

LAND AT COLWELL FARM
LEWES ROAD, HAYWARDS HEATH
WEST SUSSEX RH17 7TB
PLANNING INSPECTORATE REF: 6005786

CLOSING STATEMENT FOR MID-SUSSEX DISTRICT COUNCIL

Introduction

1. Although the Council has not been an active participant in most of this Inquiry, we have listened carefully to the arguments advanced. Despite the matters raised by the Rule 6 Party, there is nothing we have heard which justifies any change in our position from that which we outlined in opening.
2. The Council leaves it to the Appellant and the Rule 6 Party to make detailed submissions on the main issues. However:
 - a. Although it is not for this Inquiry to prejudge the outcome of the Local Plan Examination, there are matters which need to be considered and understood in the light of the emerging District Plan.
 - b. There are a number of areas where the Appellant and Rule 6 Party have advanced different arguments on the interpretation of policy, and where the Council's position is not squarely aligned with either side. It is not in the interests of any party that the decision on this appeal ends up being challenged in Court. We therefore set out the Council's approach to those matters, in the hope that it may assist.

Main Issue 1: Whether the proposal would comply with the development strategy for housing with regard to access to services and facilities.

3. Sustainability, and the extent to which occupiers of the proposed new dwellings would be reliant on the motor car was one of the members' concerns when refusing permission. To that extent, the Council understands why the Rule 6 Party persists with its arguments under this heading. However, these arguments have to be seen in the context of the scale of the need which Mid Sussex is now being asked to meet, and the nature of the District as a whole.
4. In particular, much of Mr Russell's argument (on behalf of the Rule 6 Party) relies on the DfT Connectivity Tool, which provides a scoring system for determining how well locations are connected to services and facilities by non-car modes of transport, and allows conclusions to be drawn about the relative sustainability of different sites across the country as a whole. That is all very well, as far as it goes, but the difficulty with applying it in Mid-Sussex is that - as the District Plan points out¹ - Mid Sussex is a rural district, within which there are only three towns large enough to qualify as Category 1 settlements and where even the most sustainable locations in the District compare poorly with sites in major cities.
5. In these circumstances, it is necessary to step back from comparisons on a national scale, and consider how the Appeal Site compares with what might reasonably be expected of any new site proposed for development in Mid Sussex. In that context, the Appeal Site sits on the edge of Haywards Heath, which is one of the three Category 1 settlements, which are defined in the District Plan² as having "a comprehensive range of employment, retail, health, education leisure services and facilities" which "will also benefit from good public transport provision" and "will act as a main service centre for the smaller settlements". While Mr Greaves is obviously correct in his comment that this does not mean every site on the edge of a Category 1 settlement is sustainable, Policy DP6(3) explicitly references the settlement hierarchy as a relevant factor in demonstrating sustainability, and as a general proposition it is obvious that sites on the edge of a Category 1 settlement are more likely to have access to a range of facilities

¹ CD para2.1

² Policy DP6, CD5.3 p. 36

than sites on the edge of lower tier settlements. Further, to the extent that it is necessary to drive to the “main service centre”, those journeys are likely to be shorter from sites on the edge of a Category 1 settlement than from physically separate settlements which are further afield.

6. Against that backdrop, we draw attention to the fact that, of the 35 sites recently proposed for allocation in the emerging District Plan, 26 are on the edge of settlements in Categories 2 and 3.³ Although some of those might have particular characteristics which make them more sustainable than the Appeal Site, most of them will not. If the Appeal Site is regarded as unsustainable, it is highly unlikely the Council will be able to meet Inspector Bore’s request.

Main Issue 2: The Effect of the Proposal on the Countryside/General Character of the Area

7. Policy DP12 of the District Plan seeks to protect the countryside “in recognition of its intrinsic character and beauty” by limiting the circumstances in which development will be permitted beyond the built-up area boundary.
8. It is common ground that Policy DP12 is breached, and that there would be adverse effects on the character of the countryside in the immediate vicinity of the Appeal Site. However:
 - a. Development of any greenfield site beyond the settlement boundary will inevitably have an adverse impact on the character of that site;
 - b. The Council is currently unable to meet housing need within its area without sites which are beyond the built-up area boundary. This is reflected in the fact that nearly all of the allocations in the emerging District Plan involve development in what is currently considered to be countryside;

³ 10 in Category 2; 16 in Category 3: see Table 1 of ID14

- c. There is nothing unusual or special about the Appeal Site which would raise the level of landscape harm above that which the Council must necessarily accept if it is to satisfy Inspector Bore's request to identify an additional 4000 homes. Indeed, in order to meet that request, it will be necessary to identify sites which are considerably more sensitive.
- 9. In the circumstances, although there will be some adverse impact, this is not a reason for refusal.

