

# Statement of Case

Appeal by Bloor Homes South West  
Land at Filands, Malmesbury

Against the non-determination by Wiltshire Council of:

*Outline planning application (all matters reserved) for  
residential development, associated infrastructure and  
public open space.*

Ref. 21/01641/OUT

June 2021

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# 1. Introduction, Context and Background

## Context and Background to the Appeal

- 1.1 This Statement of Case has been prepared by Turley on behalf of Bloor Homes South West, herein referred to as **‘the Appellant’**.
- 1.2 This **Statement sets out the Appellant’s** grounds of appeal relating to the failure of Wiltshire Council to determine an outline planning application for residential development on land at Filands Road/Jenner Lane Malmesbury (**‘the Appeal Site’**). The description of development is as follows:  
  
*“Outline planning application (all matters reserved) for residential development, associated infrastructure and public open space.”*
- 1.3 The outline planning application (LPA ref. 21/01641/OUT) was submitted to Wiltshire Council and validated 16 February 2021. The application was not determined within the statutory 13 week determination period.
- 1.4 This Statement of Case presents the case on behalf of the Appellant as to why the appeal should be allowed and planning permission granted. Where relevant, and in the absence of any putative reasons for refusal, if any are to be advanced, at this stage, reference is made to responses to the application made by statutory consultees and other interested parties.
- 1.5 A draft Statement of Common Ground (SoCG) has been prepared by Turley on behalf of the Appellant and has been submitted to Wiltshire Council for comments. The Appellant will seek to agree the contents of the SOCG in advance of the Inquiry, so as to reduce the scope of evidence required. An initial draft of the SOCG is submitted alongside this appeal. The Appellant will refer to any agreed SoCG in future proofs of evidence.
- 1.6 We request this appeal is heard together with another non-determination appeal on the **same site. This second appeal is submitted under S106B and relates to the Council’s** failure to determine an application under S106A to discharge a planning obligation on the site.

## Site and Surroundings

- 1.7 **The Appeal site (“the Site”)** comprises approximately 3.01 hectares (ha) of undeveloped land off Filands Road/Jenner Lane, situated immediately to the north east of Malmesbury.
- 1.8 A full description of the Appeal Site and its surroundings is set out in the Statement of **Common Ground (“SoCG”) for agreement with the Council.**

## Appeal Procedure Statement

- 1.9 Application of the criteria set out at Annexe K of the PINS Procedural Guide (**“the Procedural Guide”**) for Planning Appeals lead to the conclusion that a public inquiry is

the appropriate procedure for determining this appeal. Accordingly, this appeal should be determined by the public inquiry procedure, and the Appellant requests that it is. Our request is provided at Appendix 1 and is summarised as follows:

- The issues in relation to this case are complex and includes evidence on planning balance and compliance with the development, the second appeal under S106B against non-determination of a planning obligation discharge, and housing land supply matters which will need to be explained by witnesses;
- The correct application of the NPPF presumption in favour of sustainable development will need to be considered by the decision maker which will be best considered at inquiry;
- Detailed evidence on five year housing land supply will be presented which will include large amounts of information which considers the deliverability of sites **included in the Council's supply. Case law has confirmed that the degree of any** shortfall in housing land supply, how long this may persist, and any steps being taken to address the shortfall are all relevant to the weight that can be given to the most important policies for determining the application and to the benefits of housing delivery;
- Legal submissions need to be made in relation to this case including, but not limited to, case law on housing land supply. The issues covered by these submissions are complex and need to be heard orally at the inquiry;
- The case is complex because it includes one planning appeal, and one S106B appeal – it is envisaged the Inspector will need to determine whether the S106 obligation should be discharged on the Appeal site, and whether the proposals have provided the necessary early years education infrastructure;
- Given the above complexities, and the nature of the issues of this case, there is a need that the evidence be tested through formal questioning by an advocate.

## Planning History

- 1.10 The Appeal site sits within a residential context, adjoining existing housing developments on the southern and western boundaries, and adjoining a committed housing scheme to the north. In this regard the Appeal site is enclosed on three sides by committed housing development.
- 1.11 **As a result of Bloor Homes' control of the committed housing site to the north**, the Appeal site forms part of a wider masterplanned area. The wider masterplan area is split into two parcels, the northern and southern land parcels, which benefit from different respective planning histories and statuses.
- 1.12 The Appeal site falls within a wider area of land subject to an outline application under reference N/11/04126/OUT for 180 dwellings and provision of land for Primary School. The application was submitted by Gleeson Strategic Land in December 2011 and refused. The decision was appealed and allowed in March 2013. The Appeal site was identified as land safeguarded for a Primary School as part of this application.

- 1.13 Bloor Homes acquired the Appeal site from Gleeson and the land to the west (falling in with the 180 unit outline) was then subject to an application for Reserved Matters consent under reference 15/05015/REM for 180 Dwellings and associated works/infrastructure by Bloor Homes in May 2015 which was approved in October 2015. This scheme has subsequently been built out.
- 1.14 As referred to above, the appeal parcel is subject to a planning obligation that requires transfer to the Council with a covenant that the land be used solely for educational purposes. Bloor Homes have applied to Wiltshire Council to discharge this obligation following numerous historic attempts to transfer the land to the Council for use as a Primary School.
- 1.15 The Council did not proceed with the transfer of the land, and it is understood that this is because the land was not required for the provision of a school, with the Council opting to take a different approach to the provision of school places in Malmesbury. The Malmesbury Neighbourhood Plan (which we come on to) includes plans for provision of Primary School capacity in the town in line requirements, and did not state any requirement for the land at Filands.
- 1.16 Turley submitted an application on behalf of Bloor Homes to discharge this planning obligation under reference 20/05470/106. This application is still pending determination and an appeal against the failure to determine this related application under S106B has been submitted concurrently with this appeal.

