TOWN & COUNTRY PLANNING APPEALS
(DETERMINATION BY INSPECTORS)
(INQUIRIES PROCEDURE) (ENGLAND) RULES 2000

Land to the South of Cliff Hollow, Berrington, Shropshire

PINS Ref: APP/L3245/W/23/3332543

CLOSING STATEMENT OF THE COUNCIL

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Introduction

1. As set out in the Opening Statement, Shropshire Council understands the need for renewable energy infrastructure and for solar farms – it has granted planning permission for many such schemes in recent months. That is because the need is well-evidenced and nationally recognised. However, that does not mean that there is "*carte blanche*" to develop in any location[1] and there are several outstanding and unresolved concerns relating to this solar farm installation at Land to the South of Cliff Hollow, Berrington, Shropshire ("**the Site**").

2. The full description of development is as follows :

   Erection of an up to 30 MW Solar PV Array, comprising ground mounted solar PV panels, vehicular access, internal access tracks, landscaping and associated infrastructure, including security fencing, CCTV, client storage containers and grid connection infrastructure, including substation buildings and off-site cabling ("**the Proposed Development**")

3. Having heard the evidence, the Proposed Development remains objectionable. It is located on very high-grade agricultural land, the development of which has not been sufficiently justified. It is clear that – even now – the compensation measures proposed for protecting priority species are inadequate. There is also an inability to mitigate the landscape impacts in this sensitive part of the countryside with its wide-ranging views, not least given the rising topography, and consequently, views will not be effectively filtered or screened from Public Rights of Way ("**PRoW**").

4. It was for these reasons that the Members of the Southern Planning Committee resolved to refuse permission for this Proposed Development, and accordingly, the Council maintains that the Appeal ought to be dismissed.

5. These Closing Submissions will distil the Council's case having regard to the main matters identified in the Opening Statement. First, we turn to the Development Plan and

[1] Mr Davies EiC.

its status (as well as the emerging local plan and the NPPF). Second, we consider the landscape and visual impacts of the proposal, having particular regard to those users of PRoWs and the local highway network. Then we turn to the impacts on agricultural land and finally, we consider the impacts upon ecology before undertaking the planning balance.

The Development Plan

6. The **Development Plan** for the determination of this application is the Shropshire Adopted Core Strategy (March 2011) and the Shropshire Council 'Site Allocations and Management of Development Plan' ("**SAM Dev**") (December 2015) (together, the "**Local Plan**").

7. The **emerging Local Plan** ("**eLP**") has started its examination through the hearing process, covering legal, procedural and strategic policies in July 2022 and January 2023. The Inspectors have confirmed that the Duty to Cooperate has been met, and the examination can continue. Several main modifications have been proposed thus far, but those have not yet been subject to consultation. The Council expects to move towards Stage 2 hearings in the Summer of 2024, which will cover site allocations and development management policies. This is a material consideration in the determination of this appeal.

8. By way of a Decision Notice dated 16 May 2023, the Proposed Development was found to be contrary to:

    a. (then) §174b of the NPPF and Core Strategy Policy CS6 and DP26(k) of the eLP in respect of the use of **agricultural land**;

    b. Core Strategy Policies CS6, CS17 and SAM Dev Policy MD12 in respect of **landscape impacts**; and

    c. Core Strategy Policies CS17 and SAM Dev Policy MD12 in respect of the impacts upon **ecology**.

Landscape and visual effects of the proposal (having regard to users of PRoW and local highways.

9. There would be unacceptable harm to the landscape character and also harm in visual amenity terms. We focus in particular on the impacts on PRoW users and users of the public highway.[2]

Landscape character.

10. The Site falls within the Estate Farmlands character as defined in the '*Shropshire Landscape Typology'* (2006). This includes mixed farming land use, with clustered settlement patterns, large country houses, planned woodland character and, critically, medium to large-scale landscapes with framed views. Mr Hurlstone explains that the area surrounding the Site contains good examples of these features.[3]

11. The Proposed Development would affect key characteristics of the local landscape character of the Estate Farmland LCT, and as such there would be a detrimental effect on the landscape character of both the Site and the surrounding area. In particular, one of the key characteristics, the "*medium to large scale landscape with framed views*"[4] would be affected. This is noted to be **major adverse** in the immediate context and would be a "*large*" effect at year 15 - an agreed position between Mr Hurlstone and Mr Leaver[5].

Landscape and Visual Appraisal

12. The LVA also notes that there would be a **moderate adverse** visual effect on local residential properties, namely Newmans Hall Cottage, the Rectory, and properties along the north edge of Cantlop.[6]

13. Wider expansive and high-quality views will be affected, to the south and east of the Site. These are evident in particular from the PRoW network that surrounds the Site[7]

[2] As clarified by the Inspector at the opening of the inquiry.
[3] §4.9 of Hurlstone PoE.
[4] §5.3 of Hurlstone Proof.
[5] See §4.11 of Hurlstone PoE.
[6] §5.4 of Hurlstone Proof.
[7] Viewpoints 11, 12, 14, 15, and 16 best represent these.

and in views from Cantlop to the east of the Site. As Mr Hurlstone explains in his evidence, Viewpoints 11, 12, 14, 15 and 16 best represent these high-quality views, and from these viewpoints, the Proposed Development would be visible.

