

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*Tax – Inheritance tax – 6.39 acres of agricultural land – residential development potential – window of opportunity during a period of housing land supply shortage – emerging development plan – access and ecological constraints – glut of development sites – whether a “bottom up” or “top down” valuation approach appropriate – open market value determined at £590,000*

IN THE MATTER OF A NOTICE OF REFERENCE OF AN APPEAL UNDER  
SECTION 222 OF THE INHERITANCE ACT 1984

BETWEEN:

SIMON DAVID THOMAS FOSTER

Appellant

and

HM REVENUE AND CUSTOMS

Respondent

Re: 6.39 acres of land,  
Wolverhampton Road,  
Shifnal,  
Shropshire,  
TF11 9HA

Before: A J Trott FRICS

Sitting at: The Royal Courts of Justice, Strand, London WC2A 2LL

on

29-31 May 2019

David Taylor, instructed by mfg Solicitors, for the appellant  
Mark Westmoreland Smith, instructed by HMRC Solicitors' Office for the respondent

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No cases are referred to in this decision.

## DECISION

### Introduction

1. The appellant, Mr Simon Foster, is the executor of the estate of Susan Elizabeth Foster, who died on 26 August 2013. At the date of death her estate included 6.39 acres of unregistered freehold agricultural (pasture) land at Wolverhampton Road, Shifnal, Shropshire, TF11 9HA (“the Site”). There was a dispute between the appellant and HM Revenue and Customs (the respondent) about the open market value of the Site for inheritance tax purposes. The appellant, upon the advice of Savills, valued it at £191,700 while HM Revenue and Customs, upon the advice of the Valuation Office Agency, valued it at £850,000.

2. It was not possible to resolve the valuation dispute and so on 5 July 2017 the respondent issued a Notice of Determination under section 221 of the Inheritance Tax Act 1984 (“the 1984 Act”) in which it determined the open market value of the Site at the date of the deceased’s death (the valuation date) at £850,000 having regard to section 160 of the 1984 Act.

3. Following an unsuccessful review, Mr Foster appealed against this determination on 10 May 2018 under section 222(4A) of the 1984 Act.

4. There are two issues concerning the assessment of the open market value of the Site:

- (i) Its residential development potential at the valuation date; and
- (ii) The correct valuation approach.

5. Mr David Taylor of counsel appeared for the appellant and called Mr Simon Foster as a witness of fact; Mr Michael Washbourne BSc, MRICS, Director of Savills (UK) Ltd, as an expert planning witness; and Mr Clive Beer MRICS, MCI Arb, Director of Savills (UK) Ltd, as an expert valuation witness.

6. Mr Mark Westmoreland Smith of counsel appeared for the respondent and called Ms Helen Howie MA, MRTPI, a consultant at Berrys, as an expert planning witness; and Mr Geoffrey Coster BSc, MRICS, FAAV, a technical adviser with the Valuation Office Agency Chief Valuer Group, as an expert valuation witness.

### Facts

#### *The Site*

7. The Site is located at the southern edge of Shifnal, a commuter town approximately five miles east of Telford. The site has access in its south-west corner

to Park Lane, a narrow residential road. To the north, between the Site and the town's defined development boundary, was a detached house known as The Uplands and St Andrew's Primary School. The Uplands was developed residentially after the valuation date by Redrow Homes (Midlands) Ltd ("Redrow"). To the east of the Site, fronting the A464 Wolverhampton Road, is a large detached house known as Beech House and to the south is agricultural land.

### *Planning*

8. The local planning authority is Shropshire Council ("the Council"). At the valuation date the adopted development plan was (i) the Shropshire Core Strategy (adopted March 2011) ("the CS") and (ii) the Bridgnorth District Local Plan (adopted July 2006) ("the Local Plan").

9. The Site is located outside the Shifnal development boundary defined in the Local Plan Proposals Map and consequently major built development is contrary in principle to policies CS5 and Local Plan S4. The Site is shown as "safeguarded land", i.e. land removed from the Green Belt and identified as having the potential to meet future development needs beyond the plan period (i.e. beyond 2026) if required. Within the plan period safeguarded land is protected from built development as though it were in the Green Belt.

10. At the valuation date the Council had recently granted (22 March 2013) outline planning permission for 400 dwellings on a 44.5 acre site of safeguarded land to the north of Haughton Road, Shifnal. This was outside the designated development boundary.