## The Proposals

- 1.17 The appeal proposal seeks outline planning permission for new homes, public open space and associated infrastructure. The description of development is set out below:
- “Outline planning application (all matters reserved) for residential development, associated infrastructure and public open space.”*
- 1.18 All matters are reserved for subsequent approval. The precise number of units will be determined by a subsequent reserved matters application.
- 1.19 A more detailed description of the proposed development is included in the Statement of Common Ground.

## 2. Development Plan

- 2.1 A summary of the relevant planning policy documents is set out in the draft Statement of Common Ground. It is expected that the documents and relevant policies which set the context for the appeal will be agreed with Wiltshire Council ahead of the Inquiry.

### The Development Plan

- 2.2 Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that:

***“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise”.***

- 2.3 With respect to the Appeal **site the ‘Development Plan’ currently comprises:**

- (i) the Wiltshire Core Strategy (adopted January 2015);
- (ii) the Wiltshire Housing Site Allocations Plan (adopted February 2020);
- (iii) the Malmesbury Neighbourhood Plan (made in February 2015); and
- (iv) the **‘saved’ policies of the North Wiltshire Local Plan 2011** (adopted June 2006).

- 2.4 The following policies are considered relevant to the determination of this appeal:

- Wiltshire Core Strategy - Core Policy 1: Settlement Strategy;
- Wiltshire Core Strategy - Core Policy 2: Delivery Strategy;
- Wiltshire Core Strategy - Core Policy 13: Spatial Strategy for the Malmesbury Community Area;
- Wiltshire Core Strategy – Core Policy 3: Infrastructure requirements;
- Saved Policy H4 of the North Wiltshire Local Plan;

- 2.5 The Appellant will seek, through the SoCG, to agree relevant policies and seek to agree which are the most important policies for determining the application, relevant to paragraph 11 d) of the NPPF.

### The Status of the Development Plan

- 2.6 It is the proposition of the Appellant that the Development Plan, inclusive of the Core **Strategy, Site Allocations Plan, and Malmesbury Neighbourhood Plan** are **‘out of date’**, and that reduced weight should be attributed to their policies.

- 2.7 The Core Strategy was submitted to the Secretary of State for examination in July 2012, and components of its evidence base, including those on housing needs and housing market areas, pre-date the publication of the National Planning Policy Framework.
- 2.8 Following the eventual adoption of the Core Strategy in January 2015, the Chippenham SAP and Wiltshire SAP were produced, which included Policies essential to delivery of **the Core Strategy housing needs and ‘completed’ the Council’s spatial strategy.** Following a protracted process of preparation, the Site Allocations Plan was only recently adopted in February 2020.
- 2.9 Throughout this period, it has been known to the Council that a new Local Plan, based on up to date evidence, has been required. This is evidenced by Wiltshire Council (with Swindon Borough Council) triggering **the preparation of a Joint Spatial Framework (‘JSF’)** in 2016/2017 which commissioned up dated Strategic Housing Market and Economics needs assessments which were published in 2017.
- 2.10 It is only now that the Council have triggered a formal Local Plan Review, with the initial consultation running from January to March 2021.
- 2.11 The Malmesbury Neighbourhood Plan was published for referendum in 2014, and **‘made’ by Wiltshire Council in February 2015, very shortly after the adoption of the Core Strategy.**
- 2.12 The whole of the development plan therefore, and the policies and spatial strategy it contains, are based on a notably historic evidence base which has been acknowledged by the Council to be in need of review for almost five years.
- 2.13 The Council have only just initiated a review of the Local Plan and the LPR is years away from being in an advanced state. We note (with consideration to the guidance at para 33 of the Framework) the review is occurring more than five years after the adoption of the CS, and that the CS plan period runs only up to 2026 so is very nearly completed.
- 2.14 Furthermore, the LPR is being prepared under different national guidance (the 2019 NPPF and NPPG updates) to the Core Strategy, with significant changes to the housing and economic evidence base (a new evidence base, which utilises a standard methodology for assessing housing need). On this basis we conclude that there is a complete absence of an up to date development plan in this case, and that the Core Strategy, Site Allocations Plan, and Malmesbury Neighbourhood Plan should all be considered out of date with reduced weight attributed to them in the determination of this appeal.
- 2.15 The Appellant will consider the status of the development further, and the degree of consistency of the policies in the development with the NPPF, in accordance with paragraph 213 of the Framework, which will be relevant to the degree of weight the decision taken should give to those policies.

### 3. Material Considerations

3.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that determination must be made in accordance with the plan unless material considerations indicate otherwise.

3.2 The relevant material considerations in the case are considered to be as follows.

#### National Planning Policy Framework (NPPF)

3.3 The revised National Planning Policy Framework (NPPF) was published in February 2019. The NPPF sets out the Government's planning policies for England and how these are expected to be applied.

3.4 The revised NPPF confirms that the purpose of the planning system is to contribute to sustainable development (paragraph 7). Paragraph 8 of the NPPF states that the planning system has three overarching objectives in order to achieve sustainable development. The Appellant will address these objectives in its evidence.

3.5 The Appellant will address the following key chapters from the NPPF in detail in its evidence:

- Chapter 2 – achieving sustainable development;
- Chapter 5 – delivering a sufficient supply of homes;
- Chapter 6 – building a strong competitive economy;
- Chapter 8 – promoting healthy and safe communities;
- Chapter 9 – promoting sustainable transport;
- Chapter 11 – making effective use of land;
- Chapter 12 – achieving well designed places;
- Chapter 15 – conserving and enhancing the natural environment;
- Chapter 16 – conserving and enhancing the historic environment;
- Chapter 17 – facilitating the sustainable use of minerals; and
- Annex 1: Implementation.