14. At the Unnamed road that connects Cliff Hollow to Cantlop Mill there is a major adverse magnitude of change as the Proposed Development would form a noticeable, "*dominant*" feature in the landscape which would be readily apparent to receptors. The residual effect would be moderate.[8]

15. Some of the impacts upon particular viewpoints should be particularly scrutinised.

Viewpoint 11

16. Viewpoint 11 (the PRoW located to the east of the site that runs north/south) links Berrington to the wider countryside[9] one can see the panels very clearly to the west[10]. There would be partial views of the Site on this PRoW (0407/16/1), and these would be a "*noticeable feature in the landscape readily apparent to the receptor*". From Viewpoint 11, the solar panels would be visible in the middle of the view.[11]

17. Whilst the boundary hedgerows would grow to a height of 4m, this would have a very limited effect in terms of screening views of the Proposed Development as can be seen in the year 15 photomontage view. Viewpoint 12 also shows how the development would be visible with the wider introduction of solar panels in the centre of the view.[12]

Viewpoint 15

18. The PRoW located to the south of the Site on the other side of the valley running in an east/west direction, linking the settlement of Cantlop to the wider countryside is also assessed. There are open views of the Site from most of the PRoW as a clear view of

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[8] §4.22 of Hurlstone Proof.
[9] §8.4 of LVA.
[10] Viewpoint 11, PRoW 0407/16/1.
[11] See §5.6 of Hurlstone Proof.
[12] §5.6 of Hurlstone Proof.

the high ground of the north is visible[13] and this forms a large proportion of the views of the wider landscape.

19. At completion, there would be open views of the proposed solar development. The sensitivity of this receptor is high, and the magnitude of change would be major adverse at completion, resulting in a level of effect of large at completion.[14] After 15 years, the magnitude of change would reduce to **moderate adverse** as vegetation matures around the Site.

20. The solar panels are visible in the photomontage produced for viewpoint 15. Even though mitigation planting is proposed, this would not develop to screen the view due to the topography of the surrounding area. Further mitigation planting would not be in keeping with the landscape character of the area where framed views are a key characteristic and as such the development cannot be completely screened.[15]

21. This is a symptom of the rising topography and the limited planting which is proposed. Accordingly, the clear views of this incongruous scheme from a number of publicly accessible locations will mean that they would never be mitigated in any effective way. Even with the boundary hedges growing to a height of 4m, this would have a limited effect in screening views from the development.

<u>Viewpoint 1</u>

22. From **Viewpoint 1**, Cliff Hollow, looking south towards the Site demonstrates that the planting would also foreshorten views. At present, there are large expansive views to the south from a field access along Cliff Hollow. The photomontage, however, shows a very dense woodland-like buffer strip from this location once the planting has matured at Year 15. Not only does this planting remove the view, but the planting is also much higher and out of character with the surrounding field boundary planting in this location.[16]

<u>Construction impacts</u>

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[13] §8.8 of LVA.
[14] §8.8 of LVA.
[15] §5.5 of Hurlstone PoE.
[16] See CD1.18

23. Construction phase visual effects have not been considered as part of the LVA[17]; nor does the LVA consider the decommissioning and landscape restoration phase. These are key phases in the scheme which have been overlooked.[18]

Conclusion on landscape and visual impacts

24. Mr Hurlstone therefore supports the view of the members of the Council that there would be a breach of Core Policy CS17 where there would be a significant adverse effect on the environment, and MD12 where development would have a significant adverse effect on the environment which cannot be effectively mitigated.

25. For these reasons, it is difficult to see how Mr Heslehurst forms the view that the landscape impacts attract only "*limited*" weight in his overall planning balance. This is surprising when there is a generational change to the landscape, where there is such an impact on local landscape character, and where long-ranging views, including from sensitive PRoWs will be considerably affected.

The Implications for the Best and Most Versatile Agricultural Land

26. The NPPF §180(b) requires that the economic and other benefits of the Best and most Versatile Agricultural Land ("BMVAL") be recognised. However, higher-grade agricultural land also has the protection of national policy (NPPF and EN-3), national guidance (the PPG), and extant and emerging local plan policy.

27. The PPG on renewable and low carbon energy states that a local planning authority needs to consider (amongst other matters) whether (i) the proposed use of any agricultural land has been shown to be necessary and (ii) poorer quality land has been used in preference to higher quality land.[19] The language of "*poorer*" quality land, being used over "*higher*" quality land permeates the WMS, and also EN-3.[20]

[17] §8.2 of the LVA
[18] §6.2 of Hulstone PoE.
[19] §4.10 of Davies PoE.
[20] Heslehurst XX.

