome.

24. Policy CP 1(3) has a sequential approach to meeting the minimum housing requirements: (i) maximising the re-use of PDL sites and other sites in the settlement boundary; (ii) then at "*the most sustainable locations on the edge of the identified settlements*" (e.g. Frome). Development outside settlement boundaries will be strictly controlled (CP 1(1)(c), CP 1(3) and CP 4).

25. The settlement boundaries were drawn on the basis of the out of date housing requirement (420 d/pa) and the Spatial Strategy to meet it. The boundaries were drawn tightly around the existing settlements. The purpose of the settlement boundaries is therefore two-fold (as TJ agreed):

    (i) To provide an area inside of which housing is in principle acceptable to meet the out of date (constrained) housing requirement to 2029; and

    (ii) To provide an area outside of which housing is strictly controlled because it is not needed to meet the out of date (constrained) housing requirement.

26. If, however, there is a need for housing which cannot be met inside the settlement boundaries, it should (as a first priority) be directed to the most sustainable locations on the edge of the 5 Towns (including Frome), applying CP 1(3).

27. It is accepted that the site falls outside of the settlement boundary of Frome. There is, therefore, a simple spatial conflict with Policy CP 1(1)(c). There is, however, no land use planning impact that flows from the location of the development outside the settlement boundary.

28. However, applying the dicta of Lindblom LJ in ***Hallam Land*** (CD 6.1 para 47), it is agreed (with the LPA) that *limited weight* should attach to such a conflict in the tilted balance for *inter alia* the following reasons. JD's position (moderate weight) is based on the consistency of the policies with the NPPF. However, as set out above, the policies *cannot* be consistent with the up to date housing requirement. JD simply provides no analysis or support for his position (beyond bare assertion). Further, he fails to apply the correct approach:

(a) The Extent of the Shortfall

29. The weight to be attached to a policy of housing restriction is inversely related to the significance of the shortfall. As the shortfall is substantial, the weight to a simple policy of spatial restraint must be limited (TJ accepts in XX).

(b) The Prospect of the Shortfall being Remedied

30. There is no stock of unimplemeted permissions available to meet the substantial shortfall in the short term. On the contrary, the LPA accept that (since Aug 2020) the issue of nutrient neutrality has placed a significant constraint on all housing delivery in 4 out of the 5 Tier 1 settlements (all save Frome). There is no immediate strategic or local solution in place. It

follows that Frome is the only town which can deliver more housing in the short-medium term.

31. Further, the LPA accept that Frome has no remaining urban capacity, which is why the LPA do not object to 1,700 new homes being developed outside the settlement boundary of Frome (Selwood Garden Village). It follows that this LPA is significantly dependent on greenfield land releases, on accessible sites outside the settlement boundaries of sustainable settlements i.e. Frome.

32. A new Plan is required. However, with Local Government re-organisation, a new Plan is (literally) years away. Further, TJ concedes that any such Plan will have to plan for a minimum of 15 years at a minimum of 877 d/pa with significant neutrient neutrality constraints. This LPA cannot deliver over 13,155 new homes without significant releases of greenfield land outside settlement boundaries (especially at Frome). On the basis that there is no reasonable prospect of a remedy to the HLS shortfall, limited weight must attach to policies of housing restriction.

(c) Nature and Purpose of the Policies

33. In that context, no material weight can attach to a policy of blanket restriction on housing outside settlement boundaries (Policy CP 1(1)(c) and CP 4). Indeed, that was the conclusion of the Inspector in the Land West of Marston Lane DL (CD 5.2 see DL 14-17). It was also the conclusion of the LPA in the Selwood Garden Village application (see Officer Report at CD 9.1). Such decisions demonstrate that there is a *technical breach* no more and that the proposal will comply with the development plan (as a whole), provided there is no conflict with DP 16.

34. By contrast, TJ accepts significant weight can still attach to a sequential approach which directs housing to the most sustainable locations adjacent to the settlement boundary of Frome (CP 1(3)). The proposal derives

significant support from Policy CP 1(3), which should be afforded significant weight.

35. It further follows that environmental and amenity policies must be applied flexibly (per ***Richborough Estates***). DP 1 and DP 4 should still be afforded weight but they must be interpreted and applied in a manner which permits necessary greenfield housing sites to be consented. The inevitable impacts of housing on greenfield sites and their immediate context cannot rationally justify refusal (or else all the necessary greenfield housing would be frustrated). It is, however, agreed that the proposals comply with DP 1, DP 4 and DP 7 (see SoCG at 5.16).

36. It follows that the tilted balance in NPPF (11)(d) is engaged. Planning permission should be granted unless any adverse impacts would significantly and demonstrably outweigh the benefits to which very significant weight must attach (individually and cumulatively). This is an intentionally high evidential/policy threshold.

37. It is in that context that a number of the issues can be addressed briefly.

(i) ACCEPTABLE LOCATION

38. It has never been in dispute that the site lies in an accessible location, within proximity of the Town Centre of the most sustainable settlement in Mendip. It is agreed that there is access to a reasonable level of services and facilities by non-car modes (OR (125) and SoCG at 5.9. This is not contested by PfP.

39. Accordingly, whilst the site lies outside the out of date settlement boundary, which will have to expand to meet the requirement to deliver over 1,057 d/pa (over the next 5 years), the site lies in an acceptable location. Indeed, given the site is an "indentation" constrained on 3 sides

by built development, it is a perfectly logical urban extension. This is now accepted by the LPA (see SoCG at 1.9).

40. Accordingly, the LPA and Appellant agree that the site lies in an acceptable location. JD's PoE claims the opposite, without any material supporting analysis. Further, in XX, he conceded that any claimed conflict with CP 1, CP2 and CP4 would *not* justify refusal of the scheme. It is unreasonable that such a position is not clearly articulated in his written evidence. It is now an agreed position of all Main Parties that this is an acceptable location for development.

(ii) IMPACT TO THE CHARACTER AND APPEARANCE OF THE AREA

41. Contrary to the impression given by JD, the site is not some modern day Garden of Eden. Rather (EiC of CF), it presents as a piece of remnant development land, safeguarded for future development, whilst development has taken place around it. It is starkly different from the Open Countryside to the north.

42. The site is not the subject of any international, national or local landscape designation. It is agreed that the site does not form part of a Valued Landscape (SoCG at 5.11). It is not, therefore, "protected" by the NPPF (187a) at all. JD confirmed *inter alia* that: (i) he had no criticisms of the LVIA; (ii) no alternative assessment; (iii) there was no technically competent evidence to set against CF's evidence; and (iv) "significant weight" should attach to the consensus of professional evidence on the acceptability of the LVIA.