#### Housing Land Supply

3.6 Wiltshire Council acknowledges that it is not able to demonstrate a supply of specific deliverable **sites sufficient to provide a minimum of five years' supply worth of housing** against local housing need.

3.7 The Council's latest Housing Land Supply Position Statement, published in December 2020, establishes that, at the 1st April 2019 base date, the County wide position is 4.56



years, a shortfall of 928 homes. Indeed, given the NPPF requirement for updates to be provided annually, the current published position, based on a 1st April 2019 base date also does not accord with the NPPF expectation.

- 3.8 The Housing Land Supply Position Paper also recognises that, even against the out of date Core Strategy requirement and its disaggregated approach to Housing Market Areas, the North and West Area (within which Malmesbury is located) would have a supply of only 4.29 years, a shortfall of 980 homes. This is relevant in the context of Core Strategy Core Policy 2 which states that land supply will be considered against the HMA distribution of homes by that Policy. It is also relevant in respect of considering proposals, such as that being determined in this appeal, which fall within an HMA where an acknowledged shortfall in homes to date exists, and where this shortfall is expected to rise in the next five years.
- 3.9 Overall, there is a significant five year housing land supply shortfall in the County, which appears to have emerged particularly in the Housing Market Area within which Malmesbury is located. Furthermore, the Appellant will present evidence to the inquiry to show that the actual level of deliverable housing land supply in Wiltshire is worse than that stated by the Council.
- 3.10 The implications of being not able to demonstrate an up-to-date five year housing land supply are significant and, as confirmed by paragraph 11 of the NPPF, without a five year housing land supply housing policies should be considered out of date and housing proposals should be considered in the context of the tilted balance set out at Paragraph 11(d) of the NPPF unless:
- i. the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed ; or*
  - ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.*

#### Deliverability

- 3.11 The Appellant will submit evidence to show that the Scheme is contribute towards delivery in the short term i.e. within five years and that the Appellant, Bloor Homes, as a major house builder, has a strong track record of delivery.

#### Local Plan Review 2036

- 3.12 Paragraph 48 of the NPPF allows weight to be given to policies in emerging local plans according to their stage of preparation, the extent to which there are unresolved objections to relevant policies and the degree of consistency with national policy.
- 3.13 The Council is currently in the process of preparing a new local plan (**“the Local Plan Review”**), which will set out the strategic context to guide development up to 2036. Given this plan is at the earliest stage of preparation, very limited weight can be attributed to it. Indeed there are not yet any draft policies within the emerging Plan to consider the appeal against.

## 4. Appellant's Case

- 4.1 Appendix J of the Guide sets out that where an appeal is against non-determination, the Appellant must address the areas that the Appellant considers most likely to **comprise the local planning authority's objections to the development proposed**. In **understanding what is most likely to comprise the LPA's objections to the development** we have reviewed the consultation responses received on the application which are as follows:

- Archaeology;
- Malmesbury Primary School;
- Education;
- North Wiltshire Swifts;
- Highways Development Control;
- Natural England;
- Public Protection;
- Urban Design;
- Trees;
- Drainage;
- Spatial Planning;
- Housing Team;
- Waste & Recycling;
- Landscape.

- 4.2 Of the above, objection has only been received from:

- Spatial Planning;
- Education;
- Urban Design;
- Drainage; and
- Ecology.

### *Urban Design and Drainage*

- 4.3 The appeal proposals are submitted in outline with all matters reserved for future consideration. Notwithstanding that the Appellant considers the indicative masterplan, parameter plans and Design and Access Development to provide a clear indication of how a high quality and well-designed residential development can be achieved on the Appeal site, it is our case that the comments raised on Urban Design (and suggested Policy conflict with CP57) are entirely matters that should be reserved for detailed consideration and that there is reason why an appropriate design solution cannot be agreed. We will seek to agree common ground with the Council on this matter.

- 4.4 The drainage comments have been addressed by additional submissions made to the Council on 13<sup>th</sup> May 2021. These documents are submitted with the appeal and included:
- Updated FRA/Drainage Strategy;
  - Updated Appendix D and E of the FRA/Drainage Strategy;
  - Covering technical note explaining the changes and responding to the points raised in the Wiltshire Council drainage response.
- 4.5 We will seek to agree common ground with the Council on this matter, and, like Urban Design we submit that the detailed drainage strategy is a matter reserved for consideration at the detailed stage.

#### Ecology

- 4.6 The Wiltshire Council Ecology response, dated 15 May 2021, states an objection, and that further information is required. The Officer did **not advance an objection ‘in principle’ to the appeal proposals**.
- 4.7 The objection focusses on two interconnected points:
- (i) The scheme would result in the loss of a Priority Habitat hedgerow, and the proposals should include provision of an appropriate replacement; and
  - (ii) In part due to the loss of the hedgerow, the scheme results in a biodiversity net loss.
- 4.8 Firstly, we disagree with the Council that the scheme must be amended to demonstrate a new specie-rich hedgerow/ecological corridor, and submit that this is clearly a matter for detailed consideration and is inappropriate for inclusion in an outline scheme for which all matters are reserved.
- 4.9 We accept the intention of the Ecology comments however, and consider there is scope for inclusion of a replacement habitat corridor on the Appeal site if this is deemed to be required at Reserved Matters stage.
- 4.10 We also accept the scheme results in an on-site biodiversity net loss, and to mitigate this net loss and provide overall net gain it is proposed that a financial contribution is made (included in the S106 HoTs) to Wiltshire Council for use to provide off-site biodiversity net gain.
- 4.11 The Council appear to agree with this in principle, but state they are in the process of developing a strategy for the provision of offsite net gain, however this may be ‘*some months away*’. It is not constructive or positive planning to advance an objection on the basis of biodiversity loss, when the Council themselves are working up a solution off-site in the immediate short term, that we have offered to contribute to. We would anticipate the period of time for the appeal to be determined, and then for a detailed scheme for the Appeal **site to be prepared, to exceed ‘some months’** and will therefore

continue to seek to agree and secure an obligation to deliver off-site biodiversity net gain with the Council.