28. The Written Ministerial Statement ("WMS") accompanying the PPG is also quite clear that poorer quality land is to be used in preference to higher quality land and that any proposal for a solar farm needs to be justified by "*the most compelling evidence*".[21] This has not been updated (even though that version of the PPG has been) and has been repeatedly referenced in appeal decisions too, namely in *Cawston*[22] *Lullington*.[23] and *Walpole.*[24]

29. The importance of BMVAL is also recognised in the Local Plan. Core Policy CS6 states that new development should make effective use of land and safeguard natural resources, including high-quality agricultural land. The value of agricultural land is also recognised in Policy DP26 of the eLP which advocates the use of "*poorer*" quality land before land of a "*higher*" quality.

30. Much was made by the Appellant of the case of *Bramley* which indicates that a sequential test is not required. However, as Mr Davies indicated (with which Mr Heslehurst agreed) the policy tests – the PPG, the EN-3, the WMS all require poorer quality land to be preferentially used. Whilst a sequential test is not required, the onus is on the Appellant to prefer poorer quality land. Undertaking such a search is therefore the inevitable consequence of evidencing whether or not poorer quality land can be used, before resorting to the use of that land which is most highly classified and which can be used most flexibly.[25]

31. As became evident in XX, Mr Heslehurst has approached the language of the policy incorrectly. He started his evidence by suggesting that poorer quality land means that once BMVAL is to be used, then no further regard needs to be had to the quality of the land. To apply that logic would be a straightforward misinterpretation of the policy.

32. All of the policies mentioned above indicate that poorer quality land is to be preferred – and that exercise does not stop once the prospect of using BMV is inevitable. Of

[21] §5.10 of Davies PoE.
[22] CD7.27. §§17 and 18.
[23] CD7.29 §8
[24] CD7.10 §13
[25] Heslehurst XX.

course, it requires Grade 3a to be preferred to Grade 2, and Grade 2 to be preferred to Grade 1. Grade 1 is the land that can be used most flexibly and is of the most superior quality. With respect, it makes little sense to disregard that superior agricultural classification of the land, treating Grade 3a in an equivalent way to Grade 1. That is to mis-read the PPG, the WMS and EN-3.

33. The reason that is significant is because many of the sites in the Sequential Site Selection Report have been ruled out on the basis that there is Grade 3 land. That, the Council say, demonstrates that in comparative terms, the use of this predominantly Grade 2 land is not necessary.

The Sequential Site Selection Report

34. Mr Heslehurst indicated that he had been instructed to work on this project in 2022, prior to the submission of the planning application. There is no evidence at all of the optioneering work that was undertaken[26], and, as Mr Heslehurst indicated, no other landowners had been approached.[27]

35. One Sequential Site Selection Report was submitted with the planning application.[28] That did not consider any other greenfield sites. It only considered brownfield sites in Coventry, Derby, Northampton, Doncaster and Deeside[29]. Those are of little assistance to this Inspector given that it does not grapple with greenfield land in this locality.

36. During the currency of the appeal, a further Sequential Site Selection document was submitted.[30] This is focused upon a narrow 3km corridor on either side of the powerline running between the substations at Bayston Hill and Cross Houses. This was a necessarily limited exercise. Within that 3km corridor, the Report Addendum quickly discounts brownfield sites from the site search due to the self-imposed restriction.[31] As

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[26] Heslehurst XX.
[27] Heslehurst XX.
[28] Heslehurst XX CD1.14.
[29] Table 2.
[30] CD4.5
[31] §4.18 of Davies PoE.

was put to Mr Heslehurst, this is more limited than the distances considered in other appeal decisions.[32]

37. The Council does not shrink from the difficulties associated with obtaining a feasible grid connection. However, crucially, there is a considerable amount of Grade 3 land even within the search area itself. There has been no in-depth soil analysis of any of the other sites considered in the Report with all being given a blanket Grade 3 grading.[33] There is no subdivision between the Grade 3 land (into BMV and non-BMV) and, in any event, the land would be of a lower grade than the Appeal Site, which, it is agreed has now been assessed to be predominantly Grade 2.

38. Much of the analysis work is also far from convincing that the Appeal Site is the "*only*" Site available – the conclusion drawn by Mr Hesleshurst repeatedly in his Proof. Take DS10 as an example, that is ruled out on the basis of impacts on PRoW users. But that is a "*Site*" which is over 300ha in size. It is Grade 3 (of a lower quality to the Appeal Site). Moreover, it is not reasonable to suggest that the 300ha parcel will have impacts upon PRoW as that is such a significant swathe of land[34]. There is no evidence that such viewpoints have been tested in any event, and that is a particularly surprising basis upon which to rule out such a large tract of land, not least given that there are impacts upon PRoW users even with the Appeal Site promoted as part of this application. There are significant gaps in the analysis and justifications as for why such sites (exceeding some 300ha) were rejected – for the same reasons as the Appeal Site. Similar criticisms can be made of other parcels in that document.