43. It follows that there was no evidential basis for the XX of CF, which was inconsistent with the evidence of JD. Indeed, on examination, JD's evidence rather supports the identification of the site a very good development opportunity:

(i) LCA (2006) (CD 4.15) - identifies that Frome has expanded to its natural limits and that any further development will inevitably have adverse impacts;

(ii) The LCA (2021) (CD 4.16(5) and (6)) - identifies that Frome exerts an urban influence over the settlement edge, save where there is hedges and planting. The site lies in B2.2, which is an area of "low" landscape value. This is the lowest category of value;

(iii) The SPD (CD 4.11) - JD selectively quotes the parts which suit but deliberately excises those parts which identify that the site is surrounded on 3 sides by built development, reads as part of the settlement and is not protected Open Space under DP 16;

(iv) The Frome Design Statement (JD at 3.18) - describes the surrounding development as 1950's, 1960's and 1970's estate development. He accepted it was "anywhere" development;

(v) Somerset LCA Guidelines (JD at 3.21 and 3.22) - JD conceded that development on the site would be acceptable, given the development is constrained on 3 sides, provided there was adequate landscaping to screen and filter the development. He agreed this had been done and that he had no criticisms of the landscaping plan.

44. It follows that the site is of "*the least environmental value*", to which development should be directed (NPPF 188).

45. Further, PfP have no criticism of the landscape constraints and opportunities. There are no design criticisms. On that basis, the only reasonable to conclusion to draw on the basis of the plans, sections and VVI's is that this will be an exceedingly high quality proposal. It is common ground there will be a very minimal visual envelope.

46. The site is bound by modern suburban housing (from the 1950's-1970's) to the south, west and east. The development does not extend any further

north than the existing housing to the east and west. The site is an obvious infill/expansion site to meet the need for more market and affordable housing in a sustainable settlement. A high quality interface with the Open Countryside to the north will be created by: (i) the orientation of the homes; (ii) a significant stand-off from the boundary; (iii) the provision of open space and gardens; and (iv) a high quality bespoke landscaping scheme (which has not been the subject of any criticism).

47. It is accepted the site will change from fields to a housing development. Such changes are the inevitable consequence of this LPA's urgent need for greenfield housing sites. The inevitable impacts of such greenfield housing development cannot rationally result in the refusal of schemes, or else the need for housing will never be met. Further, this is not the approach of local or national policy. The LPA accept (consistent with the recommendation of Officers) that the impact on the character and appearance of the area is acceptable and that the design is high quality. There is, therefore, compliance with Policies DP 1, DP 2 and DP 7 (SoCG at 5.10 to 5.17).

(iii) THE IMPACT TO OPEN SPACE

48. It is agreed (XX of TJ that there are 3 key issues:

(i) Policy DP 16 does not apply to protect the site;

(ii) If (which is denied) it does apply: the proposal complies with DP 16(1)(ii) because equivalent or better open space will be provided. The Appellant does not rely on DP 16(1)(i) and any existing surplus/deficit does not need to be considered; and

(iii) If (which is denied) the proposal fails DP 16(1)(i), it is the *net* loss in recreational space which falls to be weighed in the tilted balance. Any net impact does not significantly and demonstrably outweigh the benefits.

49. Importantly, the Appellant's position is agreed with: (i) Planning Policy Officers familiar with the production, examination and adoption of LPP1, LPP2 and the SPD: Open Space; and (ii) the Planning Officers (supported by independent legal advice from the Council's solicitor (XX of TJ).

50. Central to the resolution of the Open Space issue is the extent to which members of the public may lawfully use the site.

(a) Private Property

51. It is agreed that the site is private property. That position does not change because the site is owned by the Council (a public authority). It is private property to which the public do not have any right of access unless there is an identified source of such public or private law rights.

52. Open space can be public or private (***Renew*** CD 6.3 at 37/38). It is still, however, necessary to understand the scope of any lawful use of the site, in order to determine (as relevant) the "public value" to be attached to the use of the site.

(b) Primary Use of the Land

53. JD (3.6) considers the lawful primary use of the land to be *sui generis* (recreational use). Such a contention is flawed and irrelevant to the issues for determination, for the following reasons:

- JD's point is that there has been a material change of use of the planning unit (the site), which is now immune from enforcement action. Given that this is not an Enforcement Appeal (against the service of an EN), this is irrelevant. The grant of planning permission would permit the residential use of the appeal site, regardless of the previous primary use;
- For an appeal to succeed against the service of an EN under s.174(2)(d), the owner (not local residents) would have to demonstrate that (at the date of the service of the EN) the recreational use was immune from

enforcement. To do that: the owner would have to demonstrate that there had been a continuous material change in use for 10 years from the date of the EN. The evidence does not support that conclusion, not least because Janet Haigh stated the appeal site had been grazed for 2m in 2023. It follows that there has not been a continuous material change of use for the preceding 10 years. The suggestion that a change of use from recreational use to agricultural use is not material is irrelevant to that point (XX of DD). The primary use for recreation must be continuous. It has not been;

- It is agreed (XX of TJ) that SC (landowner) could: (i) withdraw the permissive path; and (ii) fence (1.8m) access to the site, to prevent unauthorised access. There is no reason for SC (as LPA) to serve an EN on itself (as landowner) to cease the use by fencing the site. That is barmy. Accordingly, the point is irrelevant;
- Further, the primary (*public law*) use of a site does not confer any *private law* right to use a site for that use i.e. a material change of use from an agricultural barn to a single dwellinghour may become immune from enforcement; that does not mean the public have a right to live in it.

54. JD's reliance on this claimed primary use of the site, in support of the public value, is deeply flawed.

(c) Public Law Rights to Use the Site

55. There is a PROW which runs outside (north) of the site. There will be no material impact to this PROW and it is not considered further.

56. There is a permissive path through the site. Accordingly, it is agreed that the public have the right to pass and re-pass along this linear route. It is not paved. It is not maintained and it is not even. It is agreed (XX of TJ) that the landowner's permission can be revoked at any time

(d) Private Law Rights to Use the Site

57. In XX, both JD and TJ conceded that they had not identified the source of any private law right to use the site. That is clear from their PoE's which fail to address the issue at all. Accordingly, their judgments on "public value" are fatally flawed.

58. In XX, TJ confirmed that:

- It was not SC's position (as landowner) that the public had a licence to use the site;
- It was not SC's position (as LPA) that the public had a licence to use the site.

