

**IN THE MATTER OF
THE TOWN AND COUNTRY PLANNING ACT 1990**

AND IN THE MATTER OF CONJOINED APPEALS:

**LAND AT DOWNLANDS FARM,
LAND AT BIRD-IN-EYE NORTH,
LAND AT BIRD-IN-EYE SOUTH,
UCKFIELD, EAST SUSSEX.**

**CLOSING SUBMISSIONS
ON BEHALF OF
THE LOCAL PLANNING AUTHORITY,
WEALDEN DISTRICT COUNCIL,
AND
THE HIGHWAYS AND COUNTY PLANNING AUTHORITY,
EAST SUSSEX COUNTY COUNCIL.**

1. These submissions are made on behalf of Wealden District Council and East Sussex County Council. Reference will principally be made to the position of Wealden District Council (“WDC”) as local planning authority. In respect of highways matters, s. 106 contributions and education matters, reference will be made to the position of East Sussex County Council (“ESCC”) and WDC or the Councils as appropriate.
2. These Closing Submissions incorporate, without repeating, the Opening Submissions made at the start of the inquiry. They do not purport to be a comprehensive review of the evidence presented during the course of the inquiry, but, rather intend to direct the Inspector and the Secretary of State to those matters which the Councils consider to be the salient issues upon which the appeals should turn.
3. The structure of these submissions is as follows:

- (1) overview
- (2) housing land supply
- (3) landscape
- (4) ecology
- (5) highways
- (6) other material considerations
- (7) conclusions

1. Overview:

- 1.1 There are three sites before the Inspector and Secretary of State, Downlands Farm (“Downlands), Bird-in-Eye North (“BIEN”) and Bird-in-Eye South (“BIES”), all, principally, for residential development. Respectively, they seek permission for 750 units, 300, and 198 units, totalling to some 1,200 new houses for Uckfield.
- 1.2 Not one of these sites is allocated for residential development. All three stand in open countryside, two adjacent to the urban area of Uckfield and one adjacent to the A22 Uckfield bypass. The Councils are strongly opposed to all three.
- 1.3 Section 38(6) of the Planning and Compulsory Purchase Act 2004 has the effect that the non-allocation of these sites in the development plan is the critical starting point for considering these appeals. The appeals should be refused, in accordance with the development plan, unless material considerations indicate otherwise.
- 1.4 Under the plan-led system, there should be no doubt that significant housing such as is proposed by all three sites (separately or together) should not be brought forward except through the forward planning process. Significant justification is required to depart from this principle.

1.5 The material consideration prayed in aid by all three appellants to justify this departure is an alleged shortage in housing land supply. This is examined in its own section below. It is proper here, however, to observe that even should a shortage of housing land be found (and it is strongly contended that it is not to be found), that will not automatically lead to permission for unallocated sites.

1.6 For unallocated sites such as these even to be considered for permission, a shortage of housing land supply must be established, but, in addition, to that, the sites must themselves be acceptable in planning terms for the development proposed. In respect of all three sites, there are sound planning objections to their development beyond the mere fact that they are not allocated. Consequently, the Councils respectfully submit that permission should be refused even were it to be found that there is a sufficiently glaring housing land shortfall to justify replacing the forward planning system with planning by s. 78 appeal.

1.7 The planning objections may be summarised as follows:

BIES: principle, accessibility to services, prematurity ahead of town centre transport solution, deliverability;

BIEN: principle, accessibility to services, prematurity ahead of town centre transport solution, noise;

Downlands: principle, accessibility to services, impact on town centre traffic, landscape, ecology, education, deliverability.

1.8 For the ease of the Inspector's consideration of these submissions against his notes of the inquiry, the topics below follow the order heard at the inquiry.

2. Housing land supply:

- 2.1 PPS3 requires that local planning authorities are able to show a five-year supply of housing land. In the absence of this, they are liable to have permissions for suitable unallocated sites granted on appeal. As noted above, such sites must, if they are to be granted on the back of a land supply argument, show that they are suitable, in addition to being unallocated. They must also show that they are themselves deliverable (see below).
- 2.2 Necessarily, the investigation of a land supply (for five years or any other period) will involve establishment first of the requirement and secondly of the supply. Regrettably, in the inquiry, both aspects were matters of contention.

Requirement:

- 2.3 As to requirement, much of the debate at the inquiry (evidence and cross-examination) has been rendered out of date by the publication of the Secretary of State's proposed Modifications to the SE Plan. This is because the principle areas of difference were:
- (i) the extent of regard that should be had to the Structure Plan requirements given the SE Plan period starts from 2006; and
 - (ii) the interpretation of para. 2.1 of the draft SE Plan and its impact on the question of shortfall.
- 2.4 The argument for continuing regard to the Structure Plan was based on assertions of uncertainty over the figures in the SE Plan. The Structure Plan contained higher figures as annual requirements than did the draft SE Plan or the Panel Report. The appellants therefore argued that until there was more certainty as to the Secretary of State's view on the annual requirement, regard should still be had to the Structure Plan, rolled forward even after the end of its own plan period¹.

¹ See North 2.1A, p.1 for the effect of doing so

- 2.5 It was accepted² that this argument would fall a victim to the passing of time. Time has now passed. The Secretary of State has published her proposed Modifications and there is now no justification for continuing to have regard to the Structure Plan. Indeed, it is submitted that the Structure Plan requirement now has no bearing on the five-year land supply, as the SE Plan has a start date of 2006, ie prior to the start of the five-year period, agreed as October 2007.
- 2.6 The effect of this is that, as regards housing requirement, page 1 of North 2.1A can be set aside, as can p.3. The analysis for the SE Plan is that shown on p. 2 of North 2.1A, albeit that the figures now need to be up-dated.
- 2.7 Following the Inspector's direction, Mr. Walker has presented a written response to the SE Plan proposed Modifications³. This uses the same format as the analysis on p. 2 of North 2.1A, but up-dates the figures.
- 2.8 The consequence is⁴ that the annual requirement is 550, giving a total Oct 2001-Oct 2012 of 2,750. This is agreed with the appellants.
- 2.9 The remaining difference on housing requirement is how to treat the question of shortfall. Mr. Walker always accepted, in considering the SE Plan annual requirement, that any shortfall/surplus from the beginning of the SE Plan period (April 2006) to the start of the agreed five-year period (October 2007) should be taken into account. On agreed figures, the shortfall of completions against SE Plan (as proposed to be Modified) requirement is 444. Mr. Walker added this shortfall to the SE Plan requirement Oct. 2007-Oct. 2012 (ie now 2,750) to come to a total requirement of 3,194⁵.

² Woolf xx CB

³ W6

⁴ see W6, Table 3

⁵ see originally, p.2 of North 2.1A and, now, W6, Table 3

- 2.10 However, prior to the publication of the Modifications, that was not enough for the appellants. Relying on their particular interpretation of a passage in the draft SE Plan, the appellants argued that shortfalls against the Structure Plan/RPG9 requirements pre-dating the start of the SE Plan period [ie up to 2006], should be added in as well. Further, the appellants did not calculate this pre-2006 shortfall from the start of the Structure Plan period [1991-2006], but at the rather arbitrary date of 2001 (which coincided with the end of a period of over-performance and the start of a period of under-performance), as the start of the RPG9 period – even though the Structure Plan requirement to 2001-2006 was simply carried forward by RPG9. This came to a significant number 1,255, leading the appellants to have a shortfall addition of 1,594⁶ to Mr. Walker’s 339⁷.
- 2.11 The passage relied upon for all this elaborate argument was paragraph 2.1 of the draft SE Plan. Mr. Walker disputed the appellants’ interpretation of paragraph 2.1, but that debate has also been rendered academic and out of date. Paragraph 2.1 of the draft SE Plan has been deleted by the proposed Modifications, and not replaced.
- 2.12 Consequently, there is no justification for the appellants having regard to any “shortfall” pre-dating the start of the SE Plan period (ie pre-2006).
- 2.13 The appellants have recognised that the pre-2006 shortfall argument is no longer open to them [see its absence at p. 4 of the Additional Planning Policy SOCG, 5.9.08⁸]. In its place, they seek to raise an additional numerical requirement called “backlog of unmet housing need”⁹.
- 2.14 Such an argument is without foundation. As explained in W6, “unmet housing need” is a term derived from the draft SE Plan, not something newly created by

⁶ Woolf 4.12-4.14

⁷ W1, Apx 7

⁸ Appx B to W6

⁹ see WO2

the Modifications. The appellants have not previously asserted that there was a justification to add a further numerical requirement by reference to “a backlog of unmet housing need”; they should not be doing so for the first time now..

- 2.15 The concept of there being such a “backlog” appeared in H1 of the draft SE Plan. The only change in the Modifications is to move it to policy H2 and identify a ten-year time frame. There is no suggestion by the Secretary of State that this should be taken to be an additional numerical requirement, nor is there any support for the calculations the appellants then seek to use to quantify it.
- 2.16 The correct figure for the 5 year requirement (for the whole of Wealden) is therefore 3,194 units¹⁰

Supply:

- 2.17 Completions April 2006-Oct 2007 were able to be agreed; the dispute concerned how to account for future supply. Again, the passage of time during the course of the inquiry has assisted the matter.
- 2.18 It is accepted that it is for the local planning authority to show the supply. However, in undertaking this exercise for a s. 78 inquiry, it is obviously in the public interest to avoid wasting inquiry time and public resources, and to concentrate on areas of dispute. Consequently, following pre-inquiry meetings, Mr. Walker sought to establish from the appellants the sites were disputed in respect of delivery.
- 2.19 The initial response¹¹ was encouraging: there was an in-principle position that no allowance would be made for sites allocated in the Wealden Non-statutory Local Plan, and there were a limited number of other sites where delivery would be

¹⁰ Appx B to W6. 4

¹¹ at the meeting of 5.12.07

disputed on the facts. Soon after the meeting, Mr. Walker asked to be informed which were these “limited number”, but, regrettably, this information did not appear until the production of appellants’ evidence¹².

2.20 Mr. Walker responded to this information in his supplementary evidence and rebuttal statement¹³. He and agents for the appellants had meetings in order to continue to narrow the differences. Indeed, these exchanges continued into the opening weeks of the inquiry. Very regrettably, far from narrowing the number of sites where a dispute arose, these exchanges seemed continually to lengthen the list. WDC sought to respond as best it could in the time available to a changing landscape.

2.21 The chief concern pursued with Mr. Walker in cross-examination¹⁴ was not so much that there was anything that could be shown that would indicate that he was wrong in his conclusions, but that there might be some as yet unearthed information that would do so. The simple response is that Mr. Walker had done enough to satisfy himself that there were no bars to development of those sites upon which he relied. Where there was some doubt, he applied a discount, having regard to the advice in para. 54 of PPS3..

2.22 By contrast, the appellants could, themselves, point to no “show-stoppers” to warrant dismissing these sites¹⁵, and a complaint that further research should have been done to discover any lurking barriers (ie prove a negative) to all sites relied upon rings hollow in the context of Mr. Woolf’s initial response¹⁶ that the appellants were seeking to challenge only a handful of (identified) sites. Mr. Walker’s evidence was not a SHLAA; it did not purport to be one, nor did it need to be one. It was sufficient in a s. 78 inquiry to establish the housing land supply situation for the purposes of, and in accordance with the guidance in PPS3, and in

¹² ie 18th December 2007

¹³ W1a, issued 7th January

¹⁴ Walker xx JC

¹⁵ Tustain xx CB

¹⁶ ie at the meeting on 5.12.07

the context of the appellants' initial stance on which sites were and were not being challenged.