39. It is respectfully suggested that there has been a considerable post-rationalisation here. That is perhaps unsurprising given that the only landowner who was approached was the owner of this Site.

40. The result of those shortcomings is that there is poorer quality agricultural land which has not been sufficiently ruled out – and resultant conflict with the PPG,[35] the WMS and NPPF.

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[32] Lullington 8km, Walpole §10 5km, Ledwyche 5km.
[33] §4.21 of Davies PoE.
[34] See CD4.5, §3.12.6.
[35] See CD6.2

“Most compelling evidence”

41. The WMS sets out the standard of evidence required – the “*most compelling*” evidence.[36] Any attempt to downgrade the status of the WMS is to fail to recognise its policy status, and a failure to grapple with that test is to reduce the high standard required of any evidence base scrutinising whether or not poorer quality can be used. That has been repeatedly recognised as the relevant standard– see *Walpole*[37] and *Cawston*[38] by way of example.

Farm diversification

42. In Mr Davies' XX, he was probed about whether or not the Proposed Development comprised “*farm diversification*” and would therefore gain the support of policy CS13. That policy supports diversification in rural areas, recognising the continued importance of farming for food production and supporting rural enterprise and diversification of the economy, in particular areas of economic activity associated with farm diversification, forestry, green tourism and leisure, food and drink processing and promotion of local food and supply chains.

43. **First**, the policy does not provide for renewable energy generation within the terms of the policy (even in circumstances where other local plan policies do recognise the same – see CS6 and CS8 by way of example). **Second**, this is a question of fact and degree – here some 44ha (plus another 25 ha are possibly being taken out of agricultural use). Notwithstanding the findings of the Inspector in Kemberton, Mr Davies reasonably considers this to be a change of use of the land rather than a diversification opportunity to supplement the existing farm business.

Conflict with the Local Plan

[36] See Pickles' speech in 2015: “We are encouraged by the impact the guidance is having but do appreciate the continuing concerns, not least those raised in this House, about the unjustified use of high quality agricultural land. In light of these concerns we want it to be clear that any proposal for a solar farm involving the best and most versatile agricultural land would need to be justified by the most compelling evidence.”
[37] CD7.10, §14
[38] CD7.27, §17 and 18

44. Whilst it may be possible to protect and maintain the soil's physical characteristics[39], that does not account for the limitations in the flexibility and the use of the land over 40 years. Nor does it account for the fact that the land is being given over for predominant energy generation. That will remove the flexibility of the land being used for agricultural purposes. That means that the agricultural land is not being used "*effectively*" and so there will be the resultant conflict with CS6.

The emerging local plan

45. In XX of Mr Davies, the Appellant argued that compliance with DP18 would mean that there would also be compliance with DP26 (part 2k) of the emerging Local Plan. DP18 states that development should avoid Shropshire's best and most versatile agricultural land (grades 1, 2, and 3a) wherever possible unless the need for and benefit of the development justifies the scale and nature of the loss. Respectfully, the "*need*" to use that land of such a high quality should be demonstrated. That requires justification - and so the inevitable consequence of compliance with DP18 and DP26(k) is that evidence is required to show that the use of higher-grade agricultural land is needed. For the reasons set out above, on the evidence that has been submitted, the development of such high quality land has not been shown to be needed.

Whether the proposed off-site mitigation would provide an appropriate safe and undisturbed environment for successful Skylark nesting.

46. As we set out in Opening, Skylarks are one of the most threatened species, protected by the Wildlife and Countryside Act 1981 (which covers all nesting birds) and the Natural Environment and Rural Communities Act 2006 ("**NERC 2006**"). It is a species which has declined by 63% since 1967 and is red listed which is a measure of its conservation status.[40] There is also a well-reported, wider decline of farmland birds, and is of particular local concern.[41]

[39] §3.1.3 of ADAS Rebuttal.
[40] §4.32 of Corfe PoE.
[41] See Corfe Rebuttal PoE §2.20.

47. The Site lies within a particularly important area for the species – see the Shropshire Bird Report 2022 which shows that the area to the east of Berrington supports a stronghold of singing/breeding skylark.[42] This is a site which is part of a sustainable, highly productive local population.[43] Mr Fearn's acknowledgement that this is a "*green list*" species in Shropshire ought not devalue the status of the species in this locality. It simply means that this is an area which is of particular importance for this priority species. Moreover, if the populations in Shropshire can assist in the recovery of the national numbers, then they should be protected in order for numbers to flourish. Just because they are green-list species in Shropshire, does not mean that the status ought to be downgraded.

<u>The survey work.</u>

48. Ms Corfe critically evaluates the survey work having regard to best practice/guidance documents, including those published by CIEEM, Natural England as well as the British Standard.