59. Indeed, TJ fails to consider whether the public's use is lawful/permitted *at all.* His analysis is not informed by such an important consideration. The LPA provide no evidence or analysis to support the proposition that the public use is permitted/authorised/lawful[5] (in the civil law sense). On the basis of the LPA's evidence (and SoC), the only permitted/lawful use of the site is along the permitted path.

60. PfP assert (Opening at 20) that the public have a licence to use the whole of the site. That must mean *all members of the public* (even those who live miles away and who have never been to the site) have such a licence. Yet, JD provides no evidential support or analysis to support such a bold contention.

61. PfP rely on the case of ***R (Flynn) v SoS CLG*** [2014] 1 WLR 3270 (emphasis added):

> *37. In my judgment,* ***a licence*** *within the meaning of section 174(6) means* ***a permission to enter and to occupy the land in question****. The licence may be a contractual licence, that is one supported by payment or some other*

[5] Unlawful in the civil law sense i.e. without any private right to do so. It does not mean "illegal" in the criminal law sense.

consideration. ***The licence may be a bare licence, that is a permission to enter upon a person's land and occupy it, the licence being terminable on reasonable notice****: see, e.g., the description of such a licence in E & L Berg Homes Ltd v Grey [1980] 1 E.G.L.R. 103 at 106C-D and R v Doncaster Metropolitan Borough Council ex p. Braim (1986) 57 P. & C.R. 1 at pages 15–16.*

38. A licence to occupy may be granted expressly or impliedly. If it is an express licence, it may be granted in writing or orally. ***If there is no express licence, the grant of a licence to enter on and occupy land may be implied or inferred from the circumstances. Whether there is such an implied licence will depend upon all the relevant circumstances including the particular relationship between the parties involved and the circumstance in which the premises were occupied****. See Buckinghamshire County Council v Secretary of State for Environment, Transport and the Regions (2001) 81 P & C.R. 342 at paragraphs 34 to 35.*

62. This case is discussing the meaning of "licence" in the context of s.174(6) T&CPA 1990, which defines "*relevant occupier*" for the purposes of service of an EN. It is, therefore, deciding who may be a relevant occupier, such that an EN should have been served on them. That is not the issue here. Nonetheless, PfP rely on this case.

63. It is agreed that there is ***no express licence***. There is no contractual licence and no consideration has been given by members of the public. There has been no licence given orally or in writing. It is clear, therefore, that SC does not want (or intend) to grant such rights.

64. Accordingly, PfP rely on a licence for the public being implied/inferred from all the circumstances: "*Whether there is such an implied licence will depend upon all the relevant circumstances including the particular relationship between the parties involved and the circumstance in which the premises were occupied.*"

65. Whilst the implication of a bare licence might be of some relevance where (as in ***Flynn***) an individual occupies a site permanently in a caravan (such

that a LPA should have considered whether they were a "relevant occupier", it is of no application here.

66. The evidence of the use of the site by a number of local residents has not been factually contested. It shows that they have used the site (on a transitory basis i.e. they cross and leave) since the 1970's, when the adjacent estate was built and the site left for development as a Middle School. TJ asserted (in EiC) that local residents had enjoyed "unfettered access" to the site over the years. PfP appear to take the some approach. However (as TJ conceded) such a proposition fails to take account of number of important issues which show that SC (as landowner) has never intended that the public have unfettered permission (or a licence) to use the site:

(i) The site was acquired by SC in 1973 with the benefit of a full residential planning permission. The purchase price reflected the permission. The site was purchased to provide a Middle School for the suburban estates which were being constructed around it. *The Council (as landowner) therefore purchased the site with the intention that it should be developed and it was held and managed on that basis* (CF at 3);

(ii) In 1975, SC completed a DMMO, which specifically *deleted* paths A-E, D-F and C-A (CF App 1 Plan 4). These are essentially the same paths over which the public now assert they have a licence. *The deletion of the footpaths is consistent with the Landowner's intention to develop the site (at that time) for housing* (CF at 5);

(iii) In 2003, the site was being grazed. It cannot sensibly be argued that, at the same time SC had granted an express grazing tenancy (CF at 9) that the public have an implied licence to occupy the same site;

(iv) In 2005, the Tenant Grazier "*of many years*" decided not to renew the tenancy. It is clear, therefore, that there had been an express

grazing tenancy (for value) for many years prior to 2005. There cannot simultaneously be an implied licence to use the whole site by the public (CF at 9);

(v) In 2004, a permissive path was granted. It follows that SC were prepared to grant rights of access across the site but on the strict basis that they could be revoked at any time without notice (CF at 8). This was to facilitate the eventual development of the site (EiC DD);

(vi) From 2005 - 2008, the site was (again) let on an express tenancy to Mr Baker. That continued year on year. Again, there can be no implied simultaneous licence (CF at 10);

(vii) In 2007, to assist the Tenant farmer, SC erected fencing to ensure the public can only use the permissive path. That is the clearest signal that the public did not have a right to use the site and a licence cannot be inferred. Indeed, the erection of a fence would clearly bring any implied licence to an end with notice (CF at 10);

(viii) In November 2020, SC made a statutory deposit under s.31(6) HA 1980 and s.15A(1) Commons Act (2006). As CF explains (11), the purpose and effect of the statutory deposit is clear. It prevents any future claim by the public: (a) for a right of way across the site through long user (s.31(1) HA 1980); or (ii) to claim a right to use the site for lawful sport and pastimes (a village green) through long user (Commons Act). At the same time that SC is making it clear that it is seeking (through a statutory notice and deposit) that the public cannnot acquire rights over the site, it cannot be rational to imply a licence for the public to have identical rights. Indeed, CF states: *This shows clearly that the Council (as landowner) had no intention to grant rights of way or wider access over the site to the public* (CF at 12);

(ix) In 2020, the Council formally resolved to declare the site surplus to education requirements and seek the allocation of the site for housing. Actively seeking the development of the site for housing

is not consistent with an inference of the site being kept available as open space;

(x) On 3rd September 2022, the SC confirmed disposal of the site as a "surplus asset". This allowed the disposal of the site to LiveWest (an RP developer) (CF at 15 and 16);

(xi) In 2023, the site was grazed with cattle for 2 months. Again, a licence cannot be inferred during this period, when there is a grazing tenancy/licence;

(xii) On 13th June 2023, the Council Estates Team erected a notice to remind the public that the route was permissive only;

(xiii) Further, the landowner and the Council Officers have worked with the Appellant to bring forward a high quality residential scheme for the site which was recommended for approval. This was another statutory notice under s.31(5) HA 1980.