- 4.12 If we are unable to secure the proposed financial obligation with the Council, we suggest the imposition a suitably worded condition to require the details of measures to secure a biodiversity net gain as part of the Reserved Matters application.
- 4.13 The financial contribution towards biodiversity offsetting or application of a condition would secure **'Biodiversity Net Gain'** and result in an overall positive effect on habitats, and in our view offset the loss of the hedgerow on the Appeal site.
- 4.14 In relation to the loss of the Priority Habitat hedgerow, the Ecological Impact Assessment EAD concluded the proposed development would avoid significant ecological harm included to protected species.
- 4.15 Furthermore, the Appeal site already benefits from a planning consent for a historically different use (a Primary School) which would due to its nature certainly result in the loss of the Priority Habitat hedgerow. In this regard the loss of a greenfield site (and associated loss of an important hedgerow) constitute harms which have already been established as acceptable through previous schemes on the Appeal site.
- 4.16 On balance we consider that, even including the loss of the Priority Habitat Hedgerow, weighing the adverse ecological impact arising from the appeal proposals against the off-site biodiversity net gain would result in an ecological benefit of some degree.
- 4.17 With regard to the position above, and based on the consultation responses received to date we consider that the Council has not raised any technical reasons why permission should be refused.
- 4.18 Based on the above findings and the remaining consultees responses where points of objection have been raised, it is envisaged that the likely reasons for refusal that will be advanced by the Council would therefore be as follows:
  - Matter 1: Accordance with the Development Plan, including Spatial and Community Area Policies – we expect the Council to raise a perceived conflict with Core Policies 1 'Settlement Strategy', 2 'Delivery Strategy', and 13 'Spatial Strategy for the Malmesbury Community Area' of the adopted Wiltshire Core Strategy.
  - Matter 2: Early Years Education – we expect the Council to raise an objection based on the perceived failure to deliver early years education infrastructure for the Town.
- 4.19 It is expected that any matters relating to planning obligations will be resolved in advance of the inquiry. A Section 106 Legal Agreement is expected to be agreed with Wiltshire Council ahead of the Inquiry. It is therefore expected that the appeal will focus on the perceived conflict with Core Policies 1, 2, 13, and the failure to deliver early years education on the Appeal site which the Appellant considers are not justified reasons for refusal. In addition, the Appellant will demonstrate that third parties have not raised any further reasons as to why planning permission should be refused.

- 4.20 This Statement of Case forms part of the appeal submission and sets out the case that will be presented at the Inquiry by expert evidence on behalf of the Appellant. The Appellant reserve the right to add to the matters contained in this Statement and to the list of documents set out.
- 4.21 These are considered in turn below and the Appellant reserves the right to address any further matters of implied reasons for refusal which the Council raise during the course of the Appeal.
- 4.22 The case presented below addresses the Appeal **proposal's** perceived conflict with the development plan and summarises further matters and material considerations that support a grant of outline planning permission for residential development on the Appeal Site.

#### Matter 1: Accordance with the Development Plan

##### *The Wiltshire Core Strategy*

- 4.23 It is the Appellant's case that proposed development is in accordance with Core Policy 1 '**Settlement Strategy**', which sets out the settlement strategy for Wiltshire. This development proposal is in line with the aims and aspirations of this policy, specifically in its requirement to deliver significant development at Market Towns (such as Malmesbury) including that which delivers new homes and jobs to help sustain and enhance local services and facilities and promote better levels of self-containment.
- 4.24 The development proposals are also considered to be in accordance with Core Policy 13 '**Spatial Strategy: Malmesbury Community Area**' which provides for approximately 1,395 new homes will be provided in the Malmesbury community area, of which about 885 should occur at the town of Malmesbury. Whilst it is acknowledged that the number of homes built and committed in Malmesbury will exceed this requirement, it is an approximate number with no ceiling.
- 4.25 Core Policy 13 also requires proposals in the Malmesbury Community area to demonstrate how the relevant issues and considerations listed at paragraph 5.73 of the Core Strategy will be addressed. The appeal scheme is not in conflict with these issues and considerations, therefore, the Appeals Proposals are also considered to accord with that aspect of the Policy.
- 4.26 In respect of Core Strategy Core Policy 2, the development assists with the delivery seeking a minimum of 42,000 homes across Wiltshire and a minimum of 24,740 homes in the North and West HMA. In this respect, the appeal proposals would accord with the first part of Core Policy 2. However, it is acknowledged that the Appeal site is outside of the defined settlement boundary for Malmesbury where the plan limits the type of development that is permissible. Those types of development at listed at paragraph 4.25 of the Core Strategy and it is acknowledged that the proposal is not one of those listed forms of development.
- 4.27 Given this, it is acknowledged that the Appeal Scheme would not accord with this part of the policy. However, the Appeal site is bound by built or committed development on three sides, and the Appellant considers the Appeal site is arguably in principle a

committed development in that it has benefitted from an implementable outline consent for a Primary School. **This is supported by the Council's own classification of the Appeal site in a recent emerging Local Plan Review consultation as a 'commitment'.**

*Saved Policies of the North Wiltshire Local Plan*

- 4.28 Whilst not specifically raised in the Spatial Policy comments, there is potential that the Council might also cite saved Policy H4 of the North Wiltshire Local Plan as a further policy where a perceived conflict is said to arise. Saved Policy H4 of the North Wiltshire Local Plan provides for new dwellings in the open countryside where these are related to agricultural or forestry worker homes or where the new homes is a replacement dwelling. The Appellant's acknowledge that the Appeal Scheme does not propose one of these limited forms of development permissible in the open countryside and so no support for the development can be garnered from saved Policy H4.