49. **First**, the Breeding Bird Survey[44] sets out a methodology which ought to be followed. Mr Fearn is one of those acknowledged in that document, which has been in circulation for a number of years.[45] The surveys undertaken would fall sort of the recognised guidance set out in that document.

50. The lack of survey data from June to August 2022 means that Skylark (as a species with multiple broods) are unlikely to have been fully identified even on the Appeal Site.[46] Guidance requires six surveys,[47] and any deviation must be justified.[48] The reason that this matters is that on the Appeal Site, survey work was undertaken from 23 March 2022 to 30 May 2022, which captured the points where territories were being held.

[42] See Appendix F of Corfe PoE.
[43] See Corfe Rebuttal §2.16 – and addressed with Fearn in XX.
[44] CD10.4
[45] Corfe EiC.
[46] §4.31 of Corfe PoE.
[47] CD 10.4 – Bird Survey & Assessment Steering Group.
[48] Ms Corfe rebuttal covers when you can deviate from this good practice survey approach in §§ 2.13 and 2.14 and none of the factors are met, so it follows that the limitations and deviations cannot be deemed to be acceptable.

However, as Ms Corfe indicated, Skylark were breeding later in that season[49] having broods in late July –yet this limitation is not addressed[50]. That means that some surveys were potentially missed, or not explored.

51. Therefore the full productivity of skylark at the Appeal site is not known as the number of broods was not confirmed and due to missing June to August it is likely that a third or fourth brood has been overlooked.[51] As such the evaluation of skylark importance is considered to be undervalued at site/local, whereas County is considered proportionate given the significant limitations presented by the survey.

52. Mr Fearn's answer to this limitation is that the methodology in the paper by Fox came to the same result on the number of territories being held on the Appeal Site – 11.[52] However, as he himself acknowledged, that paper has a number of critical limitations, largely relating to the infancy of that survey methodology. This is described as a "*prototype methodology*" that makes "*several assumptions and is as yet without monitoring data*"[53]; it is only a "*starting point".* In the absence of any survey work, Mr Fearn has effectively used it as the complete answer to how many territories are held on the Mitigation Land.

53. Moreover, as the R6 party identified in photographs taken of the Site, the land was in an oil seed rape crop (as part of a crop rotation) when the survey works were being undertaken (rather than an arable field). As the Fox paper illustrates, oil seed rape is a less favourable crop for the species than arable.[54] Had the field been in an arable crop when the survey was undertaken, then the density of skylark may well have been even higher.

54. **Second**, the survey work of the Site is, itself, problematic – not only were there fewer visits undertaken than expected[55] no names, qualifications and professional accreditations of surveyor(s) were recorded[56]. No start and end times were noted, there

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[49] Corfe EiC.
[50] Shropshire Bird Book.
[51] Corfe EiC.
[52] CD10.22.
[53] See page 6 of CD10.22
[54] By way of example, arable farmland is 0.28 density whilst oil seed rape is a 0.12 density.
[55] See Corfe Rebuttal §§2.12 and 2.13.
[56] Corfe EiC.

was a failure to record whether the surveys were completed during wet or dry weather conditions and a failure to record how Skylark are using the Site and the proposed Mitigation Land during the breeding and winter period.[57] There was no indication about the location or number of survey transects, or zones of influence shown in the figures presenting the survey findings.[58]

55. The figures presenting the results were also erroneous in the first version of the submitted EcIA (Sept 2022) and again in the second version of the EciA (January 2023) due to a duplication of the amber-listed bird species and an omission of the red-listed bird species other than skylark.

56. Regardless of how new the guidance is in the Breeding Bird Survey Methodology; such detail is good practice when one is undertaking survey work to understand the extent of a population on a piece of land. Mr Fearn acknowledged that this was sub-optimal and is not a practice that he would have himself employed.[59] The reason that this is relevant is that Fox has been used to calculate the number of territories which need to be replaced. However, there is doubt about whether there are in fact more territories which may be held on the Appeal Site.

57. **Third** those issues are only compounded when – added to the limitations which have already been observed, one considers that Browne[60] highlights that Skylark can be underestimated by up to 16%. Therefore, when one factors in 100% of the territories currently held on the Appeal Site into Fox's metric – which, on Ms Corfe's evidence could well be significantly higher than reported work - this could be significantly underestimated.

<u>The Mitigation Land[61]</u>

[57] Ibid.
[58] See Corfe Rebuttal §2.25.
[59] Fearn XX.
[60] CD10.26

[61] Throughout, for ease of reference we have referred to the Mitigation Land however, it ought to more properly characterised as the Compensation Land.