67. It is CF's evidence that the site has been held and managed at all times in a manner which will allow it to be developed. That is clear from the above. Both JD and TJ accepted that they did not doubt the contents of CF's statement. The Appellant submits that these are the clearest contra-indicators that a licence to the public for the unfettered use of the site has been granted (by implication).

68. The argument falls down at a very basic level. PfP cannot identify who the Parties to the licence may be or when the licence commenced. They cannot identify the terms of the licence (if any). They do not and cannot explain how the licence must terminate when there is a full tenancy for occupation of the site for grazing or when a notice is erected but somehow manages to re-appear at a later date. That is not a coherent position.

69. Finally, ***Flynn*** refers to *"the particular relationship between the parties involved"* and *"the circumstance in which the premises were occupied"*. PfP claims the licence grants access to the public. That must include

members of the public who have never visited the site. You cannot conceivably infer a licence to someone who has never been to the site. Further, even those who used the site cannot claim any "particular relationship" with SC. They simply used the Council's land without consent. Finally, the premises were not "*occupied*". They were used on a transitory basis. On every level, this proposition is hopeless.

70. It follows that neither the LPA nor PfP have identified any lawful basis on which members of the public can use the site, save for on the permissive path.

(e) Acquisition of Rights Through Long User

71. At times on Day 1, it was like being in a Footpath or TVG Inquiry, where residents assert they have been using the route/site "as of right" for a continuous period of 20 years (without force, without secrecy and without permission). It is accepted that residents can acquire rights through long user. Indeed, this is the usual and correct statutory mechansim whereby residents can assert they have the rights they want.

72. However, given: (i) the statutory deposit of the notices under s.31(6) HA and s.15 CA 2006, and (ii) the date of the planning application, and (iii) the claim that the use of the site has been with permission, any such application to acquire rights through long user would be statutorily precluded and doomed to failure.

73. This explains the hopeless reliance on the proposition that the general public have a licence to use the site unfettered.

(f) The Scope of the Lawful/Permitted Use of the Site

74. It follows that DD is unanswerably correct to exercise his planning judgment on the basis that **the extent of the lawful permitted use of the**

site is restricted to a right to pass and re-pass along the permitted path (DD at 3.7). That is his judgment. It is the Appellant's legal position.

75. Whilst SC have an unfettered discretion to withdraw such permission at any time (EiC of DD and XX of TJ), such permission has not yet been withdrawn and the use/rights must be considered at the time of the decision. This has always been the Appellant's approach, consistent with ***Renew*** (CD 6.3 at para 37).

Issue 1: The Interpretation and Application of DP 16

76. The Appellant's case is clear on this issue:[6] **DP 16 seeks to protect existing open space. The protected open space is that shown on the Policies Map and new spaces that come forward. The site is not shown on the Policies Map. It is not a new space that has come forward since the adoption of the Plan. DP 16 therefore does not apply to the site**.

77. Regrettably, given the objections, this simple proposition will now take some explaining.

(i) Principles for the Interpretation of a Development Plan

78. The interpretation of a Development Plan policy is a matter of law. The planning witnesses are not lawyers (see DD at 3.8 etc). Whilst they have helpfully set out their case, any answers in XX do not impact on the objective interpretation of Policy DP 16. Indeed, objectors cannot rationally assert (simultaneously) that: (i) planning witnesses cannot be asked about questions of law (XX of JD); and (ii) claimed "concessions" undermine a legal submission. Indeed, if that what the case, the LPA would have had to concede the Appeal, on the basis that TJ's evidence is that a permissive route would not be an open space (XX of TJ). Instead, the legal submissions will have to be heard and determined on their merits.

[6] and DD did not deviate from it

79. As DD explains (7.5), the relevant legal principles on the interpretation of development plan policy should not be controversial:[7]

- Per Lord Reed in ***Tesco v Dundee*** [2012] UKSC 13:

  *18. ...**The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities**. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others ... **policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.***

  *19. **That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract** ... In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). **Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.***

- Per Sir Keith Lindblom in ***R (Plant) v Lambeth LBC*** [2023] EWCA Civ 809 at [34]):

  *Well established principles are engaged (see the judgment of Lord Reed in Tesco v Dundee City Council, at paragraphs 17 to 22). **Development plan policies must be interpreted with realism and common sense, and with a proper understanding of their practical purpose**. The court must keep in mind that **this exercise is not the same as construing provisions in a statute or the terms of a contract. The formulation of the policy in***

[7] I have used the same cases referred to in the PfP legal opinion for convenience

***question may not be perfect**, especially perhaps if it is the product of re-drafting in successive processes of plan-making. But whatever shortcomings there may be in its drafting, **the object in interpreting the policy is always to ascertain the true meaning of its language and the effect it is intended to have in guiding planning decision-making. A policy must, of course, be seen in its context. And it is also essential to view the policy itself in its entirety**, avoiding a disjointed reading of individual criteria or phrases within it, and **thus gain a true sense of how its constituent parts fit with each other and work together as a whole. A practical and coherent interpretation, if that is possible, should be the aim**.*

- ***R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC*** [2014] EWCA Civ 567 at [15]:

*... it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan **the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy**. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the polices will be implemented.*

80. The ***Cherkley*** decision needs to be understood in the context of that case. It is clearly deciding that the Reasoned Justification (RJ) can explain the policy. It is "*plainly relevant to the interpretation of the policy*". However, in ***Cherkley,*** the LPA was not required to demonstrate an additional requirement that there was a "need" for a new golf course in an area because that requirement in had only been used in the RJ and not the policy itself. In that sense, the RJ cannot "*trump*" the requirements of the policy and add an additional criterion. That is quite different from using the RJ to understand and interpret the words of the Policy (which is the Appellant's approach but not the Objectors).

(ii) Background to the Development Plan

81. It is agreed that the LPP1 was produced, examined and adopted in the context of NPPF (2012), with which it needed to be consistent, in order to be sound (XX of TJ).

82. It is common ground that (XX of TJ): (i) the definition of open space in the NPPF has not changed (from 2012 to 2024); and (ii) the policy has not changed (from NPPF (99) to (104).[8] National Policy on Open Space is the same *now* as it was in March 2012. LPP1 expressly refers to NPPF (2012) - see the box at 6.141.

83. Further, it is common ground (XX of TJ) that there has been no material change in the claimed use of the site from 2012 to date.