Main Issue 3: Loss of Trees/Ancient Woodland

- 10. Although the Decision Notice refers to the loss of trees, the Council's primary concern here related to the loss of the trees at the proposed entrance to the Appeal Site and the consequent impact on the character and appearance of the area and the Conservation Area.⁴ It has never been part of the Council's case that the Appeal Site contains ancient woodland: that has only ever been a concern raised by the Rule 6 Party.
- 11. Ordinarily, we would say no more about this issue than that. However, in this case there has been lengthy and heated debate between the Appellant and the Rule 6 Party about:
 - a. The definition of ancient woodland;
 - b. The level of certainty required and the application of the precautionary principle;
 - c. The evidential basis and process deciding whether something is ancient woodland.
- 12. All of these questions raise matters which are, or give rise to, points of law. They also have a bearing on arguments which the Rule 6 Party has raised about the reliance which should be placed on the Appeal Site's inclusion on the long list and in the Main Modifications which have been proposed to the emerging District Plan. In the Council's

⁴ CD10.1 paras 7.2.4, 7.26, 7.36-7.45

view, there is a straightforward (and more legally robust) answer to all of these points, which sits mid-way between some of the more extreme propositions advanced by both the Appellant or the Rule 6 Party. In our view, the correct approach is as follows:

- a. In order to find conflict with para 193 of the NPPF, there needs to be a clear and positive conclusion that there is ancient woodland on the Appeal Site.
- b. That decision is to be made on the basis of the normal civil standard of the balance of probabilities.⁵ References in the NE Handbook to cases where the issue is finely balanced should be read in that context.
- c. The definition which should be applied is that set out in the NPPF glossary, but that definition needs to be read:
 - i. in its entirety, rather than by cherry-picking individual sentences. In particular, when the NPPF says ancient woodland is “an area that has been wooded continuously since at least 1600 AD” that must be read alongside the specific inclusion of “plantations on ancient woodland sites (PAWS)”. The concept of PAWS necessarily presupposes the clearance of existing trees and their replacement by a new “plantation”, which may even be of a different species or mix of species;
 - ii. alongside the Government Guidance on Ancient Woodland⁶ which states that “‘Wooded continuously’ does not mean there’s been continuous tree cover across the whole site” and that “Open ground, both temporary and permanent, is an important component of ancient woodlands”.

In this context, any suggestion that “continuously wooded” means there must at all times have been trees (or mature trees) on the Appeal Site is clearly wrong.

- d. However, the specific inclusion of PAWS in the definition of ancient woodland is not a justification for extending ancient woodland to include hedges which

⁵ CD21.2 para 6.1.1

⁶ CD21.1

delineate agricultural fields. As Mr Forbes-Laird observed, the notion of “woodland” is as much about the dominant land-use as it is about the presence or absence of trees at any particular point in time. In that context, “plantation” should be given its normal meaning, which relates to a woodland or forestry-based use. An orchard will contain trees which have been planted, but that does not make it a plantation or a woodland, even if there were once oaks growing on the same site.⁷ Similarly, a hedge may exist on the site of what was once ancient woodland, but that does not make it a “plantation”. Indeed, the NE Handbook specifically advises that a “narrow or simple hedge shown on Epoch 1 that has expanded ...should not be assessed as woodland”.⁸

- e. As to the approach to be applied when determining what is (and what is not) ancient woodland, the NE Handbook⁹ specifically states that it is not intended to be prescriptive and is “not a guide to best practice on how to research individual woods or groups of woods”. In those circumstances, Mr Forbes-Laird’s view that the Handbook should be regarded as “determinative” clearly goes too far. However, this does not mean that the Handbook is irrelevant when dealing with individual sites: both Mr Carpenter and Mr Forbes-Laird have relied on it, and they are obviously right to do so. Leaving aside the fact that there is no other guidance directed at how decisions on individual sites should be made, there is no obvious reason why the principles set out in the Handbook (including that concerning the importance of cartographic evidence) would be any less correct or applicable on a site-specific analysis.

13. Applying this to the Appeal Site, the Council simply notes that:

- a. The concerns raised by the Rule 6 Party are limited to the hedgerows which run approximately north-south through the site, and what has been referred to as “the shaw”;

⁷ CD21.2 para 3.3.3.6

⁸ CD1.2 para 3.3.8

⁹ CD1.2 paras 1.3

- b. Of these, it is only the hedgerows which would necessarily be affected by the Appeal Scheme, because some removal would be essential in order to access the site. Even if (which the Council does not agree) the shaw is “ancient woodland”, it could be excluded from the developable area of the site at the reserved matters stage;
- c. The OS maps from 1874¹⁰, 1896¹¹ and 1938 depict the hedgerows with a single line, which is consistent with the conclusion that these were then hedgerows rather than woodland. This is also what can be seen from the aerial photographs.
- d. On this basis, the Council does not consider that there would be any loss of or harm to ancient woodland such as to prevent the grant of planning permission, or preclude the allocation of the Appeal Site in the emerging District Plan.

