IN THE MATTER OF

THE TOWN AND COUNTRY PLANNING ACT 1990

AND IN THE MATTER OF

LAND AT

GRANGE ROAD, NETLEY.

CLOSING SUBMISSIONS

ON BEHALF OF

THE APPELLANTS

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1. These submissions are made on behalf of the Appellants. The scheme is for up to 230 dwellings and open space[1] on land outside but immediately adjacent to the settlement boundary of Netley, in the adopted (2006) Eastleigh Local Plan (2001-2011). The Council has accepted that it does not have a 5 year land supply[2] and has further accepted that this is a sustainably located site in terms of accessibility to facilities and services for residential development, as an extension to a sustainable settlement within the Borough[3].

2. In truth, therefore, this is (or should be) an extremely simple and straightforward case, the main issue being, as the Inspector identified 'the effect on the character and appearance of the area', the subtext for which being whether that effect warrants refusal of permission given the acknowledged weighty benefits of granting

[1] SoCG p. 1
[2] SoCG para's 6.2-6.4
[3] SoCG para. 6.1(3)

permission, not least in the light of the failure of the Council to be able to demonstrate a 5 year housing land supply.

3. Unfortunately, this site is in the Borough of Eastleigh and so has been caught up in the machinations of an authority which is both determined to avoid its true obligations on housing delivery and to deny the consequences of its failure to fulfil those obligations. Thus, what should have been - and frankly still is - a simple matter has been drawn into the vortex of strained legal arguments, promulgated not by officers but by others, contrary to the High Court authorities purportedly relied upon, inconsistently applied and ultimately leading nowhere.

4. This is of a piece with the High Court challenge[4] to the Hamble Lane, Bursledon, decision, which found that the Council did not have a 5 year land supply[5]. The Council mounted a s. 288 challenge despite having no grounds to do so. So 'hopeless' was that challenge that the Defendants described it, quite properly, as an abuse of process; it was not only dismissed in short order by Dove J, but he took the unusual step of awarding *both* the Secretary of State and Taylor Wimpey, as Second Defendant, awards of costs, and on an *indemnity* basis[6].

5. It is of a piece with the Council promoting a local plan which is so woefully inadequate in its approach to and quantification of housing need that after one round of preliminary hearings, the examining inspector found the plan unsound[7].

6. It is of a piece with the Council, having received the LP Inspector's report favouring 677 dpa to publish a housing supply assessment still using the rejected 615 dpa figure 'in the interim'[8].

7. It is of a piece with the Council, having received the LP Inspector's report finding the emerging (now defunct) Local Plan's 615 dpa figure to be unsound, to promote a replacement local plan based on 'evidence' which either simply chooses to ignore, or

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[4] Dunlop Appx 12
[5] Dunlop Appx 11
[6] Dunlop 4.4 (p.19)
[7] Dunlop Appx 22
[8] Dunlop Appx 30

– more hubristically - expressly rejects the LP Inspector's findings, and seeks to support all over again the original 615 units[9].

8. It is of a piece with a Council which claims, though its Leader, to have a 'commitment' to housing delivery[10], but which is trailing even its own (rejected) 615 dpa requirement by 1,300 units[11].

9. And it is of a piece with a Council which chops and changes its stance and arguments, as it sees best suits its current purposes[12].

10. Thus, having lost Hamble Lane, it was forced to accept that its settlement boundary policy (1.CO) and its gap policies (2.CO and 3.CO) were 'out of date' and para. 14 of the NPPF applied. All through 2014, committee reports consistently repeat that formula[13].

11. Then comes a change – it seems on legal advice, although we are told there is nothing in writing[14] – that, relying on *Cheshire East,* gap policies 2.CO and 3.CO were not caught by para. 49 of the NPPF and so not rendered out of date by the lack of a 5 year housing land supply.

12. Even after that change, for schemes the Council wished to grant (eg Horton Heath and Chestnut Avenue), it acknowledged that general countryside policy, 1.CO, was caught by para. 49 and was out of date, and that, therefore, although gap policies might escape para. 49, para. 14 of the NPPF was still engaged and the scheme should be approved[15]. But for schemes it wished to oppose (ie the present one and, we are told, Sovereign Drive, Berry Farm and Hamble Station[16]) it argued that *both* 1.CO and 2.CO/3.CO were 'free' of para. 49.