84. DD's evidence is expressly clear: *The appeal site was an "existing open space" as defined in the NPPF 2012 at the time of the preparation, production, examination and adoption of the Plan*" (DD at 7.8).

85. In the context of the NPPF (2012) definition, the LPA produced an Open Space Study (June 2012) (CD 9.20). "Open Spaces" are defined in an identical way (CD 9.20 at 1.1-1.3) to the RJ to DP 16 (see 6.140 to 6.142). There can be no doubt that Open Space is being considered in an identical manner to NPPF 2012 and LPP 1.

86. Consultants had been instructed by Mendip DC to carry out "*an audit of all open space, play space and playing pitch provision across the district*" (CD 9.30 at 1.5). On that basis: *The development strategy is based on the comprehensive audit of open space provision and its assessment of quantity, quality and accessibility of open space* (CD 9.30 at 2.3). There is no evidence to contest the comprehensiveness of the Open Space Study (OSS).

[8] DD at 7.6

87. The OSS identifies a surplus of Open Space in Frome College of 18.71 ha (TJ had mistakenly understood there to be a deficit). There was a surplus of 3.63ha in Frome (CD 9.30 at Table 4). The OSS was updated in a Technical Note June 2012 (CD 4.3). The updated surplus was 3.45ha (see 2.1). The site is not identified as Open Space to be protected as TJ accepted, even though it was capable of meeting the NPPF definition (see Map at 2.2). An Open Space deficit of 8.15 ha arose from the increase in population from 2,300 new homes (Policy CP 2). It was, therefore, for those developments to address that projected deficit.

88. On that basis, it is not contested that the site was not protected as Open Space under DP 16 in the submission draft of the Plan. There were no objections on that basis. The Policy and the Proposals Map were examined and found sound (consistent with NPPF (2012) para 99 and definition of Open Space). It is unanswerable that the site was not protected by DP 16 on the adoption of the Plan on 15th December 2014. TJ agreed.

89. At the time of the adoption of the Plan, there can be no doubt that the LPA knew of the site. LPP1 states (at 5.9): ... *the best location for any new school remains to the north of the town which can address recognised traffic issues across the town associated with the morning school run.* ***The County Council retains a site at Packsaddle that was purchased for this purpose.***

90. As the site was safeguarded for future development. There can be no doubt that the LPA knew it was open space (TJ's assertions to the contrary are not credible).

(iii) Policy DP 16

91. So far as relevant (at this point) Policy DP 16 states: "*Development resulting in the loss of existing open, sport or recreational space ...*" No reliance is placed on sport or recreational space. Accordingly, the issue is

the interpretation of "existing open space". "Existing" adds nothing in this case.

92. All Parties start with giving the words in the Policy their ordinary meaning. The difficulty is that "open space" without further explanation or qualification is too broad. A car-park is an open space. Any greenfield site is an open space. That is not the point of the Policy. Accordingly, a further explanation is required. There are 2 options:

(i) The Appellants consider the explanation is provided in the RJ which immediately precedes the Policy;

(ii) The LPA/PfP consider the explanation is provided in the NPPF (2024);

93. The Appellant's interpretation should be preferred:

- The NPPF is a separate document. You would not, ordinarily, seek a definition of a term in a completely different document. Further, there is no reference to the NPPF Glossary in the Policy or in the RJ. There is no clear reason to have regard to it, as opposed to (say) the definition on open space in s.336 T&CPA 1990[9];
- Further, the NPPF changes over time. As a matter of principle, terms in a development plan cannot be given a different interpretation over time as NPPF changes. If there is to be a change to a development plan policy, a statutory process is required;
- Rather, the usual starting point to find the definition of a term in a policy would be: (i) the glossary in the Plan (not relevant here); or (ii) the Reasoned Justification;
- In this case, the RJ provides the explantion of the term "open space".

[9] *"open space"* means any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground;

94. Under the heading "*Safeguarding Open Spaces*", 6.149 (CD 4.1) states: *The open spaces of which the Council is aware are shown on the Policies Map. Development Policy 16 will also apply to new spaces that come forward.*

95. It is a perfectly usual tool of policy interpretation to look at the Proposals Map to confirm a relevant designation. The LPA had undertaken a "comprehensive" audit of Open Space in Frome and decided not to identify the site as open space. That is a perfectly logical outcome of a development plan process. The LPA were "aware" of the site (*supra*) but decided that it should not be safeguarded as open space because it was being safeguarded for the development of a middle school.

96. Having gone through the development plan process and specifically decided that the site should be safeguarded as a Middle School (LPP 1 at 5.9), it would be an absurd outcome to apply (again) the definition in NPPF (2012 or 2024) to conclude that the site should be protected open space (when there had been no material change in circumstances). That would render the entire development plan process futile.

97. Further, it cannot rationally be argued that (from December 2014), the site is a "*new space that has come forward*". The evidence of the use of the site has been the same from 2012 to date. Rather, as is clear from the RJ, "new spaces that come forward" will be *inter alia* space delivered through GI Strategies, open space required in new development (DP 16(2) and (3)) and new allocations under LPP2. It could also be open space that has "*slipped through the cracks*" (XX of DD). If an open space came forward, of which the Council was not aware during the development plan process, DP 16 will also apply to it. However, this is not a site which can be considered to have fallen through the cracks of the development plan (LPP1 at 5.9).

98. It follows that the site is not: (i) an open space on the Proposals Map; and/or (ii) a new space that has come forward. It is not, therefore, an existing open space which is to be safeguarded by Policy DP 16.

99. Applying the relevant authorities *supra*, such an interpretation/approach:

- Clearly informs the public of the approach which will be followed, without reference to documents (the NPPF) to which no reference is made (***Dundee***);
- Secures consistency and direction in decision-making. The decision through the development plan process will be the same as the decision on a planning application in this case (***Dundee***);
- Interprets the policy statement objectively, in accordance with the language used, read in its proper context (the Reasoned Justification and preceding development plan process) (***Dundee*** and ***Plant***);
- Interprets the Development Plan with realism and common sense with a proper understanding of the practical purpose. It does not render the development plan process utterly otiose;
- Applies the supporting text in a manner which is both descriptive and explanatory (***Cherkley***).