Main Issues 4 and 5: Heritage

14. Although it formed part of the Council’s initial reasons for refusal, in the light of the additional need identified by Inspector Bore, the Council accepts that the less-than-substantial harm which it had previously identified to the Conservation Area, Colwell House and North Colwell Barn is now outweighed by the benefits of the Appeal Scheme for the purposes of paras 215 and 216 of the NPPF. Accordingly, it no longer contends that harm to heritage assets provides a clear reason for refusal for the purposes of para 11(d)(i) of the NPPF. However, given the statutory duties under the 1990 Act, this is a matter the Inspector will need to address. We make the following observations to guide that analysis.

15. First, there remains a difference between the Council and the Appellant as to:

- a. whether the Appeal Site is within the setting of Colwell House and (if it is) the magnitude of the impact on the House;

¹⁰ CD9.3a p. 13

¹¹ CD9.3a p. 14

- b. the magnitude of the less-than-substantial impact on the Lewes Road Conservation Area and the non-designated North Colwell Barn.

16. Second, in opening,¹² Mr Corbett-Burcher referred to Mr Smith’s explanation that the Appeal Site does not form part of the setting of Colwell House and asserted that there was “no other evidence to the contrary by any other Party at the inquiry”. That is not strictly correct, and it would be wrong as a matter of law to proceed on that basis. Although the Council has not called a conservation witness, the consultation response from the Council’s Conservation Officer is before the Inquiry¹³. We readily accept that the weight given to this may be reduced on the grounds that the author has not been called or been cross-examined upon it, but it is still “evidence”. In this regard, the position of the Conservation Officer is no different to that of various other statutory consultees to whose consultation responses the Appellant expressly says weight should be given, even though the authors have not been called as witnesses. There cannot be one rule for consultation responses which favour the Appellant, and another for those which do not.

17. Third, the reason why Mr Smith (on behalf of the Appellant) argues that the Appeal Site does not form part of the setting of Colwell House is because there is only “some minimal perception of a white stuccoed building from limited northern parts of the Site’s central field; it is fleetingly glimpsed in winter months and there is no legibility of the asset’s significance”.¹⁴ Had heritage still been a reason for refusal, the Council would have cross-examined Mr Smith on whether that analysis did not conflate two separate issues, namely (i) whether the Appeal Site was within the setting of Colwell House, and (ii) whether (if it was) the views of and from the House contributed to the appreciation of its significance. As to the former, the conventional approach to setting¹⁵ is that “setting is the surroundings in which an asset is experienced”. If – as Mr Smith recognises – there are views of Colwell House from the Appeal Site, that would suggest that there is at least some “experience” of the heritage asset, and that the Appeal Site is therefore within its setting. Whether or not those views enable any understanding of

¹² Para 5.2

¹³ CD4.35

¹⁴ CD9.5 para 7.3

¹⁵ See NPPF Glossary, as set expanded on in CD18.4, Historic England’s Good Practice Advice on the Setting of Heritage Assets p.2

the significance of Colwell House is an entirely separate matter, which the Inspector will have been able to judge for himself on site.

18. We stress that we do not suggest that any of these points affects the final outcome: ultimately, even on the Council's case, the harm is less than substantial, the relevant test is that in para 215 of the NPPF and there is a compelling need for housing in the District. However, we arrive at the conclusion that heritage is not a reason for refusal by a different route to Messrs Smith and Billington, and the route by which conclusions are arrived at can be important if a decision is to be legally robust.

Main Issue 6: Ecology and BNG

19. It has never been part of the Council's case that permission should be refused for either of these reasons. Nothing we have heard in the course of this Inquiry has led us to conclude that such issues as might arise cannot be dealt with by condition or through the s.106 obligation.

Overall Planning Balance

20. Drawing the above together, the starting point (as prescribed by s. 38(6)), is the development plan.
21. On this issue, - and although we get there by slightly different routes - all parties agree that the appeal scheme does not accord with the development plan when read as a whole. That conclusion is self-evidently correct, simply on the basis that there is conflict with Policies DP6 and 12 because the appeal site is beyond the built up area boundary. These are strategic policies and – even if there were no other conflict – that would be enough of itself to give rise to conflict with the District Plan as a whole.
22. However, that is not and cannot be determinative, because s. 38(6) requires the decision-maker to ask whether there are material considerations which would justify the grant of permission, notwithstanding the conflict with the development plan.