58. **Fourth**, there are limitations relating to the proposed mitigation/compensation land survey work too. Some 25ha of land has been put forward as compensation – and only 6ha will be used for breeding Skylarks.[62]

59. The land has not been surveyed at all to understand how many Skylark (if any) hold territories on that land, or whether further territories can be accommodated – that is a critical omission which means that the carrying capacity of the mitigation land cannot be identified. This point is identified in the Fox paper as Step 5 requires the existing carrying capacity of the receptor site to be subtracted from the donor site territories (acknowledging there is a carrying capacity issue for skylark).

60. Again, Mr Fearn relies upon Fox (2022) to estimate how many territories are likely to be held on the Mitigation Land. But, as acknowledged above, those limitations also apply to that exercise of estimation.

61. Just prior to the start of the inquiry, the Appellant suggested that this issue could be overcome by using a pre-commencement condition. The Council remains of the view that the ecology work contains fundamental shortcomings, and such a condition would not overcome those issues.

62. As explored in XX, the only way that the land will be able to accommodate 11 territories is on the basis that the land is kept in "*organic set-aside*". Any other iteration will provide for fewer than 11 territories in quantitative terms. To illustrate the point, if the arable conversion is used, then some 42 ha would be needed (or 27ha with improvements); for "*pasture*" some 68.75ha would be needed; for "*set aside"* some 29.7 - only with "*organic set aside*" does one need just 20ha.[63]

63. However, the land has not been farmed organically, which takes two years to achieve. There is no indication in the management plan that the land will be used as set-aside. That only goes to underscore how this has been the subject of improvisation; none of these points had even been canvassed with the Council until Mr Fearn gave evidence orally. It is anything but a careful, considered approach.

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[62] §1.5 of Fearn PoE.
[63] Figures explored with Ms Chalaby in XX.

64. What is more problematic, is that this all operates on the assumption that just 11 territories need to be replaced. If indeed there are more territories (given all of the limitations with the survey work outlined by Ms Corfe) then the Appellant's approach will fail to provide a similar replacement at all.

65. There are further reservations that Ms Corfe has about the approach undertaken, as some Skylark have been recorded on the Mitigation Land as recently as January 2024. Mr Fearn explained that this was not the same as if the land was being held as a territory (with birds breeding on the Mitigation Land). However, it may well be (given that birds will often return to that area in which they have been sighted), and, in any event, there is just no way of knowing without the land being surveyed.

Conditioning surveys

66. Circular 06/2005 (though dated) is the up-to-date government circular - §98 of that document states that the presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat. Surveys should be undertaken before planning permission is granted.[64]

67. The Circular (and The British Standard[65]) consider that it is essential that the presence of protected species is established before planning permission is granted. This applies to the Mitigation Land and the Application Site.[66] It also requires such survey work to be undertaken prior to planning permission being granted. These define "*exceptional circumstances*" to this requirement and none of those would apply in this case.[67]

68. Though the Appellant will say that there is no "*development*" being undertaken on the Mitigation Land, it is imperative that such surveys are undertaken to understand the number of Skylark as well as the other protected species which are likely to be present on that land – and in any event, given that it is being put forward in the manner

[64] §§98 and 99 of Circular 06/2005 and as replicated in the Position Statement.
[65] BS42040 a Code of Practice for Biodiversity in Planning and Development.
[66] §3.6 of the Position Statement.
[67] Corfe EiC.

suggested, it is clearly a part of the proposal which ought to have been considered, properly.

Other shortcomings

69. Ms Corfe notes a number of other shortcomings in the Ecological Impact assessment ("**EcIA**"): she identifies a lack of information in terms of the habitats assessed, the protected species surveyed, such as breeding and winter bird surveys, reptiles, and great crested newts as well as uncertainty surrounding the Mitigation Land, and the scheme proposed. There is also uncertainty about the impact on wintering birds[68]. These are still further shortcomings which underscore how inadequate the EcIA has been, not only on Skylark but on other species too, such that the full impacts upon biodiversity cannot be readily known, or understood.

Natural England consultation on conversion to arable.

70. It is relevant to note that the Council has not received any indication from the Appellant about whether or not Natural England have screened the proposed reversion to arable land in for Environmental Impact Assessment purposes. Moreover, as Ms Corfe highlighted, it would be surprising if it were not screened in given the fact that the land has been in HLS for some ten years and given its proximity to the Berrington Pools SSSI; arable conversion may require further fertiliser application and would have potential negative consequences for biodiversity[69].

The issues with the UU

71. The UU only binds the extent of the Mitigation Land as defined in the UU. The evidence of both the Council and the R6 Party is that it is highly likely that further land will be required for compensation and that this would not be provided[70]. If the land was in arable use, or if it was used for grazing, then there just simply would not be enough

[68] See §2.23 of Corfe Rebuttal
[69] Though the Council notes that this is not necessarily factored in the BNG score that only applying to the redline of the application.
[70] As explored in XX with Heslehurst.

land to provide for the territories lost. Even if a scheme were to be acceptable, it is only the Mitigation Land as defined in the UU that would be bound. It is on that basis that the pre-commencement condition would not overcome the issues identified.