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[9] Dunlop Appx 33
[10] Cllr House 'proof of evidence'
[11] Dunlop p. 48 – NB a 1583 unit shortfall against the more reasonable 677 dpa requirement
[12] See this inquiry throughout
[13] Dunlop Appx 10, 14,15,16,17
[14] Harrison 6.2 and orally
[15] See those committee reports, and accepted Harrision xx CBQC, Day 1
[16] Although no evidence has been presented to that effect

13. That is a remarkable[17] argument and, it must be said, a 'hopeless' argument on the law, purporting to rely on *Cheshire East* and *Wenman* while actually contradicted by them[18]: general countryside policies of constraint are in the 'first category' – ie counterpart housing policies, caught by para. 49. It is an argument that has, courtesy of the decision in Sovereign Drive, now (very properly) been abandoned: the Council accepts that 1.CO is caught by para. 49 and – as the authority cannot demonstrate a 5 year housing land supply – it is rendered 'out of date' by para. 49[19].

14. From the ashes of this conceded point arises a new one: namely the argument that although the Council concedes that 1.CO is 'out of date', because it argues that 2.CO is not 'out of date', in some way access to para. 14 of the NPPF is blocked. In short, it is argued, so long as the Council can find a development plan policy which is not out of date, para. 14 is denied to the decision-maker.

15. This is an argument which makes its first appearance in the letter of 26th October 2015, signed by Mr Tustain, but written with legal input. It was first seen by Mrs Harrison on Saturday. It is nothing more than the latest wriggle in the Council's determined attempt to escape the consequences of its failure to be able to demonstrate a 5 year land supply and avoid the quite deliberate rigours of the NPPF.

16. It is an argument which flatly contradicts the approach taken by the Council itself in Horton Heath and Chestnut Avenue – both sites it wished to grant in the Local and Strategic Gaps – where it found that gap policies were up to date and harmed, but 1.CO was out of date and para.14 applied[20].

17. It is an argument which – impermissibly – seeks to read into para. 14's phrase 'relevant policies are out of date' the words 'all' or 'every'.

18. And it is an argument directly in conflict with the findings of Lindblom J (as he then was) in *Phides* at para. 70, where the Court held as unimpeachable the Inspector's approach of finding some policies 'para. 49' policies as out of date, finding some

[17] Not least because the applicability of para. 14 cannot possibly turn on whether one wishes to grant a scheme or refuse it.
[18] Those cases adopt the Ousley J categories in *South Northamptonshire* and apply the 'first category' – ie general polices caught by para. 49 – to general countryside restraint policies like 1.CO.
[19] See "Mr Tustian's" letter of 26th October 2015
[20] See those reports, but also accepted Harrison xx CBQC, Day 1

policies as not 'para 49' policies and hence not out of date, but finding the latter issue to be 'moot' – in the sense of being 'of no practical significance to her conclusion that the paragraph 14 presumption was engaged in any event.' Lindblom J found that the decision had to be made 'as statute requires in section 70(2) ... and section 38(6)...And the presumption in paragraph 14 of the NPPF has to be applied.'[21]

19. Thus, despite all the posturing and reams of legal submissions masquerading as planning evidence[22], the matter resolves very simply to the following propositions:

    (1) The Council now accepts that 1.CO is a 'relevant policy for the supply of housing' within the meaning of para. 49 of the NPPF;
    (2) The Council now accepts that it cannot demonstrate a 5 year housing land supply, contrary to its duty under para. 47 of the NPPF;
    (3) The Council now accepts, consequently, that para. 49 of the NPPF deems 1.CO 'out of date';
    (4) *Phides* demonstrates that even if there are other polices which are not 'out of date', by virtue of accepting 1.CO is out of date, para.14 of the NPPF is engaged and permission should be granted unless the adverse impacts significantly and demonstrably outweighs the benefits of doing so.

20. The Council seems to have overlooked *Phides* in its rush to find an escape to the necessary consequences of losing the (hopeless) argument over 1.CO in Sovereign Drive. Lindblom J's judgement is a complete answer to the Council's new point on para. 14: once the Council concedes (as it has to) that 1.CO is 'out of date', para. 14 is engaged regardless of the status of 2.CO, and the decision must be made on the 'tilted scale' of the second bullet of the second half of para. 14.