- 2.23 Time having elapsed, Mr. Walker was, in the event, able to update the inquiry on factual matters that had arisen since giving his evidence¹⁷. This included expressions of intent by relevant landowners, the absence of which had caused so much criticism from the appellants¹⁸. The sum of matters led to a slight revision of the supply figures (losing some here, adding some there), with a final addition of 159 dwellings compared to the January position.
- 2.24 Returning to the “in-principle” issue of the appellants allowing no contribution from sites allocated in the WDC NSLP, again, events prove the argument hollow. The document may not be the “development plan” for the purposes of s. 38(6) of the 2004 Act, and the sites may not, therefore, be “allocated in the development plan” for PPS3 and the guidance on evidencing a five-year land supply, but in the real world reliance is being placed on it by developers and permissions being granted on the basis of it by WDC, with (with one small site as an exception) no objection from GOSE.
- 2.25 This was already occurring before the inquiry. As a consequence, the appellants were placed in the curious position of being forced to acknowledge the puissance of the NSLP when it had manifested itself in an actual planning permission, while doggedly refusing to give any allowance for those sites allocated in the NSLP but not yet with a permission issued – no matter how far the planning process the site may have reached. This was yet another argument that would be defeated by Time. As time passed, more sites in the NSLP would be granted permission, and have, even on the appellants' case, to be taken into account. That process has

¹⁷ WDC15 and 21

¹⁸ Walker xx JC and PVQC

indeed continued during the inquiry¹⁹, and there can be little doubt that it will continue hereafter.

2.26 The history of the NSLP is before the inquiry. Its production and adoption followed the advice of GOSE in order to facilitate and speed up housing delivery²⁰. It was most unfortunate that that aim was hampered by the appellants (or some of them) mounting a legal challenge to the plan, which legal challenge had to be pursued to the Court of Appeal, with concomitant delay and uncertainty. WDC's adoption of the NSLP was eventually vindicated; the plan has been adopted for development control purposes and is plainly being relied on by landowners and WDC. In these circumstances, there is no reason to give no allowance to sites which are allocated in the NSLP merely because it is not formally part of the development plan.

Calculating the five-year supply:

2.27 With an agreed five year requirement of 3,194 against the SE Plan Modifications (and dismissing the contention of a numerical addition for "housing need"), WDC show a 3,835 supply, giving a surplus of 641²¹. This equates to a 6 year land supply²².

2.28 This is without reliance on the additional supply justified in WDC15 of 159 units (which would give a surplus of 800 dwellings or 6.25 years supply²³).

2.29 This is, admittedly, a reduced surplus against the position under the Panel Report (which was 1096 or 7.01 years supply²⁴), but it is comfortably in excess of what must be shown under PPS3.

¹⁹ see WDC 15

²⁰ !

²¹ W6, Table 3

²² W6, 4.7

²³ W6, 4.8

²⁴ W6, Table 4

- 2.30 Consequently, on the evidence, there is no justification for permitting unallocated greenfield housing sites at Uckfield.
- 2.31 Further, it should not be forgotten that these appeal sites, being in Uckfield, are not within the area where the Secretary of State's Modifications have increased Wealden's housing requirement.
- 2.32 The proposed Modifications increases Wealden's annual requirement from the Panel's 480 to a figure of 550. It is this latter figure which results in the five-year requirement of 3,194. However, the increases are all in the Sussex Coast part of Wealden (280 going to 350), not "Rest of Wealden" (which remains at the Panel's 200).
- 2.33 Consequently, while Wealden as a whole can demonstrate 6 years housing land supply (or 6.25 with WDC 15), the area containing Uckfield can demonstrate an 8.71 years supply²⁵. To permit significant additional unallocated greenfield housing, therefore, at Uckfield is not only unjustified against a five year land requirement under PPS3, it is actually to upset the strategy for growth set out by the Secretary of State in her proposed Modifications²⁶.
- 2.34 On this basis, all three appeals should fail, even without regard to the other planning objections to the schemes before the Secretary of State²⁷.

²⁵ W6, 4.27: Note, the 6 years also does not take account of the supply from permissions which will, in the real world, continue to be permitted on windfall sites [see W1, 10.2, 10.3 and Apppx 10] and in reality therefore there will be a greater supply than the 6 or 6.25 years indicated.

²⁶ See further analysis at 4.31-4.44 of W6.

²⁷ NB the appellants have not followed the inspector's express imprecation against additional evidence and have made reference to the Polegate decision [North 14] in WO2. It is to be hoped that the Inspector will consequently disregard these observations; otherwise, he and the Secretary of State should carefully distinguish the circumstances at Polegate which lies outside the Uckfield "Rest of Wealden" area, within which, as indicated above, an 8.71 years supply can be shown and which is not identified for additional numbers by her Modifications. It is submitted that the Polegate decision is of little material weight in these decisions.

3. Landscape:

- 3.1 There was no landscape objection taken to BIES. Following the landscape SOCG²⁸, any landscape objection in respect of BIEN can be taken to have been resolved.
- 3.2 There is profound landscape objection to Downlands.
- 3.3 The evidence is (and the facts are manifest) that Uckfield sits in a rough bowl of landform. Historically founded on the river crossing, the settlement has marched up the sides of the bowl over time. To the south and southeast, the slope of the bowl levels out with a plateau divided by the Framfield stream. To the northwest there is a sharply delineated lip, marked broadly by the position of Snatts Road along the ridge. Uckfield lies to the south and southeast of this ridge. Its presence is not felt from the northwest at all.
- 3.4 Therein lies the essential distinction between the three sites. BIES and BIEN can be considered to be “inward-facing”. They will be seen from within the settlement, but significantly less so from without it. They lie within the embrace of the topography that also holds the rest of the settlement. Downlands does the opposite.
- 3.5 The Downlands site lies on the northwest slope beyond the Snatts Road ridge. It faces outwards, not inwards. It lies visually divorced from the settlement of Uckfield and, for the first time, it would be perceived from the northwest that Uckfield had spilled out of its containment and was making its presence felt in that sweep of landscape from the High Weald AONB, through Maresfield, to the South Downs beyond.

²⁸ North ...

- 3.6 The Inspector needs only to be reminded, but the Secretary of State needs to be informed of the extraordinary quality of that view. Standing on the elevated slopes of Ashdown Forest, the view is one of woodland interspersed with pockets of open fields. Human habitation scarcely intrudes; human settlement not at all²⁹.
- 3.7 One of these pockets of open farmland is Downlands Farm. Viewed from Ashdown Forest or the considerably nearer position of Maresfield, this break in the woodland cover is quite apparent. That it does not shout at the viewer is a product of its congruity in the scene, rather than its lack of visibility. That congruity will, however, be wholly lost if the proposed development were to take place.
- 3.8 Instead, then, of a sweep of view almost devoid of human presence, 750 houses, a local centre, employment, roads and lighting will be introduced on a prominent outward facing slope. Uckfield will be seen to have marched, Zulu-like, over the hill and down the slope to Maresfield.
- 3.9 The situation is made worse by the design choices adopted by the Downlands appellants. Rather than modestly minimising the impact of the development in the landscape, they have perhaps recognised its inevitable intrusion and sought to make a virtue of it. The proposal is to place the highest density and the tallest buildings on the most prominent part of the developed site. Mr. Russell-Vick's ambition was to create a hill-top village. Downlands would proclaim itself to the landscape like some Wealden San Gimignano.
- 3.10 However clever this approach might be as a marketing tool to prospective purchasers, it is the opposite of an approach in sympathy with the landscape. It may be very pleasant to look out from an eminence over the landscape of the

²⁹ Indeed, it would not be going too far to say that it is a view that Piltdown Man, that well known local celebrity, would have recognised - an observation that could not be said of much of the South East of England.

- High Weald AONB, but to do so places the tallest, densest and bulkiest development in that part of the site which will do most damage to the landscape. WDC and the landscape consultants for the BIES and BIEN appellants all took exception to this approach; it is to be wondered, *prima facie*, why Mr. Russell-Vick took a different view.
- 3.11 The answer to that difference in expert standpoints is to be found in Mr. Russell-Vick's proof and cross-examination³⁰.
- 3.12 Mr. Russell-Vick did not approach the question of landscape impact arising from Downlands from the point of view of assessing what harm would be caused if 750 houses, employment, roads, lights etc etc were to be developed on the open fields of an outward sloping site facing into the AONB. He assessed what the landscape harm would be *given* that 750 houses (etc etc) were to be built on the open fields (etc etc).
- 3.13 Mr. Russell-Vick's analysis, therefore, is of absolutely no assistance in the inquiry, indeed, it is positively dangerous and misleading³¹. The Inspector will recall comparisons with any encomium upon the beauty of the late HM Queen Elizabeth the Queen Mother, aged 103³². It is no good analysing harm on the assumption the development will be there as that begs the very question that the inquiry is called to answer. What must be established is the harm in absolute terms, to weigh in the balance when deciding the question of whether or not to permit the scheme (or some other, or none at all).
- 3.14 To compound the woes of the Downlands case further, Mr. Russell-Vick volunteered in some detail why he thought it was appropriate to judge landscape harm *assuming* development of 750 houses (etc). This was the litany of benefits

³⁰ Russell-Vick x CB

³¹ That is not to suggest that it was not honestly produced, merely that it is so profoundly misconceived as to lead the reader into potential error.

³² Russell-Vick xx CB

he had identified as being brought by the Downlands proposal which, he said, lay beyond the scope of the planning system to achieve. He asserted that they were on offer through the fortunate circumstances of the Downlands scheme having been put together by persons “freed from the pressure of the boardroom” (and by implication in a superior position to BIES and BIEN). This list, carefully recorded by WDC, became known as Mr. Russell-Vick’s “Six Good Things”.

- 3.15 Thus the argument seemed to go: (1) the Downlands scheme should be approved because of the planning good it brings about; (2) given that it is going to be approved anyway, let me see how bad its landscape harm will be on the assumption 750 houses (etc) have to be built roughly here; (3) actually, the landscape harm isn’t as bad as it could be if you place 750 houses etc etc in the open countryside, on a prominent outward-facing slope etc, etc.
- 3.16 Mr. Russell-Vick’s Six Good Things were a fatal miscalculation by those advising the Downlands appellants - although this does not appear to have been appreciated by them at once.
- 3.17 Like Mr. Tustain’s reliance on more affordable housing than policy required (see below), the attempt to place weight as material considerations on matters which went beyond that which the planning system could properly seek is to fly in the face of Circ. 05/2005. As with Mr. Tustain when promoting his affordable housing case³³, that point did not appear to have occurred to Mr. Russell-Vick.
- 3.18 Planning permissions are not to be bought or sold. The Secretary of State gives no weight to elements of the scheme that are not necessary in the sense of being required to overcome some planning harm, which if not overcome would lead to refusal of permission. To identify aspects of the scheme as being beyond that which the planning system can properly require is to identify aspects of the

³³ Tustain xx CB

- scheme which are not necessary; to laud them as material considerations is to mistake, or to act in ignorance of, Circ. 05/2005.
- 3.19 The espousal of the Six Good Things inevitably led to WDC calling for the Trust Deed which would permit land held for (some) charitable beneficiaries to be disposed of at less than Best Value. It led to WDC challenging the Downlands appellants to demonstrate that it could actually deliver a scheme with significant (and valuable) elements which went beyond that which the planning system could require, or to face the sanction of costs.
- 3.20 That gauntlet, thrown down on 31st January, was met with calculated silence. It was only after BIES had placed the Downlands Trust Deed³⁴, and WDC had placed the Downlands Option Agreement³⁵ before the inquiry that, on the last day of evidence at the inquiry, Mr. Tustain repudiated the Six Good Things as any part of the Downlands case³⁶.
- 3.21 The claimed reasons for that repudiation will be explored below, but the repudiation of Mr. Russell-Vick's Six Good Things having occurred, even he would have to accept that he had no case for his novel approach to landscape assessment.
- 3.22 Two separate matters should also be noted in respect of visual impact.