*The Malmesbury Development Plan*

- 4.29 The MNP does not include any policies which seek to prohibit or restrict residential development outside settlements boundaries (which were reviewed and set by the Site Allocations Plan). In this respect, there is no explicit conflict with any part of the MNP in **the Appellant's view**.
- 4.30 Should the Council identify any perceived conflict, then the Appellant will address that through its inquiry evidence.

*Overall Accordance with the Development*

- 4.31 Overall, given the Appeal site is currently outside of, but adjoining, the settlement boundary, and is not one of the limited forms of development supported in the open countryside, it is acknowledged that there is some policy conflict with Core Strategy Core Policy 2 and also with saved Policy H4 of the North Wiltshire Local Plan.
- 4.32 **Nevertheless, it is the Appellant's view** that the level of policy conflict is low, that the degree of actual planning harm as a result of this policy conflict is very limited and there are other materials considerations, set out later in this Statement of Case, which indicate that planning permission should be granted.
- 4.33 Furthermore, the weight to be given to the identified conflict with policies in the light of other considerations such as the acknowledged absence of a five year housing land supply, together with a consideration of the level of actual planning harm that arises as a result of policy conflict, is considered under the planning balance section later in this statement of case. Ultimately, the main purpose of these policies are to ensure that the required level of growth is delivered in the plan period and to see this achieved in a sustainable manner. **It is the Appellant's case that**, in the acknowledged absence of a sufficient deliverable housing supply, more development sites therefore need to be identified, particularly on suitable and deliverable sites in sustainable locations, such as Malmesbury, and so reduced weight to the most important policies should be applied as, to do otherwise, would frustrate otherwise sustainable development.

- 4.34 Beyond our findings above that the Appeal Proposals would accord with Core Policies 1 and 13, and would accord with part of Core Policy 2, the proposal is also in accordance with a suite of other policies within the adopted development plan, including, but not limited to, CP43 Affordable Housing, CP41 Sustainable Construction, CP45 housing type and tenure, CP50 Protecting Biodiversity, CP51 Landscape, CP52 Green Infrastructure, and CP60 Sustainable Travel.

Matter 2 Education - the necessary early years education infrastructure.

- 4.35 As we have stated we request this appeal is heard together with another non-determination appeal on the same site (application reference 20/05470/106) as the issues are fundamentally interlinked. This second appeal is submitted under S106B and **relates to the Council's failure to determine an application under S106A to discharge a planning obligation on the Appeal site.**
- 4.36 The planning obligation in questions relates to the provision of a Primary School on the Appeal site, and **relates to the Council's Education objection to this application, which is repeated here:**

*"We note that this application doesn't include a site for a nursery, As previously advised in our consultation response to application 20/05470/106, a site of at least 0.4ha is required.*

- There is no spare capacity in existing early years provision in Malmesbury.*
- In addition to our requirement for a 0.4 has nursery site, we also require a full developer contribution towards the 9 places that the proposed development would generate a need for.*
- As per the calculations in the table shown above, this is £157,698 towards the development of Early Years provision in Malmesbury.*
- The financial contribution would be subject to indexation and along with the appropriate land, secured via a Section 106 Agreement, to which the Council's standard terms will apply.*
- However, the lack of a nursery site being offered here, means that we have no alternative but to object to this application, as it fails to deliver the necessary early years education infrastructure." (Our emphasis)*

- 4.37 The Council agree that there is no need for a Primary School on the land, but maintain that the land still has an obligation to provide educational uses. The Council now consider that there is a requirement for is a 0.3ha nursery/early years educational site.

- 4.38 **The Appellant's** case on this matter is as follows:

- The planning obligation no longer serves a useful purpose and should be discharged (the subject of the associated S106B appeal);

- As a result, the Council have no reasonable grounds to object to this application on the basis that there is a requirement to provide educational uses on the land;
- In any case there is not suitable evidence of demand for a 0.3 nursery site on the Appeal site, with known more sustainable alternative sites in the Town (see Malmesbury Primary School Response to application 21/01363/OUT, 17<sup>th</sup> March 2021, Appendix 2);
- **The appeal proposals accord with Core Strategy Policy 3 ‘Infrastructure requirements’;**
- The appeal proposals provide financial contributions towards early years, primary and secondary provision, which will be secured through a S106 agreement and satisfactory address the appeal proposals contribution to local infrastructure.

4.39 **On this basis, the Council’s objection that** the necessary early years education infrastructure has not been provided on the Appeal site should not form a reason to dismiss the appeal, and the associated S106B appeal should be allowed.