21. For this reason, the Appellant is quite relaxed – for the purpose of the argument (or more pertinently *avoiding* the argument) – to treat 2.CO as a policy not caught by para. 49. It makes no difference, given the Council's concession on 1.CO, to the fact that para. 14 is engaged. Further, accepting that 2.CO is not a para. 49 policy does not close off the conclusion that it is 'out of date' by some other route – as recognised by para. 215 of the NPPF.

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[21] The letter of 26th October 2015 asserts that Mr Manning, who followed this approach in Sovereign Drive, erred in law. To make that assertion, the Council must assert that Lindblom J erred in *Phides* – a submission the Council has not dared to make (and would have no grounds to make in any event).
[22] Ie Mrs Harrison's proof

22. This, indeed, was the route always identified by Lang J when she opened the controversy as to what was and what was not a housing policy in *William Davies*[23]. For non-para 49 policies, the route was via the Annex to the NPPF – ie para's 211-215. Lewis J in *Cotswold* made it clear that general countryside policies were para. 49 policies[24]; Ousley J in *South Northhamptonshire* articulated the distinction between categories[25]; Lang J adopted Ousley J's categories and applied them in *Cheshire East*[26] and *Wenman*[27], and reiterated that in respect of 'category 2' policies – ie non.para.49, the approach to their 'out of dateness' was contained in para. 215: consistency with the NPPF as a whole[28].

23. The Appellant's objection to 2.CO has never been one age of the 2006 plan, or chronology; nor has it been one of inconsistency in principle with those paragraphs of the NPPF which seek to protect the environment. Thus, neither of Miss Graham's objections in Bodkin are relevant here. The Appellant's objection to 2.CO is to its spatial application – as found by the Hamble Lane Inspector[29] - in the light of the fact that the Plan containing that spatial application was not a plan whose spatial strategy accorded with the requirements of the NPPF. Mrs Harrison accepted[30] that a development plan which did not provide for meeting the objectively assessed development needs was one which is in conflict with the NPPF[31]. She further accepted[32] that the 2006 Plan and the spatial strategy which it sets forth does not seek to meet the NPPF-compliant development needs of today. The consequence is written at para. 215 – the spatial application of the gap policies in the adopted plan (no matter how consistent the principle of those policies may be) is not consistent with the NPPF: 2.CO is out of date[33].

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[23] At para.47
[24] See Dunlop Appx 21, At para.72
[25] At paras 38-48
[26] At paras 45-53
[27] At para's 49-59
[28] See *Cheshire East* at para. 62
[29] NB – the fact that this decision pre-dates *Cheshire East* is a complete irrelevancy; the argument of out of datedness in its spatial application by virtue of para 215 proceeds independently of the question of being rendered out of date by para. 49;
[30] Harrison xx CBQC, Day 1
[31] Specifically 17 3rd bullet, 14 first half and 182 on 'soundness'.
[32] Harrison xx CBQC, Day 1
[33] Dunlop x, Day 2

24. By virtue of the Council's concession on 1.CO, and the operation of *Phides,* paragraph 14 of the NPPF is engaged: benefits need to be weighed against the harms and permission should be granted unless the harms significantly and demonstrably outweigh those benefits. This is so whether or not 2.CO is out of date (either as a para. 49 policy or by 215).

25. But, additionally, the Appellant is content – for the sake of argument – to test the scheme against s. 38(6) without the 'tilted balance' in para. 14. Both bases require harms and benefits to be weighed. On both bases, the Appellant contends, the evidenced strongly shows that permission should be granted.

Benefits:

26. The benefits are many and not disputed. They are enumerated and quantified in the evidence of Mr Dunlop[34]. Mrs Harrison did not dispute them or lead evidence to doubt them[35], nor was Mr Dunlop cross-examined as to their validity or weight[36]. It is concluded, therefore, that the Council accepts the benefits, and weight, as follows:

27. Under economic benefits, there will be a significant injection into the local economy during the 5 year construction period and then continual additional household spend of some £5m pa, supporting the Council's economic growth strategy and the objective to enhance viability of settlements. Paragraphs 18-20 of the NPPF indicate that these significant sums be accorded significant weight.

28. Under social benefits, the provision of 230 dwellings including 81 affordable units is in the context of acute housing need and a failure to show a 5 year land supply, as well as an affordable housing need which outstrips supply by more than 100%[37]. There is no doubt that this is a sustainable location for additional development and would provide ready access to the facilities and services for residential development, as well as being a high quality living environment. Significant weight should be accorded to the social benefits, indeed much smaller contributions to the Council's housing needs have been accorded 'substantial' weight.