³⁴ South ...

³⁵ WDC ...

³⁶ This will be returned to below, and in the costs application hereafter, but it will not have escaped notice that this repudiation was some six months after Mr. Russell-Vick had first enunciated the Six Good Things, six months after there being no re-examination on the point, six months after the calculated silence in response to WDC's "gauntlet" of costs, after Mr. Walker had given his evidence and after the point remained unchallenged by Mr. Clay in cross-examination of Mr. Walker. The volte face appears to have been forced upon the Downlands appellants by other parties placing before the inquiry the legal instruments that showed that a scheme at less than Best Value could not, in fact, be delivered. Indeed the Option Agreement requires that value be maximised and provides for a subsequent planning application to increase development area and value, with an overage payment accordingly [...].

- 3.23 One is the proposal to create a pedestrian/cycle route through the woodland adjacent to Snatts Road with a “boardwalk” through that adjacent to Rocks Road, all lit to adoptable standards³⁷. Were this proposal ever to happen (as to which see below) there can be little doubt that there would be significant harm to the visual appeal of the woodland and the rural characteristics of Snatts Road and Rocks Road. The alien engineering of the raised board walk would be striking; it would introduce lighting and people into an unlit and unpopulated location; the overall route would involve the destruction of certainly 32 trees, including those covered by a TPO, and the probable removal of a further 22³⁸.
- 3.24 The other is the visual effect on the A22 of the “non-car” route along the A22 bypass, the roundabout and the “green bridge” entrance portal.
- 3.25 The Masterplan shows the route along the A22 to be a pedestrian and cycle route [no other pedestrian link is shown in Phase 1 in the ES and DAS]. Mr. Russell-Vick was cross-examined on its (un)attractiveness to, amongst others, pedestrians, and was not re-examined on the basis that his understanding of its purpose was incorrect. It was Mr Brown in chief [Days 23/24] who informed the inquiry that the path along the A22 was to be limited to cyclists³⁹. In either event, the route would have to be lit to adoptable standards.
- 3.26 This route would introduce lighting along a currently unlit stretch of the A22, which is carefully contained in a cutting and/or flanked by the wooded lower reaches of the Downlands Farm site itself. Together with the “Tracy Island” style entrance portal to the development itself, and the lighting on the roundabout, this continuous stretch of lighting along the A22 would further urbanise the otherwise rural location and emphasise the sense of Uckfield making its presence felt outside its natural containment.

³⁷ See Down 8.

³⁸ Walker Vol.3, 8.39-8.51 xx JC

³⁹ It will be recalled that he then had to revise the Phasing orally under cross-examination [Brown xxCB].

4. Ecology:

- 4.1 Following pre-inquiry discussions, WDC did not pursue an ecological objection to BIES. With a subsequent SOCG with BIEN⁴⁰, any ecological objection to BIEN may be taken as having been resolved.
- 4.2 There is profound ecological objection to Downlands.
- 4.3 Development at Downlands Farm would be, quite literally, enveloped by ancient woodland. Moreover, two narrow (and hence vulnerable) fingers of ancient woodland (one wet woodland, a BAP Priority habitat, the other an even more significant ghyll woodland with exposed sandstone rock features⁴¹ and significant lower plant assemblages) actually penetrate the development area, resulting in them being surrounded on three sides by the proposed scheme. Ancient woodland is acknowledged to be lost on Snatts Road (although its extent and significance is under dispute), and there can be little doubt of a real threat of degradation by indirect effects of much of the remainder.
- 4.4 PPS9 emphasises the importance and the vulnerability of ancient woodland. Once lost it cannot be recreated. Permission should not be granted that would result in its loss or deterioration unless the need for, and benefits of, development in that location outweigh the loss of the woodland habitat⁴².
- 4.5 Much was made by Mr Colebourn, for Downlands, of the all pervading influence of man on the ecology of the United Kingdom in general and the Weald in particular. It was pointed out that this influence can be beneficial, that the choices of the human race down the centuries have created and maintained many of the

⁴⁰ North 12

⁴¹ the exposed sandstone rock features of the Weald being considered by Natural England as of national significance [NE Habitat Significance Map]

⁴² PPS9, para. 10

habitats now considered worthy of protection, and that the countryside stood most at risk from neglect and abandonment of traditional land management than from increased recreational pressure.

- 4.6 The influence of Man on the environment is undeniable. The risk to the “natural” environment of ceasing or changing traditional land management is similarly well attested. But what Mr. Colebourn failed sufficiently to grasp is the distinction between the all pervading influence of Man as a (potentially) beneficial agent in the environment, through, for example, choices in land management or environmental policy, and the influence of individual human beings themselves on the flora and fauna they encounter. Borrowing the quote from a third party, Mr. Pope, it will be recalled that English Nature (now Natural England) consider that the introduction of human presence is the most effective non-lethal method of disrupting wildlife.
- 4.7 What Mr. Colebourn seemed to extrapolate from his observation of the pervasive influence of Man was that no perceptible adverse impact should be expected from the introduction of 750 houses between and around these precious nature conservation resources. By contrast he pointed to the advantages to flow from bringing 55ha into management. A host of points arise.
- 4.8 First, with the exception of Budletts Common (as to which, see below), Dr Roper, for WDC, disputed that the existing habitats are in decline. He considered that much of the woodland have seen very limited recent human management and that continuity would be better.
- 4.9 Secondly, management could do more harm than good, favouring generalists and species number (a mistaken notion of biodiversity) over rarer specialists in a less

diverse ecosystem. The more appealing and obvious may, not unnaturally, be favoured over the less engaging and obscure⁴³.

- 4.10 Thirdly, much of the management said to be required is to counter the harm otherwise caused by the introduction of the housing development. It is thus placing mitigation and compensation first rather than after avoidance.
- 4.11 Fourthly, the management proposed might actually increase the harm it is trying to avoid, for example by concentrating people such as dog walkers and picnickers in certain areas.
- 4.12 Fifthly, with the minimal input really required to keep the habitats in good heart (if they do not have to cope with the arrival of the residents of 750 units), there are ample publicly funded grant schemes such as the Higher Level Stewardship, in which the arable fields are already enrolled. The Woodland Trust has expressed an interest and the evidence is that it has the expertise and resources to take over these woods, despite the understandable lack of interest currently evinced by the Downlands trustees.
- 4.13 Sixthly, Downlands is not a scheme promoted as some sort of enabling development in order facilitate a country park or ecological management plan. Were the principle aim of the planning application to provide for a managed country park, the development justified as enabling such a provision would be very limited indeed. The ecological management, at the cost of 750 houses, is therefore a benefit at a cost too high and hence unnecessary.
- 4.14 Seventhly, the improvement of habitat at Budletts Common cannot be said to be compensatory provision for harm to the ancient woodland. It profits the

⁴³ it is difficult, in the real world, to imagine a resident-run management company inhibiting the conditions conducive to a carpet of bluebells in order to preserve the conditions favourable to a leafless propagule (or protonema) indistinguishable from green slime. *Orthodontium gracile* loses out to *Endymion non-scripta* (Syn. *Hyacinthoides non-scripta*) in most people's books; obscure, detritus-eating craneflies are even less likely to find advocates outside a public inquiry.

- woodlanders nothing to discover that the Downlands appeal is designed to bring benefit to a reptile.
- 4.15 Furthermore, the Downlands scheme wholly underestimates the true impact of the development which is said to bring about the benefits claimed for the management plan. It is as if the exciting prospect of 55ha in management has tempted Mr. Colebourn to don rosy spectacles when viewing the benefactor scheme.
- 4.16 This rosy view extends to expressing a belief that through Downlands some sort of social engineering experiment will be conducted, where the Youth of Great Britain (or at least Uckfield) will be educated with a new care and appreciation for their furry and feathered co-habitees of the Globe.
- 4.17 Quite apart from the doubts over the efficacy of this experiment, and the time-lag until the new generation are properly inculcated with an appropriate sensitivity to their environment, there is the difficulty of explaining to the dormouse, the Great Crested Newt or the nesting song birds, who might otherwise be anxious in the presence of Man, that they really have nothing to fear from a *Downlands* resident.
- 4.18 The plainly comic side of this ecological version of “hug a hoodie” obscures the perhaps more potent threat posed by residents.
- 4.19 It is certainly true that there will be undesirables who act in a damaging manner. Dr. Stenning spoke of his experience as warden of Lake Wood. This lies considerably further away from residential properties than will the ancient woodland on the Downlands site, but it is still the subject of unwanted attention.
- 4.20 It is to be hoped, though damaging and unpredictable, these anti-social persons will be few. Far greater in number and hence far greater in potential impact are the well-meaning residents who consider that they care about wildlife and

consider that they are doing no harm enjoying the country park (“that’s what it’s there for, after all,” they might reasonably say).

- 4.21 These are the ones who picnic where currently no one picnics, who walk their dogs where currently no one does. These are the ones who, in “enjoying” nature, will disturb it, and by appreciating it will harm it. Paths will concentrate the disturbance into smaller areas (a good thing) but at greater intensity (a bad thing). It is the intensity of human presence, the frequency of the visits, which will be most telling.
- 4.22 Consequently, a lone walker on an unfrequented footpath might have no measurable impact on the flora and fauna of the area through which he passes; the level of impact will increase with the number of occasions and length of time people are present. That is why Mr. Colebourn is both right to say that you do not need absolutely to exclude humans from entering the countryside and wrong to say that you can therefore place 1875⁴⁴ residents between and around ancient woodland without harm arising.
- 4.23 In fact, the Downlands approach to impact on the ancient woodland seems to have at its heart an irresolvable inconsistency.
- 4.24 On the one hand, the October 2007 Design and Access Statement reads at 6.1: “The protection and enhancement of the semi-natural Ancient Woodland and, in particular, Longwood Gill would be given highest priority. General access to these areas would be *prohibited*; they would be managed by the on-site warden but would not form accessible parts of the Country Park.” (emphasis added). There is a clear recognition of the need to exclude the general public, a recognition that without such prohibition, harm would be caused.

⁴⁴ Downlands D&AS October 2007, p. 4.2 [..]

- 4.25 On the other hand, Mr. Colebourn's evidence was that it was impractical to exclude people from woodland near their homes, but that no harm would arise. Indeed, the plans show the area of acknowledged ancient woodland extending far beyond that part shown for restricted public access; much of the Country Park is ancient woodland, to which residents of Downlands and the wider Uckfield are not to be prohibited but actually to be *encouraged* to visit.
- 4.26 It is respectfully submitted that it is inconceivable that such an approach will do other than cause the "deterioration" of the ancient woodland, to use the policy test from PPS9.
- 4.27 In the light of that, it is to be wondered that the inquiry was treated to such a minute examination of the ancient woodland status of Parcel 6 by Mr. Colebourn. Whether or not these parcels are ancient woodland does not affect the fact that acres of undeniable ancient woodland will suffer deterioration as a result of the scheme, contrary to policy.
- 4.28 It might be said that the reason why so much time was spent on Parcel 6 was because there was a suggestion that they might suffer "loss"⁴⁵ of ancient woodland, contrary to policy. Again, however, even if Parcel 6 contained no ancient woodland, Downlands would still cause a loss of ancient woodland by driving the pedestrian and cycle access through acknowledged ancient woodland adjacent to Snatts Road, Hunters Way Shaw.
- 4.29 A less charitable explanation is that by drawing attention to all the effort and survey work that went into disproving the status of Parcel 6, attention was distracted from the paucity of effort, indeed, the total absence initially of any investigation into Hunters Way Shaw.