72. There are a number of other drafting issues which the Council has flagged (multiple times) to the Appellant and which have not been addressed. The Council continues to have a question over the interests – as the details of the Settled Land interest has not been evidenced. In addition, the Council has not seen any evidence of the interest of the farmer (if any) in the mitigation land and so cannot ascertain whether they need to be bound by the UU as if in control of the land. There has also been a failure to provide for any kind of enforcement in how the Mitigation Land would be managed, including decommissioning if the Mitigation ceases to be provided[71] as would be normal in such cases. The UU is not capable of binding any land that is not identifiable as mitigation land at the time of entering into the UU.[72] There are also discrepancies between the plans provided[73].

Policy Compliance

73. In XX of Mr Davies, the Appellant suggested that Policy CS17 operates at a higher level than identifying individual species. It is a Core Strategy Policy, and so, it would not provide granular detail. However, MD12 does directly bear on this application. It states that "*in accordance with policies CS6, CS17…",* the "*avoidance of harm to Shropshire's natural assets and conservation, enhancement and restoration will be achieved by…",* "*ensuring that proposals which are likely to have a significant adverse effect, directly, indirectly, or cumulatively on any of the following: …(iii) priority species*".

74. That clearly applies to species in the generality (i.e. more than one priority species)[74]. Interpretation of policy is a matter of law, and it would be wrong to interpret policy MD12 in the way that Mr Fearn invites you to – that the impacts have to be on the species, interpreted on a county wide basis. There is no support for that approach within

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[71] See §5.10 of the Position Statement.
[72] See §6.2 of the Position Statement.
[73] See §6.1 of the Position Statement.
[74] Heslehurst XX.

the policy itself, when it is read fully and fairly. No individual application would ever violate the terms of that policy if it were to have a significant adverse effect, on a county-wide basis.[75] An individual application would be very unlikely to have such an impact on the entirety of Shropshire's skylark population. That would completely undermine all of the protection that the policy affords to those species and, as such, would almost never be engaged, or breached.

75. Moreover, it would be to completely disregard the Natural England advice which clearly states that harm to protected species should be avoided (and if not, then mitigated, and latterly, compensated)[76]. Natural England is explicit that where there is a displacement of birds, such as preventing them from nesting during the development works, this must not take place during breeding season. The proposal should provide a suitable amount of replacement habitat to compensate for displacement[77] including that there should be "*no net loss of habitat*", there should be *"like-for-like"* replacement near to the original site, to provide a long-term home for the species. In addition, the proposal should make sure compensation sites are established for wild birds use before work starts.[78] That guidance should be afforded significant weight – given that it is official guidance from a statutory consultee as opposed to a paper with a methodology which remains to be fully developed.

76. The Fox article recognises that it '*makes several assumption and is as yet without monitoring data. However, it is anticipated to provide a starting point for discussion on Ground Nesting Bird mitigation*'. It is also important to state the Appellant has not completed a Fox alternative approach calculation or presented that to the Inquiry and has still applied the error that Fox highlights '*It is common to see ecologists propose a basic metric such as two plots for each skylark territory displaced. It is not clear how this is decided upon and appears to confuse the 2 plots/ha rate of RSPB farmland management advice with a suggested rate per displaced territory*.' This is part of the Appellant's mitigation Strategy which is fundamentally flawed and cannot therefore be subject to a Grampian or UU.

[75] As put to Fearn in XX.
[76] CD10.11 – section 3, page 9.
[77] CD10.10 – page 4
[78] Ibid.

77. Mr Fearn's approach would also be entirely contrary to the approach taken by Inspector Parker in the decision in *Manuden*.[79] In that case he was considering a 49.9MW scheme where the ecological impact assessment had considered that there were around 17 breeding territories. There he states that ground-nesting species such as Skylark will be especially affected by the loss of the arable farmland and its conversion to pastoral land for sheep-grazing and solar farming.[80] The failure to provide compensation in that case meant that adopting the "*precautionary*" principle, it would be reasonable to assume that the application will support a "*considerably reduced number of birds than it currently supports*", and, as a consequence, a negative impact upon breeding birds on open ground (particularly skylarks) would be anticipated as a result of loss of nesting habitat as well as unmitigated direct impacts of the construction associated with the proposal.[81] In that case, Inspector Parker found that the proposal would fail to "*conserve and enhance*" biodiversity – observing the duty under section 40 of the NERC 2006. The proposal would also be contrary to the local plan policy, he found[82]. Finally, the Inspector noted that the proposal would be contrary to §180 (now §186) of the NPPF which means that planning permission should be refused where significant harm to biodiversity cannot be avoided, mitigated or compensated.