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[34] Dunlop Section 8
[35] Harrison xx CBQC, Day 1
[36] Dunlop xx PSQC, Day 2
[37] Dunlop x – 3000 supply against 7000+ need

29. On environmental matters, there will be net biodiversity gains and opportunities taken to enhance and increase planting compared to present. There is no harm to any designated interest of acknowledged importance and the sustainability of the locality in terms of accessibility favours the reduction of travel demands and connected climate change and carbon challenges. Again, in Mr Dunlop's unchallenged view, significant weight should be accorded to the benefits arising from the scheme in the environmental dimension.

30. These benefits need, then, to be summed: significant, plus significant/substantial, plus significant. The sum of the benefits is then weighed against the harms alleged.

Harm:

31. Of the 11 putative reasons for refusal, 10 have now been abandoned. This leaves only Reason for Refusal 1, which has two strands: offence to Countryside policy 1.CO and offence to Strategic Gap policy 2.CO.

32. 1.CO is now recognised by the Council to be out of date[38]. Mrs Harrison no longer, therefore, raises it as an in principle objection[39].

33. In any event, the landscape analyses of impact on the countryside by both Mr Armstrong and Mr Self identified the extremely limited area over which any alteration of the character of the site would exert any influence – basically the immediate boundaries and two very short sections of Woolston Road and Grange Road[40]. The change to the character of the site itself is no more than axiomatic of the change of green to brownfield and was accepted therefore not to amount to landscape objection in the context that the Council accepted the need for Greenfield release adjacent to existing urban areas[41]. Such sites are being granted on both applications and appeals. The extremely limited extent of that impact further reduced the weight to be given to

[38] Letter 26th October 2015
[39] Harrison xx CBQC, Day 1
[40] See Self Appx G
[41] Armstrong xx CBQC, Day 2

any change in character of the site[42]. The change itself was within an undesignated landscape, off the bottom of the scale in terms of the hierarchy in para. 113 of the NPPF and (even on the Council's case) of only 'ordinary' value, 'reasonably tolerant of change'[43]. Bounded on the south and north by development, on the west by a road and a landfill and contained on the east by allotments and a woodland belt, it is exactly the sort of land which can acceptably be released to meet development pressures – as the lack of extensive visibility demonstrates so well[44].

34. On the second strand, the spatial application of policy 2.CO is also out of date, for the reasons Mr Dunlop explained, by reference to para. 215 of the NPPF. It places blanket restriction on land now needed for today's development pressure, as the designations were drawn to meet the different and lesser needs judged at 2006. As Mrs Harrison accepted the adopted plan does not deliver today's NPPF-compliant development needs and as such is in conflict with the policies NPPF taken as a whole[45].

35. Again, in any event, the aims of policy 2.CO are not offended. The strategic gap, derived from policy G.2 of the Hampshire Structure Plan, is between Southampton and Netley/Burseldon/Hedge End. It is an east-west gap. This is how it is delineated and described in all the planning and supporting documents: the local plan policy itself, its Appendices, the SP origin and the PUSH supporting policy 15. It is how it has been treated by the Council throughout[46] and by the landscape officer in particular[47].

36. That officer concluded that as the site was not on any crossing route east-west and that Netley already lay to the west of the site, and would, with Abbey Fruit Farm, lie even more so to the west, no objection could be made to the impact of the site on the Southampton-Netley/Burseldon/HedgeEnd gap[48].

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[42] ibid
[43] Armstrong proof
[44] Self x, Day 2
[45] Harrison xx CBQC, Day 1
[46] Self and Dunlop x, Day 2
[47] Dunlop Appx 7
[48] ibid

37. Nonetheless, Reason for Refusal 1 makes that allegation, and the Statement of Common Ground re-iterates that the dispute concerns the diminishing of the gap 'between' Southampton and Netley/Burseldon/HedgeEnd (ie an east-west gap).

38. Unfortunately for the Council, not only did its design officer not support that contention, its appointed landscape consultant found that he could not do so either. Indeed he confirmed that he raised no objection and gave no evidence in respect of an east-west gap[49]. Rather he felt that the Netley-Bursledon gap was the one that would be more likely to be harmed.

39. First, of course, he was correct in aligning himself with Mr Davies the landscape officer and with the LVIA produced by Mr Self (twice) that there was no impact on the separation of Southampton and Netley. The contention in the reason for refusal, therefore, is not made out.