⁴⁵ ironically through a decision of the Downlands appellants to move the roundabout in order to avoid acknowledged ancient woodland on the west of the A22 not previously spotted in the ES.

- 4.30 Hunters Way Shaw is shown as ancient woodland on the Weald Ancient Woodland Survey and the Government's 'MAGIC' interactive map. Its published status is therefore the same as the other parcels of ancient woodland on the Downlands site. Yet for reasons wholly unexplained, its flora and fauna went entirely uninvestigated in the Downlands ES. Both as originally produced and as revised ahead of the inquiry. It is given no vegetation parcel number in the ES and there is no discussion of it or any impact of building the principle cycleway and (it appears) only pedestrian access through it. As if to illustrate the extent to which Hunters Way Shaw has been systematically ignored, many of the maps in the ES (even when transferred into Mr. Colebourn's evidence) cut off the page without even showing the Snatts Road link and Hunters Way Shaw.
- 4.31 Dr. Roper considers Hunters Way Shaw to be undoubtedly ancient woodland and, due to its relationship with the agriculturally prohibitive outcrop of cliff on its eastern side, possibly partly primary woodland, a relic of primaeval forest. Yet even when this was pointed out to the Downlands appellants through Dr Roper's evidence, Mr. Colebourn concentrated his survey efforts, his mapping efforts and the involvement of Natural England's senior woodlands experts on Parcels 6. Reams of rebuttal text and appendices are devoted to these parcels. The scant information on Hunters Way Shaw stands in marked contrast.
- 4.32 Of what there is, the map evidence is consistent with an ancient woodland designation. WDC8, which is a map that was known to Mr. Colebourn but not included in his original evidence shows the whole Shaw to be wooded, although differently named. The 1785 map included in the Natural England assessment also shows the land to be wooded⁴⁶ The tithe map has it as "Boney's Plantation", presumed to be a reference to the Napoleonic wars, and the OS surveyors map, although unfortunately damaged at that very location, shows it wooded at least in the main.

⁴⁶ Although concerned with Parcel 6, the NE assessment fortunately includes that part of the 1785 map which shows Hunters Way Shaw

- 4.33 Mr. Colebourn in his Supplementary Response Proof⁴⁷ had, finally, to accept that the cartographic evidence was consistent with ancient woodland designation as he, himself, felt obliged to acknowledge that a green blob in the middle of his map was properly called ancient woodland. The proposed footpath and cycle way would go through the middle of it. The rest of the colours on his plan represented land which he said had no ancient woodland flora. This is in contrast to the approach of the Ancient Woodland Inventory Surveyor, Sally Westaway, who had recorded the entire area as ancient woodland, while recording its invasive as well as native species.
- 4.34 As ancient woodland also includes Plantations on Ancient Woodland Sites (“PAWS”), the presence of non-native tree cover on a site which qualifies cartographically as ancient woodland cannot be taken as a reason for refusing to record it as ancient woodland. As Dr. Roper explained, much of the interest in ancient woodland is the structure, the flora and the fauna of the woodland soil, undisturbed by ploughing or enrichment. Part of Hunters Way Shaw is acknowledged by both parties as ancient woodland on the basis of its flora as well as its cartography; wood melick, a good indicator species, was found; other species present (eg maple and holly) are consistent with ancient woodland, as is bramble scrub. Alien cherry laurel is less an indication that Hunters Way Shaw is not ancient woodland than a testament to its own invasive qualities.
- 4.35 It is respectfully submitted that the correct conclusion is that of Dr. Roper and the Ancient Woodland Inventory, namely that Hunters Way Shaw is properly to be regarded (and hence protected) as ancient woodland.
- 4.36 That this was not covered in the ES or originally in the evidence is little more than astonishing. The absence of survey extended beyond the question of its woodland status; there was no bat survey and no badger survey. Investigation by others

⁴⁷ CO4 Appx 13 & 14

- revealed that there was a badgers' set at the base of the outcrop destined to be the footing for the fly-over bridge. Similarly, so abundant were the bats in the vicinity that Dr Roper was moved to call the junction between Snatts Road and Rocks Road "Bat Metropolis".
- 4.37 The ES, Dr Colebourn's evidence and the Downlands case generally has been woefully inadequate in their consideration of the impact on the flora and fauna of the woodland adjacent to Snatts Road.
- 4.38 Other habitats at Downlands include areas of heath and acid grassland and some developing wood pasture. There are a number of streams and ponds and some lengths of hedge row, as well, of course, as large areas of open grassland and arable run on an organic basis. As Dr. Roper indicated, habitats do not stand in isolation: many species using woodlands would also visit the fields and wetlands. In respect of its ecology, the whole of Downlands is greater than the sum of its parts, due, as explained, to the way in which different habitats are complimentary.
- 4.39 Turning to protected species, the list would be daunting to anyone but the Downlands appellants.
- 4.40 The site is said (by one of the Country's leading herpetologists) to be of SSSI standard for its herpetological interest. The proposals for the development site are plainly damaging, but Professor Beebee considered that even the much vaunted restoration of Budletts Common would do more harm than good, exposing adders and other reptiles to human attack and risk of fire.
- 4.41 A map of the breeding ponds and 250m terrestrial foraging areas of Great Crested Newts overlaps the site so as to leave no development area⁴⁸. The proposals not only build on extensive parts of those foraging areas, they actually destroy two

⁴⁸ there is no need to look at the 500m radius so commonly used; the entire site is within 250m of a breeding pond.

- breeding ponds⁴⁹ and place GCN at risk of humans, cars and cats, and their eggs and larvae at risk of unwanted aquarium fish released “into the wild”.
- 4.42 There are dormice and badgers, there are bat foraging zones and bat commuting routes criss-crossing the site, and the expectation of bat roosting sites, although the latter were inadequately surveyed⁵⁰. All these would suffer disruption of feeding routes, removal of foraging areas and disturbance by the presence and activities of man.
- 4.43 The very idea of placing 750 houses (1875 people) plus a local centre, a primary school and 2,000sqm of employment (80 jobs) into the heart of this area of currently undisturbed countryside, to build on the organically farmed fields and to recreate in the designated ancient woodland is so contrary to the spirit and letter of the raft of protective nature conservation policies at national and local level that to do so with a straight face, and apparent sincerity, is rather disarming.
- 4.44 Indeed, Mr, Colebourn⁵¹ does make the entirely disarming observation that nature conservation interest is seldom harmed by development. That, of course, is because the planning system refuses harmful schemes permission!
- 4.45 That, it is respectfully submitted, should be the outcome of the Downlands application.

5. Highways:

Highways impact and the town centre:

⁴⁹ To be “replaced” by new ponds created through the destruction of ancient woodland and in locations of uncertain hydrology

⁵⁰ Colebourn xx RW

⁵¹ somewhere in his voluminous written evidence

- 5.1 There is a highways objection to all three sites.
- 5.2 Uckfield has a town centre constrained by the river crossing and the railway such that there is considerable existing congestion. Mr. Harris's evidence was that the County Council had done all it could within the existing highway network to "tweak" the capacity of the town centre network and the key routes leading to it. Significant extra pressure on the network would need to be addressed by a step-change in intervention.
- 5.3 This intervention could take the form of one of a variety of highways schemes coupled with demand management measures, or, if the highways schemes proved unpalatable, it could conceivably be just a package of (more far reaching) demand management measures. Either way, a solution to the town centre was some way in the future and development in the meantime would cause an unacceptable worsening of an already unsatisfactory situation.
- 5.4 The ESCC and WDC are strongly of the view that the solution to Uckfield's town centre traffic problems, and the future scale and location of growth at Uckfield should be considered carefully and together, and that the forum for such comprehensive "joined-up" thinking should be the forward planning system, where all the relevant stakeholders can be more deeply involved than in a s. 78 appeal into one or more individual housing sites. Any other approach would be premature given the existing congestion levels on the Uckfield road network.
- 5.5 Until that process has been undertaken in the proper democratic manner, and the outcome decided upon, ESCC and WDC consider that no significant housing development should be permitted at Uckfield. The implementation of any *allocated* development to be provided through the LDF would be carefully scaled to match the transport solution eventually decided upon. It would also be carefully

- timed so as to have the benefit of the town centre solution, as well as be carefully bound into making an appropriate contribution to its cost.
- 5.6 That said, ESCC and WDC early recognised that one possible outcome of this inquiry is that the Secretary of State grants planning permission for one or more of the sites. In these circumstances the proper forward planning process is bypassed and the Councils must make the best of the matter they can. Consequently, ESCC worked up a method for minimising protecting the highway impact at Uckfield in the event of development going ahead before the forward planning process would have permitted it.
- 5.7 The first difficulty facing ESCC is determining an appropriate contribution to a town centre solution. There is there is no currently identified solution, and so no certain scheme to cost.
- 5.8 Instead, there are a range of potential intervention options which have been modelled. The most efficacious of these (so called Option 3B) involves a gyratory which in the past has been opposed by WDC and the Town Council. Which, if any, of the current physical options are pursued can only be decided once appropriate public consultation has been undertaken and considered by ESCC and WDC.
- 5.9 Similarly, with any physical set of measures eventually decided upon would go a suite of “soft” measures for managing traffic demand. The scale and nature of those measures are, at this stage, equally uncertain as they will depend on the nature of the physical intervention, if any, that they are to accompany. The more efficacious the physical works, the lesser in scale and effect need be the demand management measures, and vice versa. However, it remains the position of ESCC that a blend of both “hard” and “soft” measures would be pre-requisite to the implementation of a sustainable transport solution for Uckfield.