100. The LPA suggest that such an interpretation means that the RJ will "trump" the Policy. That is not correct. It is providing an explanation, no more. KG argues that this means that the site could be Open Space (under NPPF 2012 and NPPF 2024) but would not be Open Space in DP 16. Such a contention is deeply flawed: (i) it supposes that the definition to apply in DP 16 is the NPPF which is wrong (*supra*); and (ii) it ignores that the definition of Open Space in NPPF 2012 was applied throughout the development plan process. It is the comprehensive process of audit and decision-making on which sites to protect (applying the NPPF definition)

which results in the site not being protected by DP 16. KG wishes to ignore and render otiose the entire plan process. That cannot be correct.

101. KG further argues that, as the site is open space as defined in the NPPF (2012 and 2024), compliance with DP 16 is "academic", as NPPF para 104 (2024) must apply. At one point, DD appeared to agree with him. Such a position is heretical and legally incoherent. Section 38(6) P&CPA 2004 requires a decision to be taken on whether a proposal complies with the development plan as a whole. On that basis, a conclusion that there is no conflict with DP 16 is of central relevance to the determination of this Appeal, as it remains the sole policy with which there is alleged conflict (*supra*). To the extent that the LPA submit otherwise, it is disingenuous and legally wrong.

102. The Appellant's case is that the proposal complies with the development plan as a whole. It is therefore necessary to consider whether there any material considerations which indicate otherwise (s.38(6)). NPPF (104) is capable of being such a material consideration. However, as TJ conceded, it cannot be a material consideration of greater weight than DP 16 when: (i) the national policy has not changed; (ii) the use of the site has not changed; (iii) DP 16 is afforded "full weight" by the Council; and (iv) DP 16 was examined and found to be consistent with the same national policy (NPPF 2012). It is on this basis that DD told the Inspector that: *DP 16 does not apply but NPPF 104 does*. DD explains his rationale quite clearly at 7.37 and he has not deviated from it (assuming planning evidence on legal interpretation is somehow relevant).

103. The Appellant submits[10] that no reliance can be placed on PfP's legal opinion: (i) it will be superseded by PfP's submissions at this Inquiry; (ii) it makes the flawed claim of a bare licence without reference to the

[10] with the greatest respect to a Barrister who has not attended the Inquiry or heard all of the relevant evidence

relevant evidence *supra*; (iii) it does not address these submissions; (iv) it addresses 2 issues: (a) whether the site must (as a condition precedent) be identified on the Proposals Map; and (b) whether the site must be "public". That is not the Appellant's case. It is not addressed further.

(iv) Local Plan Part 2 (CD 4.4)

104. The LPP2 was adopted in Dec 2021. DD explains that consultation began on the Plan in 2015 (DD at 7.17). There is no suggestion that the consultation was not comprehensive (there are robust statutory requirements). The site was expressly known to the LPA. The site had been found to be surplus to requirements and SC had resolved to seek the allocation of the site (CF at 14). The site was submitted to the call for sites (XX of DD). The LPA were (again) expressly "aware" of the site. The use of the site between 2014 and 2021 is alleged to have been the same as now. The purpose of the LPP2 is (expressly) *To review and update the open and community space designations* (LPP2 at 1.2).

105. There was express consultation with Frome TC and the Parish Councils (5.4). As a result, 2 new Open Spaces in Frome were identified and added to the Policies Map (LPP2 at 5.5). The same approach (and same definition of Open Space in the NPPF underpinned the LPP2 development plan process). No-one has suggested that process was not "comprehensive". Being expressly "aware" of the site, the LPA decided not to add the site to the Policies Map. Accordingly, the site cannot rationally considered to be protected in the LPP1 or LPP2 at Dec 2021.

(v) SPD: Greenspace (Feb 2023)

106. The SPD is supplemental to the Plan. At 4.12 (CD 4.10) it states: *Open spaces for sport and recreation and other spaces such as allotments are identified on the locl plan policies map These [sic] areas are subject to adopted policy DP 16. Additional sites were designated through Local*

Plan Part II. The approach of the SPD is expressly consistent with the Appellant's approach (*supra*).

107. Between the adoption of LPP2 and the adoption of the SPD: (i) SC declared the site to be a "surplus asset" and resolved to dispose of the site for residential development; and (ii) the application for the ACV Listing was submitted (Nov 2022).[11] In the statutory production of the SPD, the site was expressly considered (CD 4.11 p.18).

108. The SPD states that it specifically covers *Local Plan policies relating to new and existing open spaces*, identified under DP 1, DP 2 and DP 16. Accordingly, if (which is denied) the site could be considered to be a "new site" in 2023 (*supra*), it was addressed in this SPD.

109. The resolved position of the LPA (again) was: (i) that the site is not protected open space in DP 16; and (ii) the site falls to be Typology 3. It states (CD 4.11) *inter alia*: *"Any balancing exercise should take into account the potential to retain greenspace and to avoid, minimise and mitigate any adverse impacts. It should be noted that this area is not covered by Local Plan Policy DP2 (Open Areas of Local Significance) or DP16 (Open Space and Green Infrastructure*. The reference to "balancing exercise" plainly means that the site was envisaged to be developed (not protected as Open Space). Typology 3 is *Green Infrastructure*. Type 3.1 (consistent with CD 4.11) is *Open and Greenspaces which contribute to local green infrastructure.*

110. TJ accepted that the resolved position of the LPA in February 2023 was that the site was not protected by DP 16 (*supra*). It simply cannot be argued that the site is a "new site" (whether since LPP1, LPP2, or the SPD) as the use has remained consistent and the LPA has been aware of it. TJ therefore argued (with JD) that the SPD was wrong, the site should be

[11] JD Appendices

Type 1. However, that contention is legally incoherent. The SPD is a statutory document (see Reg 11-16 Local Plans Regs (2012)), the LPA have to apply it. TJ gives it "full weight". If the LPA want to the SPD to reach a different judgment, there must be a revocation of the SPD and/or a new statutory process which allows for full consultation (as TJ agreed). Members are not Humpty Dumpty (*supra*).

(vi) Frome NDP (CD 4.6)

111. Finally, the Frome NDP forms part of the statutory development plan. It was made in 2016 and post dates the LPP1. It was prepared in consultation with local resident groups (DD at 7.32). The Strategy for Open Space in Frome does not promote the site for protection (CD 4.9). The appeal site is not identified as open space. The FNDP is therefore expressly consistent with both the LPP1 and 2. If, however, the site is (somehow) protected by DP 16, there is an inconsistency between the LPP1 and the FNDP and greater weight must attach to the FNDP as the later document (s.38(5) P&CAP 2004).