40. But, second, he is quite wrong to raise - as if part of the Council's case - an objection between Bursledon and Netley. That is not the Council's objection and never has been. Mr Armstrong raised it, we are told[50], in late August or early September, just as proofs were being written. It formed no part of the allegation in the May Statement of Case, nor was it carried into the October Statement of Common Ground. It features nowhere in Mrs Harrision's proof of evidence.

41. Consequently, and impermissibly, Mrs Harrison sought orally in chief for the first time to explain that the Council interpreted 2.CO as seeking to prevent coalescence between Netley and Bursledon ie a north-south gap. Such a notion finds no support in any policy or supporting document placed before the inquiry, nor is such an allegation made by the Council as part of its case up to that point. It is, in truth, yet another example of the Council 'adopting a position' to defend a refusal, and its hapless officers being given the task of acting as mouth-piece to that adjusted stance.

42. But further, when looked at, there is nothing in this new allegation of harm to a north-south gap. Travelling east and then north from Netley to Bursledon, the appeal site has no role to play, developed or otherwise. Travelling west from Bursledon on

[49] Armstrong xx CBQC, Day 2
[50] ibid

Portsmouth Road, the site has no part to play in one's sense of having left Burseldon and entering countryside. Travelling south from Portsmouth Road along Grange Road, there is no question that one is aware of having left Bursledon behind. One then arrives at Netley and if one's sense of arrival is at photo point 17 rather than somewhere between 13 and 14, that doesn't alter the perception of arriving at a new and different settlement[51].

43. In neither case, therefore, either in pure landscape terms (necessary change in character within the immediate boundaries of the site, in respect of an undesignated landscape) or gap terms (no coalescence in the protected east-west purpose and no material change in the newly-claimed north-south 'purpose') could there be said to be material planning objection of any significant weight.

Balance:

44. 'Significant' plus 'significant/substantial' plus 'significant'; these are the undisputed benefits of the scheme across the 3 dimensions of sustainable development in para. 7 of the NPPF. No or no materially significant impact has been established on the negative side.

45. A simple s. 38(6) exercise would indicate that conflict with an out of date countryside policy and no harm/no material harm with a gap policy (which itself may be considered out ~~no~~ of date) would not prevent the grant of permission with such overwhelming benefits, particularly in the context of the absence of a 5 year housing land supply. The NPPF wishes to see a step change in the delivery of housing[52] and that this be achieved in sustainable locations[53], just as found here[54].

46. The 'tilted' para. 14 balance requires that the harms significantly and demonstrably out weight the benefits if permission is to be denied. No rational conclusion would

[51] This para: Armstrog xx CBQC, Day 2 and Self x and xx PSQC, Day 2
[52] NPPF para 47
[53] NPPF para. 7(2)
[54] SoCG 6.1(3)

consider the landscape/gap 'harms' to be more weighty than the sum of significant/substantial/significant – *significantly* or at all.

Conclusion:

47. It is a matter of regret that this case has had to be heard at appeal, and that that hearing has been distracted and complicated by the Council's attempts to mount a legal case inconsistent both with its conduct elsewhere and the case law. That is particularly so as the Council has never claimed, and does not claim now that the site not capable of being developed acceptably[55].

48. The matter is, was and remains a simple one: there is no objection purely by being outside the settlement boundary as 1.CO is out of date; by *Phides* para. 14 of the NPPF is therefore engaged regardless of the status of 2.CO; in fact the 2.CO allegation is not supported by the Council's landscape officer or its retained consultant; the consultant's north-south 'harm' is (a) not one related to the purpose of 2.CO, (b) not related to the Council's allegation in its reason for refusal, and (c) not one that would materially arise in any event; the benefits are manifest, weighty and undisputed; the 'harms' cannot rationally outweigh them, significantly[56] or at all[57].

49. For all of the above reasons, the Inspector is, therefore, respectfully requested to allow this appeal and grant permission for this much needed and sustainable development.

CHRISTOPHER BOYLE QC

29th October 2015

Landmark Chambers,
180 Fleet Street,
London, EC4A 2HG.

[55] Harrision xx CBQC, Day 1, when faced with the invitation to discuss the duplicate scheme coupled with the demand that the appeal be withdrawn first

[56] Para. 14

[57] S.38(6) absent para. 14