- 5.10 What ESCC can say for certain is that there will be a solution. The scale of predicted congestion in Uckfield without some solution is too great to be allowed to continue. What ESCC cannot say for certain is what the solution will be. That will await the democratic consideration appropriate to such a major decision.
- 5.11 None-the-less, adopting a cautious approach to covering the costs of any future project, whilst also seeking to be fair in scale to the housing site in question, ESCC has calculated a reasonable contribution that should be made by significant housing sites if permitted now. It has based this on the most expensive of the potential physical improvement schemes (which happens also to be the most efficacious) conscious that if a lesser, or no package of physical works is eventually agreed upon, proportionately more will have to be spent on travel demand measures and sustainable transport alternatives.
- 5.12 With the appropriate contributions secured, ESCC can say that it has sufficient certainty that a town centre solution will be implemented, and if implemented, additional housing development can be permitted. ESCC has been scrupulously even-handed in this matter: any or all of the three rival sites could avail themselves of the ESCC work by undertaking to make the appropriate contribution to the town centre scheme. BIES and BIEN have chosen to do so. Downlands has refused to do so. This is returned to below.
- 5.13 The next problem facing ESCC in protecting the highways situation should the Secretary of State be minded to permit housing now is one of timing. It is all very well making an appropriate contribution to the town centre solution. The implementation of that solution, however, is some years off. Development in the meantime, without more, would cause additional traffic impact such as to be unacceptable.
- 5.14 In response to this, ESCC developed the “headroom” concept. This would allow development (which was making its due contribution to the eventual town centre

- solution) to come forward in advance of the final town centre solution being in place.
- 5.15 The headroom package directs itself chiefly at the existing population of Uckfield together, to a lesser extent, those currently making journeys into Uckfield. It is a package of measures designed to reduce the demand placed on the highway network by those existing travellers by providing alternatives to travelling by the private car.
- 5.16 The headroom concept is necessarily an interim measure. It “bridges the gap” in time between development now on the existing network and the situation once the town centre solution is in place. It is not a package which in any way replaces the town centre solution. It merely creates a “space”⁵² in the trajectory of increasing traffic congestion. This allows the new development to come in and “occupy” that space. If only the headroom package were implemented, and development followed, the headroom would be occupied by the new development traffic and the trajectory of increasing congestion would continue unabated to its unacceptable level.
- 5.17 The headroom concept is therefore only in place to allow advance occupations within a suitably controlled environment; beyond this, more permanent measures have to be put in place to deal with the trajectory of traffic growth outlined above.
- 5.18 Again, ESCC had been scrupulously even-handed in its approach to headroom. It has created a package of costed measures which allow for a maximum of 300 units to come forward from a (suitably accessible) development anywhere in Uckfield. That package of measures is directed to the existing situation, to existing users of the network, and so may be “bought” by any site that wishes it. As it is directed at the existing users, the headroom package does not change depending on which site is under consideration and so the whole required

⁵² or “headroom”!

- contribution is required by whichever site is approved (if only one), or divided between a number of sites (if more than one).
- 5.19 Again, BIES and BIEN have understood the concept and recognised the need for a headroom package. They have undertaken to make the appropriate contribution.
- 5.20 The Downlands appellants indicated early on that they were disinclined to make any contribution, but did, at the end of the inquiry, produce a “supplementary” s,106 obligation undertaking to make the headroom contribution⁵³. However, they have failed entirely to understand the headroom concept by imagining that this is enough on its own, without the town centre scheme.
- 5.21 The Downlands justification for making no contribution to anything in Uckfield is contained in Mr. Brown’s evidence at Appx AMB-N⁵⁴. He uses a calculation to derive a less than 2% impact on a certain junction in the town centre⁵⁵.
- 5.22 The 2% trigger is derived from of the NSLP⁵⁶ which talks of a 2% impact on the town centre. Mr. Harris’ evidence was that this trigger had been overtaken and rendered out of date by more recent government guidance which seeks a nil detriment (ie that development should not leave the network more congested than it found it). Further, even in its own terms, the impact was 2% to the *town centre*, not just one junction.
- 5.23 In addition, it may be observed that Mr. Brown’s figures themselves are only just below 2%⁵⁷, and that no sensitivity tests were run. Only a very small change in

⁵³ only; not the town centre solution

⁵⁴ 1.17 and table 1.10 on p. 8

⁵⁵ it is worth noting in passing that, if nothing else, this exercise demonstrates how poorly related Downlands is to Uckfield. The distribution used shows most development traffic heading away up and down the A22, with the scheme acting, therefore, as a dormitory for other, larger settlements.

⁵⁶ the appellants appear content to place weight on this non-statutory plan where they perceive it assists them

⁵⁷ they reach 1.87% - AMB-N, table 1.10, p. 8

- the (frankly untenable) assumptions on trip rate adopted by Mr. Brown would take the impact to over 2%.
- 5.24 Lastly, and most significantly, the calculation is in glaring error. Rather than (as it says it is doing, and as it should have been doing) comparing inward and outward flows with and without development, it is apparent that the calculation compares inward and outward flows with development to two-way flows without development⁵⁸. Corrected, as done in Mr. Harris' unchallenged Annex D8, to compare apples with apples (be it two way with two way, or directional with directional) produces a percentage impact of up to 9.6%, far in excess of the 2% policy trigger .
- 5.25 The effect of this is to render, even on Mr. Brown's reliance on the NSLP trigger, Downlands liable to make its due contribution to the town centre solution. That it does not do so makes it objectionable in terms of traffic impact on the town centre.
- 5.26 As if, perhaps, the Downlands appellants sensed that they would be unlikely to get away without making some contribution to the town centre congestion, the prospect of a "supplementary" obligation was raised for the first time in cross-examination of Mr. Harris⁵⁹. At first it was hinted that this would make the town centre contribution, but when it arrived it only undertook to pay for the headroom package⁶⁰.
- 5.27 Mr. Brown was opposed on policy reasons to a physical solution for the town centre, preferring "soft" demand management measures. He had confused, in his mind, his opposition to any physical works with opposition to a town centre solution at all. He had then compounded that confusion by imagining the

⁵⁸ Brown xx CB; compare AMB-N Table 1.10 and its drwgs, PL02 series.

⁵⁹ Harris xx JC; it actually appeared in the middle of the following day.

⁶⁰ And that only if the Secretary of State expressly requires it in her decision. *CLG please NB.*

headroom package (being mainly “soft” measures) to be a permanent long-term solution – to which, as he favoured soft measures, he could sign up.

5.28 This confusion may have been exacerbated, if not initiated, by Mr. Clay’s constant reference to only Option 3B⁶¹ to the exclusion of all other potential outcomes. ESCC’s current preference is certainly for Option 3B, as it is the most efficacious of the set of physical works, and so Mr. Harris had used it for modelling, as it showed the situation most favourable to the appellants. As noted above, however, there can at present be no certainty as to whether any of the physical schemes (or which of them) would be eventually followed, and what soft measures would accompany them. Similarly, the headroom package should not be mistaken for a soft measures package *in lieu* of the town centre scheme⁶². Mr. Harris was asked for, and provided⁶³ an indicative costings of a “soft-only” town centre solution. It came to very significantly more than the headroom package, and potentially more than the “with works” town centre costings provided for the purposes of the s. 106 obligations.

5.29 Mr. Brown’s late espousal of the headroom package might also have been influenced by his mistake as to the manner of the calculation of the 300 unit “headroom” it provided for. Mr. Brown sought to compare the number of vehicles from the BIE sites passing through a certain junction, comparing it to the number of vehicles from Downlands passing through that same junction and extrapolate back from the 300 headroom accorded to the BIE sites to a (larger) headroom he said should be accorded to Downlands⁶⁴.

5.30 Again, regrettably, this shows nothing more than Mr. Brown’s failure to grasp the fundamentals of the headroom concept. The methodology of calculating the headroom is all set out in Annex A21 of Mr. Harris’ evidence. The figures therein

⁶¹ Or the “ginormous gyatory” as he was pleased to call it

⁶² the inspector will doubtless recall the morning of ceaseless interventions from Mr. Clay as Mr. Brown’s mistake and its ramifications for his case began to dawn on the Downlands team.

⁶³ WDC

⁶⁴ Down 13

- were not re-run to show the 300 headroom eventually arrived at, but the method remains unchanged. The unit headroom calculation is a global figure for the town as a whole. It does not depend on the trip generation of any given site, still less on the actual number of vehicles predicted to pass through a given junction.
- 5.31 Consequently, the 300 unit ceiling is as applicable to Downlands as it is to the BIE sites and Mr. Brown's attempt to show that the headroom package would provide for more units at Downlands than elsewhere is founded on an erroneous base. Had he sought to discuss the matter with Mr. Harris, this misunderstanding of Annex A21 could have been cleared up. Those advising the Downlands appellants preferred to deal with the matter in a different way and so remained in ignorance of Mr Brown's error until later than they needed.
- 5.32 The result of all of this is that (with one caveat, recorded below) the BIES and BIEN appellants can be taken to have overcome any practical highways impact, by both making due contribution to the necessary town centre solution and making due contribution to a package of measures to create a headroom in order to allow 300 units to be developed in the interim. That 300 cap is sufficient for each of the BIE sites to come forward if permitted separately; the monitoring under traffic management plans secured through the s. 106 obligations will ensure that it is not exceeded if both are permitted together.
- 5.33 ESCC and WDC continue their highways objection that no significant development should come forward outside the proper forward planning system, and to do so before a town centre solution is decided upon and secured would be premature. However, with these contributions secured, should the Secretary of State seek additional housing in advance of the LDF allocation, these sites can be developed with the minimum possible traffic impact.
- 5.34 By contrast, Downlands makes no contribution to the town centre scheme. It may purchase the headroom package, but that would only "buy" it for 300 of its 750

units, and would do so only in the interim to a permanent town centre solution. Without the town centre scheme provided for, there is no “interim” – the headroom would be “the end state”, with the consequences outlined above: Uckfield traffic would continue its trajectory of increased and unacceptable congestion. There is, consequently, an unresolved highways objection and the Downlands scheme cannot be permitted even were the Secretary of State otherwise inclined to overrule the ESCC/WDC prematurity objection.

- 5.35 A further objection in any event arises in respect of Downlands. The provision of the town centre scheme and the provision of the interim headroom package only provides relief sufficient to allow development to proceed if the development itself is acceptably accessible, or can be made so. Without this, the traffic from the development is simply too great even with the town centre solution in place.
- 5.36 BIEN and BIES (with the caveat below) have demonstrated to the satisfaction of ESCC that their accessibility, enhanced sufficiently by physical works and commitment to demand management measures⁶⁵, are such that a trip rate of 0.66 car trips/unit(floor area)/hour or better can be achieved. This relieves the impact on the critical Framfield Road link into the town centre, which in turn frees up junctions and relieves other links such as Bell Farm Road, such that both sites can be accommodated.
- 5.37 Downlands, by contrast, is so abysmal in its non-car provision that its 750 units have a significantly higher trip rate and concomitant effect on the highway network. The cycle link along the A22 is unattractive and counter-intuitive and, indeed, as Mr. Brown clarified is not designed for pedestrians. The Snatts Road link was not even to have been provided in the first phase (300 units and 1,000 sqm of offices) until Mr. Brown orally amended the ES and D&AS under cross-examination. In any event that link cannot be guaranteed (as covered below) and the alternatives alighted upon latterly in the s. 106 obligation (an “on-line” Snatts

⁶⁵ In this instance directed at their own residents

Road improvement and a wiggle down steps and a back alley) cannot acceptably be provided either⁶⁶.

5.38 Mr. Brown attempted to rely on “internalisation” of trips within the Downlands site by reference to mixed uses on the site, but his TRICS analysis could not assist him with whether the comparables were similarly mixed and he had failed to take account of trips from outside the development attracted to the mixed use (school/shops/offices). Further, a significant amount of the justification for the low trip rate was the provision of the primary school on site. Delivery of this key assumption cannot be shown⁶⁷.

5.39 As a result, even were the Downlands appellants to have offered to make a due contribution to the town centre scheme and even were Mr. Brown to have understood the nature and effect of the interim headroom package, provision of these two matters would not have prevented Downlands from having an unacceptable traffic impact on Uckfield, and being therefore being refused permission..

5.40 Consequently, (with the caveat below) BIES and BIEN can be permitted without unacceptable traffic impact should the Secretary of State override the ESCC/WDC highways objection and decide to permit significant housing in advance of the LDF. This is recorded in the SOCG with the BIE sites.

5.41 By contrast, Downlands can not be permitted, even were its s. 106 obligations to have provided for the town centre scheme and the headroom package – which they do not.