#### Other Material Considerations

*The National Planning Policy Framework and the Presumption in Favour of Sustainable Development.*

- 4.40 An important material consideration for this Appeal includes the National Planning Policy Framework (2019). This includes **the Government’s** objective to, firstly, significant boost the supply of homes and, secondly, the requirement **for Council’s to** demonstrate an up-to-date housing land supply in accordance with paragraph 73 of the NPPF.
- 4.41 In addition, paragraph 11 of the NPPF applies the presumption in favour of sustainable development to proposals where the policies which are the most important for determining the application are out of date. Footnote 7 confirms that, for applications involving the provision of housing, this includes situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites.
- 4.42 Wiltshire Council acknowledge that it is not able to demonstrate a supply of specific **deliverable sites sufficient to provide a minimum of five years’ supply worth of housing** against local housing need (with a significant shortfall of almost 1,000 homes).
- 4.43 In addition, the development plan itself is also **‘out of date’ (NPPF definition) with the** Wiltshire Core Strategy being more than five years old and acknowledged to be in need of full review. This renders the Policies of the Site Allocations Plan and Malmesbury Neighbourhood Plan out of date, as they are predicated on meeting and delivering the strategic policies of the Core Strategy.
- 4.44 For these reasons, any policies cited by the Council as areas of maintained objection to the proposals must be deemed as the most important policies for determining the appeal and so should be deemed to be out of date. Whilst the degree of weight to be given to out of date policies is a matter for the decision taker, it is the Appellant’s case



that reduced weight should be afforded to the most important policies, which include Core Policies 1, 2 and 13 of the Core Strategy. In the acknowledged absence of a five year supply of housing sites, more homes need to be delivered and, if full weight continued to be applied to these policies, then this would continue to frustrate the delivery of all sites outside settlement boundaries, notwithstanding that they might otherwise be considered sustainable in all other respects.

- 4.45 Importantly, the implications of being able to demonstrate an up-to-date five year housing land supply are significant and, as confirmed by paragraph 11 of the NPPF, without a five year housing land supply housing policies should be considered out of date and housing proposals should be considered in the context of the tilted balance set out at Paragraph 11(d) of the NPPF unless:

- iii. *the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed ; or*
- iv. *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.*

- 4.46 There are no policies within the NPPF that would provide a clear reason for refusing the development proposed.

- 4.47 **As such, the appeal proposals should be considered against the ‘tilted balance’ provided** by the presumption in favour of sustainable development where planning permission should be granted unless the adverse effects of doing so would significantly and demonstrably outweigh the benefits of the proposals.

- 4.48 A further consideration is paragraph 14 of the NPPF which states that, in situations where the presumption applies to applications involving the provision of housing, the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits, only provided the neighbourhood plan became part of the development 2 years or less before the date on which the decision is made. The Malmesbury Neighbourhood Plan became part of the **development more than two years ago and cannot therefore be considered ‘up to date’** in that it can prohibit the application of the presumption in favour of sustainable development at paragraph 11d. Notwithstanding this, the MNP does not include any policies which seek to prohibit or restrict residential development outside settlements boundaries. In this respect, there is no explicit conflict with any part of the MNP in the **Appellant’s view**.

- 4.49 **The Appellant’s evidence will expand on our case that that the appeal proposals will** meet the policy objectives of the NPPF set out above, alongside a number of other policy objectives. Ultimately, **the Appellant’s case is that, when considered against** paragraph 11 of the NPPF, there are no adverse effects that significantly and demonstrably outweigh the benefits in this case. **The Appellant’s overall case on the** planning balance is set out below.

## Planning Balance

### *Conflict with the Development Plan*

- 4.50 In this case, it is acknowledged that there is some overall conflict with the development plan given that the Appeal site lies outside of the defined settlement boundaries contrary to Core Policy 2 and Saved Policy H4 of the North Wiltshire Local Plan.
- 4.51 However, other than suggesting that the development would not accord with the **Council's plan led approach, the only harms** that the Council advances in the comments that have been received, is the imprudent irreversible loss of greenfield site, and perceived loss of public confidence in the plan led system.
- 4.52 **The Appellant's case is this is not reason for refusing planning permission** – Malmesbury is market town and identified sustainable location for growth in the Core Strategy. It is a logical location for to accommodate additional growth in the absence of a five year supply. Whilst Malmesbury may have delivered the growth expected at the town for the plan period to 2026, this is a minimum target and not a ceiling and the Council as advanced no concerns, beyond early years education, that the proposals cannot be suitably accommodated within the town or that there will be any undue pressure on local services or facilities.
- 4.53 Core Policy 2 and Saved Policy H4 are both considered to be policies that are most important for determining the Appeal and so are out of date (by virtue of paragraph 11 d). Whilst the degree of weight to be given to out of date policies is a matter for the **decision taker, it is the Appellants' case that reduced weight should be afforded to these policies**. In the acknowledged absence of a five year supply of housing sites, more homes need to be delivered and, if full weight continued to be applied to these policies, then this would continue to frustrate the delivery of all sites outside settlement boundaries, notwithstanding that they might be considered sustainable sites in all other respects.
- 4.54 The overall conflict with the development plan is limited and, based on the reduced weight to be afforded to these policies, the level of harm resulting from this limited conflict is a matter that should be afforded limited weight in the overall balance.

### *Early Years Provision*

- 4.55 The Appeal Site is not the most appropriate location to provide a new nursery in the town. There is an alternative, more suitable location for such provision at Malmesbury Primary School, as evidenced by the letter from the 17<sup>th</sup> March 2021 at Appendix 2. **Financial contributions towards the creation of new early years' places at Malmesbury Primary School** can be secured through the S106 to be completed as part of the Appeal. On that basis, any objection from the Council regarding the provision of early years places should be afforded no weight **in the Appellant's view**.

### *Ecology*

- 4.56 **The appeal proposals would result in the loss of a 'Priority Habitat' hedgerow.** On balance we consider that, weighing this limited adverse ecological impact against the

off-site biodiversity net gain (the calculation for which includes the loss of the hedgerow), would result in an ecological benefit.