78. Mr Fearn seeks to suggest that providing for 11 pairs would be a "*gross over-simplification*" which would fail to have regard to conservation in the generality. But, failure to similarly provide adequate habitat for pairs of Skylark (of a similar order of magnitude – 17) in *Manuden* was fatal to the appeal succeeding. All parties – ADAS, Ms Corfe, and the Inspector in the *Manuden* appeal have taken the view that replacement does need to be provided for displaced pairs, rather than a mitigation on impacts upon biodiversity in the generality. Mr Fearn is the only party who is at odds with that approach.

79. In short, neither CS17 nor MD12 say that a significant adverse effect on the entirety of the population of Skylark in Shropshire or in the UK needs to be experienced. That is

[79] CD7.26.
[80] See §61.
[81] §62.
[82] which would result in an effect on wildlife which would not be permitted unless the need for development outweighs the importance of the feature to nature conservation and where the site includes protected species or habitats for protected species measures to mitigate and/or compensate for the potential impacts of the development, secured by planning condition.

to read in words into the policy which are simply not there. There clearly is the potential for a significant adverse effect on the population of skylarks arising from the development of this Site alone. That should attract significant weight in the overall planning balance.

The relevance of net gains

80. The Council does not dispute that net gains of biodiversity are achievable on the Site. However, that does not overcome the failure to protect priority species. They are priority for a reason (given that they have been in such sharp rates of decline). So, whilst overall biodiversity net gain may be a good thing, it does not overcome the issues associated with the loss of priority species which need to be properly provided for in order to prevent further decline.

81. The Appellant's suggestion that there would not be a "*significant adverse effect*" on biodiversity (and therefore no breach of MD12) on the basis that other net gains would be achievable, would be to significantly dilute the protection afforded to priority species in that policy. It also falls foul of the BNG Principles to apply the mitigation hierarchy first. In this case, the habitats that are being improved/enhanced and created provide no benefits to the one species on the Appeal site that is suffering significant adverse impacts. There can be no acceptable trade-offs for this.

Conclusion on ecology

82. Accordingly, owing to this multitude of shortcomings, the mitigation proposed is ineffective and results in conflict with Policies CS17 and MD12 of the extant local plan.

83. It would also fail to "*promote the… protection and recovery of priority species*" in accordance with §185 (b) and would result in significant harm to biodiversity which cannot be effectively compensated (§186).

The Planning Balance

The Development Plan

84. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("**the 2004 Act**") requires that planning permission be granted in accordance with the development plan, unless material considerations indicate otherwise.

85. The Local Plan does not make allocations for renewable energy development. However, CS8 of the Core Strategy does promote a "*low carbon*" Shropshire, delivering development which mitigates and adapts to, the effects of climate change which includes low carbon and renewable energy regeneration. This should not come at the expense of unacceptable landscape impacts, the objectionable use of high-grade agricultural land, and unresolved objections relating to priority species.

86. For the reasons set out above, the Proposed Development is in conflict with the Development Plan given the unacceptable impacts on priority species (MD12 and CS17) and because of the unacceptable landscape and visual impacts arising from the scheme. Similarly, there are serious defects with the Site Search exercise which means that there is no need to develop such high-grade agricultural land.

<u>The balance</u>

87. Mr Davies undertakes the overall planning balance. He recognises the benefits of the generation of renewable energy and the importance of its deployment. The Inspector will undertake his own balancing exercise, however, the following points ought to be noted:

    a. Ms Heslehurst attributes only limited weight to the **landscape impacts** of the Proposed Development. Those ought to be upgraded in circumstances where there are moderate-major adverse impacts on landscape character and where the impacts on PRoW, and roadway users cannot be mitigated.

    b. Mr Heslehurst attributes weight to purported **economic benefits** the scheme. However, there is no detail at all about how those economic benefits will be

realised, and without any such evidence, then this cannot be attributed weight in the overall planning balance.[83]

c. Though Mr Heslehurst acknowledges that the harms in respect of **agricultural land** ought to be given moderate weight, it should be noted that this has not been sufficiently justified. No other landowners have been approached, there is lower grade ("poorer") agricultural land even within the very extensive swathes of land (for example, in excess of 300ha) within the document itself.

d. Finally, Mr Heslehurst does not attribute any harm to the impacts upon **priority species**. Those impacts are not the same as impacts upon biodiversity, generally. Those must not be disregarded where a red list species is going to be displaced as a consequence of the Proposed Development. Even if 11 pairs were lost, this is what must be assumed in the absence of a certain, effective, secured mitigation plan.

88. The Proposed Development would not be in accordance with the Development Plan, taken as a whole and there are no material considerations which indicate that planning permission should be granted. The benefits of renewable energy do not overcome these concerns.

89. However, even if the Inspector were to find that there was no conflict with policies in the Local Plan, the impacts on ecology and the local landscape are material considerations for which planning permission ought to be refused. For all of these reasons, and for the reasons given in Ms Corfe, Mr Hurlstone and Mr Davies' evidence, the appeal should be dismissed.

SIONED DAVIES

No5 Chambers

11 March 2024

[83] Helsehurst XX.