⁶⁶ one would never meet DDA requirements, the other could only do so by closing Snatts Road to two way traffic from the junction with Rocks Road to the entrance to the site

⁶⁷ see below

- 5.42 The caveat referred to above is that since the close of the sitting days of the inquiry, and since the production of the highways SOCG with the BIE sites, it has come to the attention of the Councils that a part of the BIES site, within the red line boundary of the application, lies outside the registered title of the BIES appellants (or vendors). This is the corner of rough land flanking the bottom of Bird in Eye Hill, where pedestrian and cycle access for the BIES is proposed to be taken from the adopted footway to the southern side of Bird in Eye Hill⁶⁸.
- 5.43 The provision of that pedestrian/cycle link is critical to the accessibility of BIES and to the assumptions made on trip generation and non-car modes generally. It will be apparent from the plans that without it walk and cycle distances are increased in length, but also, and perhaps more significantly, pedestrians and cyclists are forced to climb or walk down Bird in Eye Hill on the carriageway.
- 5.44 It is respectfully submitted that without this link the acceptability or otherwise of BIES needs to be significantly reassessed. The Highways SOCG⁶⁹ was written on the assumption that the link could be provided. The provision of the link is secured by a proposed Grampian condition⁷⁰. The question is whether the restriction could be fulfilled and, if so, whether the link would remain open and be adequately maintained for the foreseeable future. .
- 5.45 While, if not fulfilled, these restrictions would (as is necessary) prevent development in the absence of the link, the concern the Councils have is the likelihood of these restriction being fulfilled.
- 5.46 First, the Secretary of State's policy is not to impose Grampian restrictions where there is insufficient certainty of them being discharged, but rather to refuse permission.

⁶⁸ ie the northwest corner of the site.

⁶⁹ WDC16

⁷⁰ Draft condition 3

- 5.47 Secondly, this whole case is about delivery (see Section 6, below). For the Secretary of State to have reached the stage where she is contemplating granting planning permission for BIES, she must have concluded that there is a housing land supply shortage that so urgently needs to be remedied that permissions for unallocated greenfield sites should be given. BIES would not be eligible for permission to make up that shortfall if there was a real danger it, too, had a deliverability problem. A neat test of the point is to recognise that as currently informed, WDC does not consider that the BIES landownership situation would allow it to feature in a SHLAA as part of the reliable supply side.
- 5.48 The Councils are content that the restriction protects their position that development could not proceed without the pedestrian/cycle link into BIES at this location. The Councils also note that the landownership doubts arise because there is a piece of land not formally registered to the BIES vendor, but in respect of which the vendor asserts title and says that there is no other known owner. This is in stark contrast to the situation facing the Downlands appellants at Snatts Road where it is known for certain that the appellants do *not* own the land.
- 5.49 The Councils are concerned that the link, having once been provided, might not remain open if another party establishes ownership of the unregistered land. In addition the Councils are concerned that the link might not be maintained to appropriate standards if doubts over the ownership prevent its adoption by ESCC.
- 5.50 Consequently, the Councils consider that permission should be refused unless the BIES appellants can satisfy the Secretary of State that sufficient certainty exists to impose the Grampian condition. In such a case, draft condition 3 must include a requirement to keep the pedestrian/cycle link in place, and the BIES appellants should be required to provide for its dedication through a planning obligation such as to secure its adoption by ESCC.

5.51 Were the above to be achieved, the Councils are able to abide by the contents of the WDC16 as regards BIES. If not, permission should be refused, as the application is objectionable without the link.

Accessibility:

5.52 In respect of BIEN and BIES (subject to the link point above), ESCC has concluded that the schemes have made their sites as accessible as it is possible to make them. Measures are to be introduced to Framfield Road and elsewhere, and alternative modes of transport encouraged through the travel plans secured through the s. 106 obligations.

5.53 ESCC as highways authority, therefore, does not take issue with the sustainability measures proposed to increase accessibility if the principle of development is accepted at those locations.

5.54 WDC, however, as local planning authority does *not* accept the principle of development at those locations. What can never be overcome is the physical location of the development sites and the distances to key facilities. These are set out in the Highways SOCG, updating Mr. Walker's evidence⁷¹.

5.55 The simple fact is that the distances in the majority of the cases exceed the IHT recommended distances and the sites are not considered to be sustainably located.

5.56 As regards Downlands, the situation is materially worse. Without the off-line Snatts Road link there is no DDA compliant pedestrian route out of the site at all. The cycle link along the A22 is counter-intuitive and unattractive and does not cater for pedestrians or people with disabilities due to its design and width. Even with the Snatts Road link, the walk distances are unacceptably long. It is no good, when assessing the sustainability of the site to say "oh, well, we will provide

⁷¹ W2, Appx A and B

facilities on site”; the proper assessment is access to existing facilities and the quality of the connectivity to these key destinations. Further, one of the most significant facilities on site, the school, cannot be provided through this permission⁷², and the Snatts Road link itself cannot be guaranteed⁷³.

- 5.57 All the green travel plan measures in the world will not help Downlands become a sustainable location if there are no meaningful alternatives to the private car facilitated by robust pedestrian/cycle infrastructure and early delivery of direct bus links..

Conclusion on highways:

- 5.58 Downlands should be refused on grounds of traffic impact and lack of accessibility. It makes no contribution to the town centre scheme, and would still cause unacceptable impact even if it were to do so. Its location is inherently unsustainable and the measures it purports to put in place to increase accessibility are not deliverable.

- 5.59 BIEN and BIES can only be permitted if the Secretary of State concludes that it is appropriate to pre-empt the LDF process and force a certain scale of development and concomitant traffic problem upon Uckfield for ESCC and WDC to solve later. Both sites are inherently unsustainably location, but if the principle of development at these locations is accepted both sites have put forward a package of measures which will make them as accessible as they can be. In respect of BIES this is only achieved if there is sufficient certainty that the pedestrian/cycle link to the Framfield Road will be delivered and maintained.

6. Other material considerations:

⁷² see below

⁷³ ditto

Affordable housing:

- 6.1 All three sites provide affordable housing.
- 6.2 The Downlands appellants sought to gain benefit by offering more affordable housing than was required by policy. Such an offer went beyond that which was necessary to overcome the policy objection that would have arisen had affordable housing not been offered. Thus to seek to claim some benefit was a misconceived notion given the terms of Circ. 05/2005.
- 6.3 Further, the offer was only an additional 10% over that required by policy and was only made in the circumstances where Housing Corporation Grant was available.
- 6.4 Lastly, as the Downlands scheme, through this offer, was “giving away” valuable development, which could otherwise have been put to the market, the scheme was not one at Best Value and so would be in breach both of the Trustees fiduciary duty to their beneficiaries, and in breach of Gleasons’ Option Agreement with the Trust. It could never, therefore, have been deliverable.

Education:

- 6.5 All three sites make contributions to education provision.
- 6.6 At Downlands the proposal is to site a school within the development. There are a number of matters which arise.
- 6.7 The first is that the very fact that providing a school within the site is clear recognition of the unsustainable location of the development. 750 units is insufficient to justify a single form entry primary school and the proposal to build

- a new one at Downlands is merely a response to the insuperable travel difficulties of gaining access to existing schools in Uckfield.
- 6.8 Further, the fact that 750 units is insufficient to generate the children for the primary school proposed means that it is far from certain that ESCC will indeed build a primary school there. Rather, it may seek to use the contribution to expand existing schools, leaving the travel difficulties facing the residents of Downlands and materially altering the accessibility assumptions underpinning the Downlands highways case.
- 6.9 Alternatively, if a school is built as proposed, children from outside the development will have to attend in order to make up the numbers. Just as Downlands is unsustainably located for a residential population to gain access to existing schools, so too it is unsustainably located for a new school to be accessed by existing residential areas. The in-coming school trips were not accounted for in the Downlands highways case.
- 6.10 In any event, and perhaps most significantly, the school cannot be built.
- 6.11 There is a minimum size of site able to accommodate the requirements of a one form entry primary school if it is to comply with Building Bulletin 99. While the site shown on the Masterplan is, in hectareage terms, adequate, it slopes significantly in two different planes.
- 6.12 Following a rather ill-humoured refusal to demonstrate how a school could be accommodated within the Masterplan, the Downlands appellants eventually did provide some details – but these did nothing more than demonstrate that it could *not* be done. The response was to retreat into a refusal to issue any more details and to write the s. 106 obligation in a way that undertook not to commence development until a scheme had been agreed with ESCC to provide a suitable site somewhere on the development site.

- 6.13 This approach cannot have been fully thought through by those advising the Downlands appellants as the effect of it was to render the planning permission being sought unimplementable by the terms of its own accompanying s.106 obligation.
- 6.14 The planning application is the subject of an ES. The Masterplan will therefore be bound into the planning permission by a condition requiring general conformity with it. The ES⁷⁴ correctly states that “precise boundaries of various types of development...” are fixed by the Masterplan. Due to the engineering works which will be required to level the 5 m double slope across the school site, the school cannot be accommodated within the site shown, nor can the road layout and development areas remain as indicated on the Masterplan.
- 6.15 The planning permission cannot be implemented until the “Primary School Site Scheme” has been agreed with ESCC. The Primary School Site Scheme will require an amendment to the Masterplan. That in turn will require an application under s. 73 of the 1990 Act to develop not in accordance with a condition previously imposed. That application would, if successful, result in a new planning permission being granted.
- 6.16 Further, the extensive levelling and/or banking works on this hillside required in order to create a suitable site have not been delineated nor assessed in the ES for their feasibility, landscape impact, ecological or hydrological impact. The school site stands at the top of the vulnerable and (this accepted) important Longwood Gill whose protection the Downlands D&AS told the public “would be given the highest priority”⁷⁵. A new ES would therefore, in theory, have to accompany the s. 73 application, but, on a proper analysis, these environmental consequences

⁷⁴ ES, Oct 2007, para. 1.7

⁷⁵ p. 6.1

should have been covered in the ES for this application, and so, in their absence, this planning permission cannot be granted.

6.17 In short, the school is not deliverable on the application before the Secretary of State.

Noise:

6.18 A noise issue arises in respect of BIEN.

6.19 Following the Noise SOCG with BIEN⁷⁶, there is no assertion that the current operations would cause a noise impact on the proposed residential properties which cannot be mitigated. Rather there is a concern that it amounts to bad planning to place sensitive development near an unrestricted commercial site.

6.20 This arises in two ways. First, following the philosophy of the PPG24 Noise Exposure Categories, it is important not to bring sensitive development into areas where they may experience unacceptable noise levels. To do so on an unrestricted commercial site is to restrict and endanger the operations of those commercial sites. As it is no defence to an allegation of nuisance that no nuisance was caused before the houses were built, an existing commercial operator might well find himself constrained by the arrival of residents where previously there were none. On the flip side, as public nuisance has a defence of Best Practical Means, residents might find themselves exposed to a level of noise which the Council cannot have reduced through the service of a noise abatement notice. Neither circumstance is satisfactory. Whereas on current activities these problems would not arise, the future is unpredictable and this sort of bad planning should be avoided.

6.21 The second aspect of bad planning is that the location of the existing commercial area has had the effect of dictating the location of the proposed commercial area.

⁷⁶ North ...

Properly this should be at the entrance of the site rather than being embedded in the centre of it. The effect of the proposed location is to bring commercial vehicles into the heart of a principally residential scheme. As Mr. Walker explained⁷⁷, this is not an appropriate way to set out a housing site.