23. In this regard, the principal “other material consideration” relied on by the Appellant is the fact that MSDC cannot demonstrate a 5YHLS, with the result that para 11(d) of the NPPF is engaged. That paragraph directs that, in circumstances where the policies of development plan which are most important for determining the application are out of date¹⁶, planning permission should be granted unless one or other of paras 11(d)(i) or (ii) is satisfied. Of these:

- a. Para (i) relates to fn 7 designations. In this case, the Council accepts that the need for housing outweighs the harm to designated heritage assets, so the only fn7 designation still in issue is ancient woodland. For the reasons we have outlined, no part of the site itself is ancient woodland, and therefore para (i) does not apply.
- b. As regards para (ii), the Council’s position at the date of its original decision was that the harms identified in the reason for refusal did clearly and demonstrably outweigh the benefits. However, a key element of that reasoning was the belief that what was then the emerging Local Plan would very soon address the shortfall in 5YHLS without any need for the Appeal Site. That is no longer the case: Inspector Bore has set the Council the task of identifying sites for around 4000 more homes than the Reg 19 Draft of the new District Plan provided for, and the Appeal Site is among those which the Council is now proposing to bring forward to address that request. In so doing, the Council has necessarily accepted that the need for the Appeal Site outweighs any harm which its development might cause.

24. Through Mr Greaves, the Rule 6 Party has argued that the Appeal Site could be removed from the long list without affecting the Council’s ability to deliver the additional housing (and still provide a buffer). As a matter of pure mathematics, that is correct, but it is an argument that could be made with equal force of any of the smaller sites on the long list. As Mr Billington pointed out, there are a number of other sites on the long list which are in close proximity to the Appeal Site which are comparable in terms of their sustainability credentials. In addition, as the Council pointed out in opening, of the 35 sites on the list, 9 are in the High Weald National Landscape, and on 3 of those

¹⁶ Which requirement is by definition satisfied if there is a shortfall in the 5YHLS: see fn 8

the scale of development proposed amounts to “major” development which para 190 of the NPPF indicates should normally only be permitted in “exceptional circumstances”. In contrast, Colwell Farm is not within an area which has been designated (at either national or local level) for its landscape value, nor is it considered to be a “valued” landscape for the purposes of para 187 of the NPPF. It is also a site which is “oven ready” and can be brought forward quickly, which is particularly important.

25. It is not the place of the Inquiry to engage in any kind of beauty contest as to which (if any sites) should be allocated in the emerging District Plan. However, even if the long list is slightly longer than it needs to be, the Council is of the clear view that there are a number of sites which would have a better claim to removal than the Appeal Site.

26. This brings us to the overall planning balance. In that analysis:

- a. The main conflict with the development plan lies in the breach of Policies DP6 and 12. The Council’s position as to the weight to be given to the breach of Policies DP6 and 12 is set out in the Officer’s Report:¹⁷ because Council is unable to meet housing needs without breaching the built-up-area boundary, the breach of Policy DP6 attracts limited weight. In so far as Policy DP12 seeks to protect the intrinsic character and beauty of the countryside, it is not inconsistent with the NPPF and should be afforded moderate weight, but the landscape impact in this case is contained and localised.
- b. Against this, the “output” of applying para 11 is an extremely weighty “other material consideration”. The contribution the Appeal Scheme would make to the provision of housing and affordable housing are matters to which substantial weight should be given.
- c. Although, at the time of its decision to refuse permission, the Council was of the view that its emerging plan would soon provide the District with a 5YHLS without the need to release the Appeal Site, that situation has changed. Without the addition of sites like the Appeal Site, the emerging District Plan will not be found sound, over five years’ work will have been wasted, Mid Sussex will be

¹⁷ CD3.3 paras 2.8-2.9

left without an up-to-date development plan and will be dependent in speculative applications to maintain its 5YHLS. That is inconsistent with the plan-led system, and is not a situation the Council can contemplate.

- d. Although the Rule 6 Party argues that it would be better for the Appeal Site to come forward as an allocation, at this point in the process that is essentially an argument based on prematurity, in circumstances where – as we observed in opening – the Appeal Scheme is simply not big enough to justify refusal on that ground. Having agreed that the Appeal Site should come forward for development, the Council can see no good reason in delaying that outcome.

27. For all these reasons, the Council accepts that it is now appropriate for planning permission to be granted.

PAUL BROWN K.C.

13 August 2026

**Landmark Chambers
180 Fleet Street
London**