112. It follows that, on the Appellant's approach, the *same* national policy (as NPPF 2024) has been applied throughout all parts of the statutory development plan since 2012 and the consistent conclusion of LPP1, LPP2, FNDP and SDP is that the site is not protected by DP 16. TJ could identify no flaw in the process of examination and adoption. Any such flaw would, in any event be a matter for the Courts.

113. **It follows that the proposal does not conflict with DP 16 because it does not apply. NPPF (104) is not a material consideration which outweighs compliance with the development plan because (as all Parties agree), DP 16 is consistent with the NPPF.**

Issue 2: Equivalent or Better Provision

114. If (which is denied) DP 16 and the NPPF definition applies: it is agreed (XX of TJ) that "*recreation*" can be considered as (i) active or (ii) passive recreation. It is necessary, then, to exercise a planning judgment on the "public value" of the site.

115. TJ agreed that "public value" must relate to the public's ability to enjoy the active and passive recreation of the site. It is the Appellant's case that "limited" public value can be derived from unlawful/unauthorised acts/use. TJ expressly agreed that: as a matter of public policy, unlawful acts cannot derive public value". That has to be correct: (i) there is no "public value" in the unauthorised entry onto private property; (ii) the land use planning system cannot condone such unlawful/unauthorised acts; (iii) neither the LPA nor the SoS (PINS), who are tasked with regulatin the use of land in the public interest, can condone (and add value) to such unlawful/unauthorised acts. Rather, unlawful entry onto private property (regardless of how enjoyable people may find it) is inconsistent with the public interest in maintaining law and order and the protection of property rights.

116. On that basis, the site has public value for active recreation (passing and re-passing along the permissive path). Public value is also derived from passive recreation (enjoyment of the open space as you pass and re-pass along the permissive path).

117. In this context, the ACV adds *nothing* to a consideration of the public value of the site. The statutory consequences are agreed. It affords a local group a short moratorium on the sale of the site, in which to mount a bid. In this case, that is irrelevant (see JD App p.73): (i) the landowner does not have to sell the site to the local group, (ii) this landowner cannot sell the site to the local group because LiveWest have an option (CF at 19); and (iii) this is an exempt sale (see CD 2.31). There is no contrary analysis. Further, it is not accepted that PfP (having raised £100,000 for legal costs)

could raise the significant cost of a site with a residential consent (with an agreed BLV of £811,000). The ACV listing is irrelevant. It is not a consideration of "very significant weight" (JD).

118. If consent is granted (as TJ accepted):

- The ability to pass and re-pass along the PROW will be retained. There is no impact;
- The ability to pass and re-pass along the permissive route will be improved by the provision of a path for less able people and the route will be secured for the life of the development. Thereafter, any redevelopment will have to provide equivalent or better POS;
- There will be an adverse visual impact along the 235m permissive path. The impact passive recreation will be neutral (or minor adverse at worst). However, the route will remain attractive and can still be enjoyed for recreation as part of a longer route (see CD 1.2 and CF cross-section App 5.3). The visual impact is marginal and very temporary (235m = 3/4 mins walk);
- An additional 0.8ha of accessible public space will be provided. This is a significant area of public open space (double the required 0.4ha) which will be managed and maintained in perpetuity. This is a substantial quantitative and qualitative benefit, which outweighs any impact to passive amenity to the 235m permissive route.

119. The reality of the impact is that, if permission is granted, the "break out space" that local residents currently enjoy will move a mere 235m north. At that point, the PROW presents a genuine sense of the Open Countryside and a breathtaking vista of the adjacent valley. That is not a material adverse impact to recreational amenity. Further, at that point, there is very good access to the PROW network which will allow shorter and longer circular routes (CF App 1.3).

120. On this basis, Officers agreed that if DP 16 applied, it was met. Significant weight should attach to such a sensible consensus of professional opinion.

121. Further or alternatively, any net harm is marginal and cannot conceivably significantly and demonstrably outweigh the benefits. In weighing that balance, it is also necessary to consider the fallback position i.e. what may happen if consent is refused.

Fallback Position

122. Firstly, it is not accepted that TJ represents SC (as landowner). Secondly, it is not accepted that TJ can pre-judge decisions of the LPA on applications which have yet to be made, in circumstances which may change. The reality is that SC is a creature of statute which makes resolutions as to its future conduct. In this case, the landowner has a resolved position (see DD App p. 16), which is: (i) the site is surplus; and (ii) the site is to be disposed of for residential development. If consent is refused, the position of the landowner does not change. Further, the site remains under option to LiveWest.

123. As TJ conceded, if consent is refused, the underlying rationale for the sale of the site remains: (i) SC still have a surplus asset; (ii) SC still has a liability (and obligations under the Occupiers Liability Act if it has granted a licence (somehow) to the public; (iii) SC still needs to derive "Best Value" to address budget issues; and (iv) SC still wants to develop the site.

124. On the basis that consent is refused because of the public value derived from the unauthorised use of the site by the public: the only plausible scenario is that the landowner would withdraw the permissive path and fence the accesses to the site, consistent with the obligations under the contract, whilst another planning application is submitted, which would inevitably succeed (whether at first instance or Appeal). In the meantime, it is possible that fencing would be the subject of disturbance and further

unauthorised access occurs. All of the significant benefits of this development would be unnecessarily and pointlessly delayed. This would be the antithesis of positive planning in the public interest.

(iv) PROVISION OF AFFORDABLE HOUSING (AH)

125. The mix and tenure of the homes is agreed with the LPA to be compliant with Policy DP 14 (SoCG at 5.30 and 5.32).

126. The Applicant submitted a FVA from AY which demonstrated that the proposal could not viably deliver 30% AH (CD 2.30). In accordance with Best Practice, the AY FVA was the subject of an independent expert audit from the DVS, who concluded the proposal could viably deliver 18%. After further negotiation, it was agreed that the scheme could viably deliver 22% AH. PfP did not contest the process, methodology, analysis or conclusion. On the agreed basis with the DVS, there is no RFR regarding viability. Rather, the position is agreed (SoCG at 5.31).

127. It is further agreed that the delivery of 16 new homes is a benefit of **significant weight**, given *inter alia*: (i) the Plan identified a net need for 743 AH/pa (145 in Frome) but there has been delivery of just 93AH/pa (23 in Frome); (ii) median house prices are not 10x median earnings, rendering housing unaffordable; and (iii) there are 2,291 households on the Council's Housing list (738 with a preference for Frome), 149 homeless and 8 families in temporary accommodation in Frome (7 more in B&B). These are real people in real need *now* and the delivery of new AH would be a substantial benefit to them. It is a truism that Planning Inquiries tend to hear from the longstanding residents of suburban homes, who understandably value the next field safeguarded for development but not from the younger people/families in desperate need of a home (with the attendant mental health difficulties unfit housing presents).