#### *Other Adverse effects*

- 4.57 Beyond the limited identified conflict with the development plan, there are very limited other adverse effects. There are no objections on landscape impact; no objections on heritage; no objection on noise, air quality or ground conditions. There is no flood risk objection and we anticipate drainage concerns to be addressed (which we will seek to confirm through the SoCG).

#### *The Benefits of the Appeal Proposals*

- 4.58 The Appellant will present evidence to show that the **development's potential to contribute to the Council's housing land supply in the next five years is a material** benefit that should be afforded significant weight in the overall planning balance.
- 4.59 There are also other significant benefits, including the delivery of affordable homes and economic, social and economic benefits that are material to the overall planning balance and will be fully detailed in evidence.

#### *Overall Planning Balance*

- 4.60 In this case, it has been established that paragraph 11 d) ii. of the presumption in favour of sustainable development is engaged whereby planning permission should be granted unless any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in this NPPF taken as a whole.
- 4.61 There are no adverse impacts arising from this development that would significantly and demonstrably outweigh the benefits. Indeed it is clear in this case that the benefits of the proposal outweigh the adverse effects and so even if the presumption in favour of sustainable development were not engaged then, in accordance with S38(6) the Planning and Compulsory Purchase Act 2004, there are important material considerations that exist in this case that indicate that planning permission should still be granted.

## 5. Third Party Representations

- 5.1 The Procedural Guide also requires the Appellant to take due account of any representations received from interested people by the local planning authority at the application stage.
- 5.2 The Appellant reserves the right to submit evidence on issues raised by third parties during the Appeal process.

## 6. Planning Conditions and S106 Obligations

### Planning Conditions

- 6.1 The parties will seek to reach agreement on planning conditions in advance of the inquiry and an update will be provided in due course.

### Section 106 Obligations

- 6.2 Proposed heads of terms for a S106 agreement are provided to the Council by Turley. These are set out in the draft SoCG and summarised here:

- Affordable Housing – 40% in accordance with Core Policy 43 with 60% Affordable Rented homes and 40% Shared Ownership;
- Public Open Space – management and monitoring;
- Education – contributions to Early Years, Primary and Secondary education places;
- Public Right of Way – improvement of MALM8 to 3m wide shared use path with lighting. A contribution of £100K to make improvements to MALM8 footpath that is located outside the boundary to the south, also 3m wide shared use path with lighting. This will link to the path at Lacemakers Road to the south;
- Bus Stops – contribution towards bus stops on the B4014;
- Biodiversity Offsetting - financial contribution towards off-site habitat creation/enhancement;
- Travel Plan – implementation of Residential Travel Plan obligations;
- Waste and Recycling - provision of containers for waste and recycling.

- 6.3 It is proposed that the obligations will be secured by way of a S106 agreement however if it does not prove possible to agree this with the Council, a unilateral undertaking will be provided. The Appellant will provide the first draft to the Council for consideration early in the process to ensure there is sufficient time for negotiation and completion, as necessary. The intention will be to provide the agreed draft 10 days in advance of the inquiry, as required by the Procedural Guide.

## 7. Summary and Conclusions

- 7.1 In accordance with paragraph 11 of the NPPF, it will be demonstrated that there are no material adverse impacts arising from the Appeal proposal that would significantly and demonstrably outweigh the benefits that the development will deliver.
- 7.2 As will be set out in evidence there are significant environmental, social and economic benefits associated with the Appeal proposals. The Appellant will demonstrate that the benefits associated with the development outweigh any alleged harms and that permission should be granted when having regard to other material considerations as well as the level of support provided for the proposals against the development plan and the NPPF when taken as a whole.
- 7.3 In summary, the Appellant considers the following matters to be central to this Appeal:
- (a) **The Government's top planning priority is to increase** the delivery of new housing - and this is reflected by the clear thrust and emphasis of the NPPF;
  - (b) There is a substantial outstanding need for market and affordable housing in Wiltshire;
  - (c) Despite this level of urgent need, there is a significant shortfall of supply and particularly within the HMA which Malmesbury is located in;
  - (d) Malmesbury represents a very sustainable location for new housing development and the Appeal Site has very good access to a range of local services, facilities, and employment and the proposals will support the maintenance and enhancement of these;
  - (e) The proposed development is based around parameter plans and a concept masterplan which demonstrate how the appeal proposals could be comprehensively developed in a sensitive and well considered manner for new homes to meet the needs of the local area;
  - (f) The appeals proposals have been subject to very limited objection from both statutory consultees, and members of the public;
  - (g) The planning obligation to provide a primary school on the Appeal site should be discharged, and any objection from the Council in relation to lack of provision of educational land does not form a justified reason for refusal;
  - (h) None of the issues identified by the Council represent significant adverse impacts; and certainly none that could be considered to outweigh the benefits of the Appeal proposals and the other material considerations that weigh heavily in support of granting approval; and
  - (i) Overall the Appeal proposals represent sustainable development in the context **of the NPPF, including the three 'dimensions' set out at paragraph 8, and when** considering the level of support provided by the Development Plan as a whole.

Where there is minor conflict with existing Development Plan policies, this is very clearly outweighed by other material considerations.

- 7.4 **The Appellant's assessment of the planning balance overall therefore is that** permission should be granted and a robust case in favour of allowing the Appeal will be made to the Inspector at an inquiry.
- 7.5 As such, for the reasons set out in the Statement of Case, which will be expanded on through the submission of evidence to the inquiry, the Inspector will be respectfully requested to allow the appeal and grant planning permission for residential development on the Appeal site.