Deliverability:

- 6.22 Delivery is key to this case. The appellants assert that there is a housing land supply shortage, and their sites can be *delivered* to assist in meeting it. If, in fact, they cannot be delivered, the argument on housing land supply becomes academic; permission should not be granted as the sites cannot fulfil the task they set themselves.
- 6.23 BIEN faces no delivery issues, itself, but its promotion as an outline scheme able to deliver 300 units from a standing start and in the current economic climate should be taken to be support for WDC's assumptions on the delivery of sites relied upon in Section 2 above.
- 6.24 BIES, as indicated in Section 5 above, must now satisfy the Secretary of State that delivery of the pedestrian/cycle link to Framfield Road. This must be both initially and in the long term. There must be sufficient certainty that a future claimant will not succeed in asserting title to the unregistered parcel so as to obstruct the link and to prevent its adoption by ESCC as highway authority. Without both of these, permission should be refused.
- 6.25 Downlands faces insuperable delivery problems.
- 6.26 As indicated above, the Snatts Road link is simply not available. It lies over third party land, including that of ESCC (as Education Authority, holding it for the Rocks Road Primary School). The Downlands appellants have known from the

⁷⁷ Walker Vol.4

- inception of their scheme (2004/5) that they would need to secure the necessary land. Whatever efforts they may have made to secure it have not succeeded.
- 6.27 When the application went in, the Downlands appellants, if properly advised, must have known the matter was coming to a head. The urgency would only have increased with the making of the appeal. During the opening weeks of the inquiry in January 2008, those advising the Downlands appellants were put on notice that WDC was not satisfied that the necessary land for Snatts Road was available. The matter was put beyond any doubt by WDC's invitation to Downlands to withdraw its appeal⁷⁸ unless it could show delivery of this key part of the proposal.
- 6.28 That the Snatts Road link is a key part of the proposal is similarly beyond doubt. Once Mr. Brown had informed the inquiry (contrary to the Masterplan) that the A22 bypass route was only for cycles, the Snatts Road link became the only pedestrian route out of the site. It was for this reason that Mr. Brown had to amend the D&AS and the ES orally under cross-examination, as the Snatts Road link was not phased for Phase 1 (300 houses and 1,000 sqm of B1).
- 6.29 The late espousal by the Downlands appellants of an on-line Snatts Road route and a Pudding Cake Lane route assessed by Mr. Harris only goes to underscore the inability of the Downlands appellants to deliver their own proposal. Neither of these routes forms part of the Downlands scheme, nor is assessed in the ES. Mr. Harris was clear that neither would, in any event, be acceptable. Pudding Cake Lane could never meet DDA requirements, while an on-line Snatts Road route could not be created and still allow for a two-way carriage way.
- 6.30 The onus was on the Downlands appellants to demonstrate that it had the necessary control of the land to deliver the Snatts Road link that it relied upon⁷⁹.

⁷⁸ made on 31st January 2008

⁷⁹ Down 8

Studied silence followed the WDC invitation in January. Six months passed. The inquiry resumed with no additional information. Highways evidence was given with no additional assistance able to be given. It was on the very last day of the inquiry that the Downlands planner, Mr. Tustain produced a document that purported to map the ownerships and append letters from the reputed owners⁸⁰.

- 6.31 That tactic alone speaks volumes on this point. If the Downlands appellants were able to show the necessary control, there would be no need to play games, pulling rabbits from hats. But the failure of the Downlands appellants to show the necessary control does not rest alone on the use of a tired tactic.
- 6.32 Magicians impress by pulling *live* rabbits from a hat. Mr. Tustain's evidence had been dead for months. With the plan delineating reputed ownerships came a series of letters which (apart from that from ESCC) pre-dated the appeal, let alone the inquiry. None committed the relevant landowners to do other than negotiate. None provided an assurance, even as a matter of principle, that the land would be made available. In respect of one area of unregistered land, Mr. Tustain had not even seen title in order to establish that the author of the letter owned all the land needed⁸¹.
- 6.33 There can be little doubt, if they were not to be remiss, that those advising the Downlands appellants would have been straining every sinew to obtain confirmation that the Snatts Road link was deliverable, and that those efforts would have continued up to the very last opportunity. Had Downlands intended to rely on nothing more than the set of letters eventually produced, they could have done so in January when challenged, as (with the exception of the ESCC letter) all those letters were in their hands then. The only possible explanation for the "last day of the inquiry" approach is that efforts were still being made up to

⁸⁰ Down ...

⁸¹ Tustain xx CB

- the 11th hour but were unavailing. Mr. Tustain confirmed that he had no more positively expressed letters than those presented⁸².
- 6.34 As regards the only recent letter, this came from ESCC and expressly indicated that the Downlands appellants should *not* infer that the land may be made available even to an in-principle extent. The land is used by the Rocks Road Primary School and held for educational purposes on behalf of the Governors by the County Council. Given the clear terms of the letter no expectation can be asserted of the Downlands appellants ever securing the land necessary for that part of the Snatts Road link.
- 6.35 The only conclusion to be reached is that the Snatts Road link cannot be relied upon. Downlands had more than ample opportunity to demonstrate its ability to provide it and has notably failed to do so. Permission should be refused.
- 6.36 Next comes the primary school. As submitted above, this critical part of the Downlands case cannot be relied upon, first because there is no commitment by ESCC to build a school on site in order to serve a development with insufficient child yield, and secondly, because the Masterplan cannot accommodate the required facilities. This is fatal to the Downlands case on sustainability and transport. Permission should be refused.
- 6.37 Lastly come Mr. Russell-Vick's Six Good Things.
- 6.38 It must be said that this was one of the more significant of the miscalculations of those advising the Downlands appellants. For Mr. Russell-Vick to be allowed to espouse these matters in the way he did was to render the Inspector and Secretary of State unable to place any weight upon them, and to place them beyond the ability of the trustees to deliver. Mr. Tustain, in one sense, had to at least attempt to execute a *volte face*.

⁸² Tustain xx CB

- 6.39 That it took, again, until the last day of the inquiry for the *volte face* to be executed is itself telling. That *volte face* only occurred after the Trust Deed and Option Agreement had been placed before the inquiry by parties other than Downlands. WDC had put the Downlands appellants on notice that it required Downlands to demonstrate that the Trust Deed permitted a scheme to be promoted at less than best value. The silence on that front, and the silence on the front of the Six Good Things appear to have been nothing more than the Downlands appellants putting a brave face on things and hoping against hope that no one else would ever find the legal instruments they themselves so studiously avoided producing.
- 6.40 Unfortunately for the Downlands appellants, but fortunately for the inquiry, both the Trusts Deed and the Option Agreement are publicly available documents, the one from the Probate Office, the other from the Land Registry. Once they had been found and placed before the inquiry, those advising the Downlands appellants knew the game was up and it fell to poor Mr. Tustain to perform the *volte face* and inform the inquiry that the evidence given on behalf of the Downlands appellants, and which had stood since January, was simply *wrong*.⁸³
- 6.41 It must have been embarrassing enough for Mr. Tustain to perform that act, but such embarrassment was compounded by his explanation as to why the Six Good Things actually went no further than policy required. This was⁸⁴ that although they went further than *current* policy required, had Downlands found itself allocated in a local plan, the site-specific allocation policy would have been expected to have included these enhanced requirements.
- 6.42 Such an explanation begins to stagger the listener; and speaks significantly of the desperation that had set in to the Downlands team by this stage. It was observed

⁸³ Tustain orally in chief

⁸⁴ Tustain x and xx CB

to him (and without demur from him⁸⁵) that it was novel for a developer to claim that he was complying with policy not yet written, or even formulated, which was more stringent than the policy which was written. It was equally novel to hear a developer consider that he was *bound* to comply with this as yet unformulated more stringent policy, such that were he not to do so (and merely comply with the published policy, like everyone else), his scheme would be refused permission. It was further put to him and accepted that in the formulation of any such (as yet unformulated) site-specific allocation policy would have itself to comply with policy and the law and not to make demands that were not necessary to be made⁸⁶.

6.43 The acceptance of that last point, inevitable though it was, brings Mr. Tustain's *volte face* to an end, mid-pirouette. If the site-specific policy can do no more than require that which is "necessary" – ie that which is necessary to overcome planning harm without which permission should be refused, it cannot be expected, as Mr. Tustain's new case posited, to be significantly more onerous than other more general requirements.

6.44 It leads one to wonder where the Six Good Things were left in the end.

6.45 The first was Mr. Tustains' own extra affordable housing. There has been no withdrawal of that offer (puny though it might be in the scheme of things⁸⁷). The scheme therefore continues to offer more affordable housing (in certain circumstances) than policy requires. It is therefore more than is necessary and Circ. 05/2005 indicates that no weight will be given to it. It is also therefore reducing the value of the scheme below that which could have been secured complying with policy and the fiduciary duty on the trustees and the terms of the option agreement mean that it cannot be delivered. The short point, whichever way it is characterised, is that this Good Thing won't happen.

⁸⁵ Tustain xx CB

⁸⁶ *ibid*

⁸⁷ see above

- 6.46 The next was the Country Park. Mr. Russell-Vick considered that this was in excess of any policy requirement. There can be no doubt about the matter. Formal open space is provided to standard, informal open space is provided in excess of standard. There can be no planning justification for extracting from the landowner a further 55 ha of land (and management sums).
- 6.47 Of course, it is always open to a landowner to seek to turn his land into a Country Park if he wishes, but it cannot be said that the local planning authority could *require* such a thing or refuse permission if it were not provided. This follows through to forward planning. A site specific allocation *might* suggest an aspiration for a country park, but there is no evidence of need for one or a requirement to provide one here and such a policy could not make its provision a prerequisite for permission.
- 6.48 As such its provision is not necessary; the Secretary of State will give no weight to it and the trustees and developer are barred by their fiduciary duty to the beneficiaries of the trust from providing it at such great cost. Again, given the landownership in trust, this Good Thing cannot happen.
- 6.49 Next comes the informal open space provision of which the same may be said. It is in excess of policy. There is no suggestion that special circumstances exist that would justify an as yet unwritten allocation policy demanding more at Downlands than elsewhere. It is therefore unnecessary, will be given no weight by the Secretary of State and cannot be allowed by the trustees or, consistent with the Option Agreement, the developer.
- 6.50 The next Good Thing was “a higher standard of design than that upon which the planning system could insist”⁸⁸. Mr. Tustain’s response was that good design was to be expected of any new development⁸⁹.

⁸⁸ Russell-Vick xx CB

- 6.51 That, it is submitted, does not help him. His statement is undoubtedly true and good design will be expected to be delivered by all three sites – and indeed any site. What Mr. Russell-Vick was asserting was good design *beyond* that which he planning system will require. The only conclusion from Mr. Tustain’s evidence is that that will not happen. Mr. Russell-Vick had misled himself.
- 6.52 If, on the other hand it had been an aspiration among the team to embrace even better design than the planning system could require, the Trust Deed, once shown to them, would have prevented such an aspiration being continued. In that sense, far from being “freed” from the boardroom, land held under a trust is more constrained. A boardroom has, as a matter of law, the ability to give value away; not so the trustees.
- 6.53 The next Good Thing was the primary school. As seen above, this cannot be delivered for practical reasons. Mr. Tustain and Mr. Russell-Vick are at odds on its compliance with policy, but both men’s evidence is fatal to the Downlands case.
- 6.54 If Mr. Russell-Vick is right and its provision is in excess of policy requirement, the Secretary of State will give it no weight and the trustees will be unable to allow it to proceed⁹⁰. If Mr. Tustain is right and its provision is necessary to overcome planning harm, without which refusal will follow, then the inability in a practical sense to deliver it (outlined above) means that permission should be refused.
- 6.55 Lastly, Mr. Russell-Vick asserted that there was more proposed in the neighbourhood centre than policy could have required. Mr. Tustain told the inquiry that there wasn’t. It is difficult to know whom to accept as, with the

⁸⁹ Tustain xx CB

⁹⁰ it is a very expensive “gift” and sits on 1.14ha of very valuable housing land

exception of the commercial space, the proposal is inexact when delineating the mix within the neighbourhood centre. The approach advocated by Mr. Tustain, presumably on instruction, is to record: the neighbourhood centre will contain no more than can be objectively justified by the local planning authority at reserve matters stage. That might include a reduction even in the commercial space. The scheme will not deliver what Mr. Russell-Vick had relied upon.