128. At the CMC, PfP agreed to submit their viability evidence early (as it had not previously been submitted). S106M (CD 9.15) do not provide a competing FVA and do not provide support for the contention that the proposal can viably deliver more than 22% AH. Rather (as JD confirms in his evidence) they raise 8 discrete points (not all of which are internally consistent). AY have produced an updated FVA, which shows that the viability position has in fact worsened (but the Appellant is committed to 22% AH). It addresses the 8 points comprehensively. There is no contrary FVA. There is (literally) no evidence to the contrary.

129. At the VRT, PfP raised 4 hopeless points:

- The cost of bat mitigation land had not been included - it has been included in the latest FVA at £12,000. That reflects an agricultural land value. The site will remain in agricultural use, so an EUV+ is not required. PfP argue (without expertise or evidence) that the cost should be £120,000 (reflecting an EUV+ of 10x EUV). The only logic is that this proposal should deliver less AH!
- The BNG works should be 0.8% of total build cost (not 0.4%) i.e. the cost should double from ~ £73,000 to £146,000. The only logic is that this proposal should deliver less AH!
- The residual appraisal has a residual land value of £223,747. If that RLV was £0, it would (again) mean that less AH could be provided. As it is, the developer has accepted that the developer profit will reduce to ~15.33% GDV. There is no point here, save to demonstrate that all PfP have demonstrated that the development is *less viable* than before and *less able* to deliver AH;
- The DVS should present and audit on costs, as this is contested. However, this is not contested by the DVS and so no further assessment is required.

130. JD's evidence is that, on this basis, permission should be refused. That is simply not a credible position for a competent planning professional to hold. Frankly, it raises issues over this competence and/or credibility. On receipt the AY update, this objection should have been withdrawn.

(v) PROVISION FOR THE GENERATION OF RENEWABLE ENERGY

131. A Low Carbon Energy and Resource Efficient Statement was submitted with the planning application. It is agreed with the LPA that the development will provide a range of energy efficiency measures including a fabric first approach, heat pumps and solar panels on 17 properties, energy efficient lighting and appliances which would be energy and water efficient, as well as reducing water consumption. The remaining units are compatible with renewable energy generation. It is agreed that the proposals would comply with Policy DP7 Local Plan Part 1. Ultimately, this is an issue addressed by Building Regs, with which this proposal will comply.

132. The latest FVA demonstrates that 22% AH is not "viable" (in the sense that there is a negative RLV of £223,000. It follows (and PfP do not contest) that any increase in build costs would inevitably lead to a reduction in AH, which they oppose. It follows that on-site energy regeneration has been maximised, so far as consistent with viability and consistent with the other policy imperatives of the Plan (read as a whole). Again, this is not a position which a competent and/or credible Planning Consultant can reasonably hold.

(vi) BIODIVERSITY

133. The site is within the SSSI Impact Risk Zone and in proximity to the Mells Valley Bat Special Area of Conservation (SAC) – Band B. The application was accompanied with a biodiversity check list, an Ecological Impact Assessment (ECIA), a Lighting Impact Assessment (Lia), Habitat

Evaluation Process (HEP) calculations, a shadow Habitats Regulation Assessment (sHRA), Habitat Evaluation Process Mitigation Plan (showing the location of bat habitat mitigation) and a LEMP.

134. After a detailed analysis, there are no objections to the proposals from Natural England, the Council's ecologist or the LPA. The sHRA demonstrates compliance with the Habitats Regs, subject to mitigation. It is agreed (SoCG at 2.14 *et* seq) that the proposals comply with Policies DP5 and DP6 and Ch. 15 NPPF. It is therefore agreed that the proposal complies with all relevant statutory and policy tests concerning ecology and biodiversity.

135. Finally, it is accepted that there is no statutory or policy requirement to provide a 10% Biodiversity Net Gain. However, it is agreed that the proposals provide for net gain for biodiversity both in terms of habitats (+4.69%) and hedgerows (+7.30%) (SoCG at 2.18).

136. PfP provide no technical ecological evidence to the contrary. Rather, their evidence doubts the cost and mechanism for securing the mitigation. The mitigation is secured by a number of conditions and the s.106. The costs is therefore irrelevant (as there must be compliance with the conditions and s.106 regardless of cost). The cost has, however, been addressed in the latest AY FVA. There is no ecological basis for refusal. Rather the (agreed) BNG weighs in favour of the consent.

137. Despite accepting that there is no technical evidence to support his position, JD asserts that "moderate to significant" weight (adverse) must attach to a scheme which will deliver a BNG. That is a wholly unreasonable position for a planning witness to hold. Again, this demonstrates that JD's evidence appears to motivated by advocacy rather than evidence.

COSTS

138. It follows from these Closing Submissions that there is not a "*respectable evidential basis*" for the RFR (in the terms of the NPPG on Costs). The refusal by Members is therefore unreasonable. The objections of PfP do not disclose an arguable case either. Their forensic examination has rather sought to highlight the comprehensive evidence base and the scheme's compliance with policy.

139. Nonetheless, the Appellant does not make an application for a full or partial award. However, that is not a decision based on the strength of the evidence. Rather, it is a decision which reflects the commendable input of the professional Officers in working collaboratively to produce a very high quality scheme and PfP not being a legal personality. The absence of a cost application should *not* therefore imply any inconsistency with the Appellant's submissions that there is not (and never has been) a respectable basis for refusal.

CONCLUSION

140. Given (i) the enormity of the need for market and affordable housing, (ii) with the acceptability of the location of the site as a first priority, and (iii) a site which is surrounded on 3 sides by built development, (iv) to be developed with an unashamedly high quality scheme, there must be a powerful cocktail of adverse impacts to justify refusal. However, such harm is (regardless of any legal analysis) no more than: (i) the amenity derived from a 235m permissive path; and (ii) the amenity harm to unauthorised users of private land. Mendip is going to have a number of very difficult decisions in the future. Respectfully, this is not one of them.

141. Any claimed harms of the proposal do not remotely outweigh (significantly and demonstrably) the benefits of the scheme, to which very significant weight must attach. Rather, the benefits very significantly outweigh any claimed adverse impacts.

142. It is, therefore, the Appellant's case that planning permission should be granted subject to conditions and a s.106 obligation.

GILES CANNOCK KC

Kings Chambers

15th August 2025