# Appendix 1: Procedure Statement

## CRITERIA FOR DETERMINING THE PROCEDURE FOR PLANNING APPEALS

1. The Planning Inspectorate has the power (on behalf of the Secretary of State) to determine the appeal method for appeals made under section 78 of the TCPA 1990 by reference to specified criteria.
2. The relevant criteria for determining the procedure for planning appeals is set out in Annex **K of the Planning Inspectorate's Procedural Guide: Planning appeals – England** (March 2021, Version 14).
3. In accordance with the procedural guide, an inquiry will be appropriate if:
  - (a) There is a clearly explained need for the evidence to be tested by formal questioning by an advocate; or
  - (b) The issues are complex; or
  - (c) The appeal has generated substantial local interest to warrant an inquiry as opposed to dealing with the case by a hearing.
4. **The use of the word 'or'** clearly indicates that only one of these criteria is required in order to justify the use of the inquiry procedure.

## APPLICATION OF THE CRITERIA

5. **The Appellant's position is that the first two criteria are relevant to this Appeal. The Appeal** is against the non-determination of an outline application, which we submit should be heard alongside another appeal made under S106B against the non-determination of an application to discharge a planning obligation on the same site, also made by Bloor Homes South West.
6. **Having regard to the Council's position and consultation responses, the Appellant considers** that the following areas are in contention between the parties and will require detailed evidence to be produced by each party in relation to their respective positions and tested under cross examination:
  - (a) Complexity – one planning appeal, and one S106B appeal;
  - (b) Planning Policy – conflict with the development plan, scale of development, principle of development, need for the development;
  - (c) Five Year Housing Land Supply;
  - (d) Whether the S106 obligation should be discharged on the site, and whether the proposals have provided the necessary early years education infrastructure.
7. The Appellant intends to use two witnesses to advance its case in respect of planning and housing land supply.



8. The Appellant considers that evidence and cross-examination will last approximately four days. This exceeds the single day (or two days in exceptional circumstances) reserved for hearings.

## CONCLUSION

9. The Appellant requests that the Appeal is determined by way of the inquiry procedure.

10. The Appellant considers that the written representations procedure and the hearing procedure would be inappropriate for this Appeal, having regard to the applicable guidance. There is a real risk that the relevant issues will not be properly scrutinised without the opportunity for the evidence to be tested through formal questioning by an advocate.

Appendix 2: Malmesbury Primary School  
Response to Application  
21/01363/OUT

	<b>Online Comments</b>
Application No:	21/01363/OUT
Comment:	<p>Malmesbury Primary School (MPS) has been looking at the possibility of providing an 80 place nursery school on the Malmesbury Primary School site for some while. To date we have been involved in detailed discussions with an end user and their specialist developer and have recently submitted an application to the Dept of State for Education, seeking their approval for the release of one third of an acre within the school boundary for the development.</p> <p>As far as MPS is concerned we would much rather see any new nursery school provision on the school site itself, rather than up at Filands. We have previously made our feelings clear to Wiltshire Council and representatives of the Town Council and we acknowledge that a new nursery is very much needed in Malmesbury. Creating such a nursery has been part of the Governors' vision for the school since early 2018. This vision was developed with parents, pupils and staff and it is specifically to have a nursery on the school site.</p> <p>The siting of the nursery is crucial to its utility to the people of Malmesbury, as well as to its academic and commercial success. The school site will provide the following benefits which we feel could not be realised at Filands:</p> <ol style="list-style-type: none"> <li>1) Parents and carers could drop off and collect children of school and pre-school ages at the same place. Having the pre-school / nursery in the same place will save time and reduce traffic flows around the town. The central location of our school is regarded as ideal by a nursery school provider and their prospective developer, with whom we are already in detailed negotiations.</li> <li>2) The school staff would be able to support the venture by helping to train pre-school staff. Training is a significant issue for all pre-schools. The current position in Malmesbury is that we have to liaise with a large number of pre-school providers, all at some distance from the school, making it impossible to have a significant impact in any one place. If our Early Years staff could become regular visitors to the pre-school then they could provide expert training to ensure children are on the correct pathway to success once they start school.</li> <li>3) The crucial transition into school for young children would be greatly enhanced. A pre-school on site would enable children to see the school buildings every day, meet older children outside and be welcomed into the school regularly to meet teachers, form an audience for plays, and generally become familiar with the school. This would greatly help them to feel secure about starting school.</li> <li>4) The school staff would gain a thorough knowledge of the needs of children who are coming. A preschool on site would present much better opportunities for extended professional dialogue, to repeatedly observe children before they join us, to provide expert advice, particularly on special educational needs, and help ensure that the children are 'ready to learn' when they move into Reception.</li> <li>5) School resources could be shared for mutual benefit. For instance, pre-school sports days could take place on our playing field; our kitchens could provide food; our hall could be used for putting on big events or meetings; the play therapist who works on our site could also work with children from the pre-school.</li> </ol>

	<p>6) Ultimately the pre-school has to be a commercial as well as an educational success. We have recently suffered the closure of two local providers, largely for financial reasons, and it is well-known that the sector struggles to be financially viable. A pre-school on an alternative site risks commercial failure.</p> <p>For all these reasons, building on our site is manifestly the best option for the people of Malmesbury. The school's governors, staff and community would be extremely disappointed to see this long-awaited facility sited in a sub-optimal position. The siting of a nursery in a lesser location than that provided by the school cannot in our opinion be worth it.</p>
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Address:	Malmesbury Primary School Tetbury Hill Malmesbury SN16 9JR
Date:	17 March 2021

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