- 6.56 Worryingly for WDC and others interested at a local level, the Option Agreement contained not only a requirement to gain best value, but a provision allowing for subsequent applications and overage payments in the event that these applications achieved more development or greater value than the one currently being pursued.
- 6.57 Two views may be taken, neither of which reflects well on the Downlands case and those promoting it.
- 6.58 The first is that the package of “goodies” and the presentation of the Downlands scheme as somehow above, and superior to, the grubby commercialism which motivates other sites was an approach which was profoundly misconceived both having regard to planning law and policy and to the circumstances under which the land in question is held. In this view, the Downlands appellants have been misadvised by a starry-eyed notion which did not reflect upon the circumstances of the case.
- 6.59 The second is more cynical. This is that it was recognised that Downlands is such a bad site that the only way to promote it is to create a Trojan Horse which offers “gifts”. These gifts, while on the surface cannot be given weight consistent with policy, might operate at a subconscious level to engender some favourable opinion being formed. The scheme could not be delivered consistent with the trustees fiduciary duty, as it gives away value when not required by policy to do so. However, to have achieved planning permission would have been to establish

the idea of housing development of this scale at Downlands and pave the way for a more valuable permission to follow, as provided for in the Option Agreement.

- 6.60 The Councils are uninterested which of the above views more closely reflects the truth of the matter. It is sufficient to say that the Downlands scheme can not and never could have been delivered. It should be refused permission.

Section 106 Obligations:

- 6.61 The Councils gave the Inspector their comments on the s. 106 obligations as they then stood in draft. Further negotiation took place after the close of the sitting days. The s. 106 obligations have now been presented by Downlands and BIEN, with accompanying notes.

- 6.62 Appended to these submissions⁹¹ are the Council's detailed points on the s.106 obligations as they now stand in respect of Downlands and BIEN. These comments do not raise any new objection save where the s.106 obligation differs from the draft previously seen.

- 6.63 At the time of writing, no s.106 obligation has been submitted by BIES. The Councils therefore must reserve their position, but will endeavour to supply comments as soon as practicable.

7. Conclusions:

- 7.1 All three appeals should be dismissed. The only justification for permitting any or all of these unallocated greenfield sites is an argument founded on the PPS3 requirement for the local planning authority to demonstrate a five-year housing land supply.

⁹¹ sent under separate cover

- 7.2 With the publication of the proposed Modifications of the SE Plan by the Secretary of State, there is now no scintilla of a reason for continuing to rely on figures derived from the Structure Plan. It will be replaced from a SE Plan start date of 2006. The agreed start date for the relevant five-year period for this inquiry is October 2007.
- 7.3 Similarly, with the publication of the proposed Modifications there is no justification for calculating a pre-2006 housing shortfall as an addition to the five year requirement. This argument was founded on para. 2.1 of the draft SE Plan, which the proposed Modifications delete without replacement.
- 7.4 The appellants have sought to mount a new case since the close of the sitting sessions of the inquiry to add a numerical allowance called “backlog of unmet housing need”. This is unwarranted and evaporates upon closer inspection. “Backlog of unmet housing need” was a concept contained in the draft SE Plan policy H1; the Modifications move it to proposed SE Plan policy H2. Neither the draft SE Plan, nor the Secretary of State in her proposed Modifications suggested that this amount to an additional numerical figure to be added into the strategic housing requirement. The appellants did not suggest such a thing when considering the draft SE Plan; they have no justification for doing so now.
- 7.5 The five-year requirement should, therefore, be accepted as 3,194 units.
- 7.6 Against this, WDC can show a supply of 3,835 units, giving a surplus of 641.
- 7.7 The appellants, by contrast have not been able to point to any factor which would seriously question the deliverability of the sites relied upon, save those already taken into account and discounted for. The appellants continue doggedly to assert that no allowance should be given for sites allocated in the Non-statutory Local Plan, even though permissions have been, are being, and undoubtedly, will

continue to be granted in reliance upon it. In short, the appellants pursue a case divorced from reality and have been unable materially to dent the 3,835 unit supply shown by WDC.

- 7.8 This supply renders a years' supply of 6 years for the whole of Wealden. This is in excess of the requirement in PPS3 and removes any case for additional unallocated greenfield housing sites to be permitted on appeal.
- 7.9 In fact, looked at more closely, the position is even more favourable. On the most up to date figures, the surplus of Wealden as a whole is 800, or 6.25 years supply. In addition, the Secretary of State's proposed Modifications concentrate development in that part of Wealden within the Sussex Coast sub-region. Uckfield lies in an area termed "Rest of Wealden". The housing land supply for Rest of Wealden is 8.71 years. Further significant unplanned growth at Wealden would run contrary to the Secretary of State's own strategy for this part of the South East.
- 7.10 In addition to there being no housing land supply argument, the sites evince sound planning objection.
- 7.11 All three sites amount to development in the countryside beyond the settlement boundary and any allocations, thereby being contrary to the development plan and the terms of s. 38(6) of the 2004 Act.
- 7.12 All three sites are unsustainably located as regards accessibility to services. Whereas it is accepted that BIEN has achieved the best it can in increasing accessibility, this cannot be conclusively said of BIES on current information. Downlands has abysmal accessibility; quite apart from the distances and topography involved, it has *no* deliverable pedestrian access to the site, and a wholly unattractive cycle route along a bypass.

- 7.13 All three sites are premature ahead of a comprehensive consideration of the scale of growth for Uckfield and the need for a town centre transport solution. Whereas BIEN and BIES have agreed to make the appropriate contributions both to the eventual town centre solution, and to a “headroom” package to minimise impact until then, Downlands has refused to contribute to the town centre scheme and wholly misunderstood the nature and purpose of the headroom package. In any event, the headroom package “bought” by Downlands through its s. 106 obligation would only allow for 300 units out of its proposed 750 units (and only those on the assumption that a town centre solution was secured).
- 7.14 BIEN suffers from having an unrestricted commercial use in its heart, leading both to compromising the future of that use, and the layout of the housing scheme. This is bad planning and should not be permitted.
- 7.15 Downlands would create profound harm to the landscape within which it sits. The analysis said to support the scheme is so misconceived as to its starting point as to be wholly useless. The effect of Downlands would be to spill the urban form of Uckfield over its containing ridge, and for the first time intrude significant development into views of a quite extraordinary sweep of landscape stretching from the Ashdown Forest and the High Weald AONB across to the South Downs.
- 7.16 Downlands would also create profound harm to matters of ecological importance, endangering protecting species, and causing loss and deterioration to significant areas of semi-natural ancient woodland. It is surrounded and divided by ancient woodland including ghyll woodland with rocky outcrops – part of a nationally significant feature exhibited by the Weald. It would actively encourage public access into ancient woodland and place at risk even those most sensitive parts from which it would seek to exclude access. It would destroy the mosaic of inter-related habitats and significantly contravene national and local nature conservation policies.

- 7.17 Lastly, there is, in any event, real doubts over the delivery two of these schemes. Given that their sole argument for permission is that they can be delivered within the five year period, so as to make up an alleged shortfall, this is fatal to permission even were there to be a shortfall.
- 7.18 BIES must satisfy the Secretary of State that it is able to deliver the pedestrian and cycle link to Framfield Road, on land outside the current registered title of the landowner. It must be able to secure this both immediately so as to permit development to commence, and in the long term against the possibility of a future claimant asserting ownership. Without both of these, the link cannot be guaranteed, nor can its adoption by ESCC be expected. Without the link suitably provided, permission should be refused.
- 7.19 Downlands has even more insuperable difficulties on delivery.
- 7.20 The Snatts Road link does not lie on land claimed to be owned by the promoters but outside their formally registered title; it lies on land known to be owned by third parties. Any favourable evidence of intention by these landowners is scant and old. The most recent communication is from ESCC as Education Authority to inform the Downlands appellants expressly that they should *not* draw any conclusions that the necessary land may be made available. On this basis, the Secretary of State, following her own policies cannot satisfy herself of the likely delivery sufficient to impose a Grampian condition. Rather, permission should be refused.
- 7.21 Further, the provision of a primary school on the site, which is such an important part of the sustainability and highways case for Downlands, has been shown to be impossible within the terms of this permission and its ES. ESCC as Education Authority has not accepted that it would wish, in any event, to provide a school on this site as the child yield is insufficient to sustain one. However, even were it to decide to provide one, the evidence is clear that it could not be provided within

the application site. The sloping site is not able to accommodate the required facilities and rendering a suitably sized flat site would be outside the terms of the ES and Masterplan. The “solution” within the s. 106 obligation of creating a “Primary School Site Scheme” to be a prerequisite to commencement has the effect of rendering this application, were it permitted, unable to be implemented. It should be refused.

7.22 Lastly, in terms of delivery, there are Mr. Russell-Vick’s “Six Good Things”, six matters he said constituted critical and favourable parts of the Downlands scheme which lay beyond the scope of planning to insist upon, but would be delivered. These were: affordable housing in excess of policy requirement; the Country Park for which there is no policy requirement; more informal open space than is required by policy; a higher standard of design than required by policy; a primary school occupying 1.14 ha of land that would otherwise be used for housing; a neighbourhood centre with commercial and community facilities in excess of that required by policy.

7.23 Although Mr. Russell-Vick’s characterisation was repudiated by Mr. Tustain some six months later, the basis of that repudiation is hollow. Policy has not risen up since Mr. Russell-Vick gave evidence and demanded of developers things it previously did not demand. All of the “Six Good Things” still, we assume form part of the proposal.

7.24 If these things, as part of the proposal, lie outside the requirements of planning (ie they go beyond that necessary to overcome planning objection⁰, they cannot be given weight consistent with Circ. 05/2005. In such circumstances, a scheme incorporating them is not a scheme achieving best value. The Downlands trustees are bound by their fiduciary duty to the beneficiaries of the trust. Nothing in the Trust Deed permits the trustees to give away value. The developers, Gleasons, are bound by the terms of the Option Agreement to maximise development value. It

further provides for a subsequent more valuable application and an overage payment if successful.

7.25 Consequently, it may be suspected that this current scheme may be no more than a Trojan Horse, dripping with gifts to tempt the unwary. The real, much less appealing Downlands proposal then appears out of its belly. Even without cynicism, that may be the effect, in law, of the requirements of the trust and option agreement.

7.26 What can, however, confidently be asserted is that the current Downlands scheme cannot and will not be built. In a context where the grant of planning permission on an unallocated greenfield site is said to be justified by being able to deliver housing units, that alone is enough to render the Downlands scheme ineligible for permission. Indeed, on this basis alone, the Downlands scheme is so fundamentally misconceived that it is not an application which ever stood a material prospect of success. The appeal should never have been made.

7.27 In conclusion, it is respectfully submitted that none of these sites should be permitted and that all three appeals be dismissed.

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

CHRISTOPHER BOYLE
12th September 2008