11. Two planning applications had been submitted but not determined at the valuation date for the residential development of safeguarded land. On 31 July 2013 an outline planning application was made for the development of up to 200 dwellings on a 25 acre site at Coppice Green Lane outside the development boundary to the north east of Shifnal. Planning permission was granted on 16 October 2014. On 2 August 2013 a detailed planning application was made for the development of 115 dwellings on a 10.9 acre site at Aston Street outside the development boundary to the east of Shifnal. Planning permission was granted on 24 March 2014.

12. Two more planning applications for the residential development of safeguarded land were submitted after the valuation date. On 11 December 2013 a detailed planning application was made by Redrow for the development of 66 dwellings on The Uplands, the 9.1 acre site located between the Site to the south east and St Andrew's Primary School to the north west. Planning permission was granted on 15 October 2014. On 2 January 2014 an outline planning application was made for the development of up to 100 dwellings as part of a mixed development on a 12.3 acre site at Stanton Road, immediately to the north of the Aston Street site to the east of Shifnal. Planning permission was granted on 3 February 2016.

13. The Council's Core Strategy set out Shropshire's development needs for the period 2016-2026 and formed the First Development Plan Document ("DPD") of the Shropshire Local Development Framework. The second DPD was the Site Allocations and Management of Development DPD ("SAMDev") which was put out for consultation in 2010. The Site was shown, together with other land to the south and east, as a "site for consideration". In March 2012 the Council published its second-stage consultation identifying preferred options. Neither the Site nor The Uplands (immediately to the north) was identified as a preferred housing site.

14. The third-stage consultation document was the SAMDev Revised Preferred Options published in July 2013. This showed the Site combined with The Uplands as a preferred option (reference SHI002) for a residential development of 160 dwellings on 18.8 acres.

15. The final stage of the SAMDev planning exercise was the Pre-Submission Draft (Final Plan) published in March 2014. Neither the Site nor The Uplands was shown as an allocated housing site.

16. Section 39 of the Planning and Compulsory Purchase Act 2004 requires a Sustainability Appraisal ("SA") to be carried out on all DPDs produced by a local planning authority. This requirement included the SAMDev Plan. The Council's SAMDev Technical Background Paper, March 2014 identified three stages in the SA process. Stage 1 eliminated sites which had serious constraints. Stage 2 was in two parts. Stage 2a assessed the suitability of sites using criteria derived from SA objectives used for the policies in the Core Strategy and SAMDev. Stage 2b presented general information about each site and assessed planning considerations and consultation responses. It recommended whether a site should be a preferred option.

17. Site reference SHI002 (which includes the Site) progressed to a Stage 2 assessment. The results of Stage 2a were summarised<sup>1</sup> as:

"The Stage 2a assessment (sustainability appraisal) scores the site negatively for access to bus routes and open space, together with potential impact on the protected trees and agricultural land quality. The site scores positively for access to the Primary School, low landscape sensitivity and flood risk. The site is outside the Development boundary, but is Safeguarded Land within the Green Belt. Overall sustainability of the site is judged to be fair."

18. The results of the Stage 2b assessment were reported in the SAMDev Pre-submission Draft: Shifnal Housing Sites Assessment, March 2014. Site reference SHI002 was not considered to be a realistic site, despite having been viewed

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<sup>1</sup> See Shropshire SAMDev Plan Sustainability Appraisal Report: Submission July 2014 at Appendix E (preferred options site assessment) and Appendix G (revised preferred options site assessment); and Shropshire SAMDev Plan, Adopted Plan Sustainability Appraisal Report, December 2015 at page 333.

favourably by the Inspector during the Bridgnorth Local Plan Inquiry in 2006, because its development was significantly constrained by the potential for harm to the Great Crested Newts that were known to be present and which are an EU protected species. The site assessment summary concluded that the development of site SHI002 was not supported unless no alternatives were available.

19. The Stage 2b site assessment summary in the Pre-submission Draft repeated the wording used in the Stage 2a assessments that had appeared in the Preferred Options and Revised Preferred Options drafts (see paragraph 17 above). But unlike those earlier reports and the later Adopted Plan Report of December 2015, the version in the Pre-submission Draft described the overall sustainability of site reference SHI002 as “poor” rather than “fair”. No explanation of this change was given in the document.

20. Part of the Stage 2b site assessment was concerned with “Inherent Landscape Character”. This was informed by landscape and capacity studies undertaken previously. The two source documents included in the evidence were the Bridgnorth Landscape Sensitivity and Capacity Study, March 2008 and the Shropshire Landscape Typology, September 2006. These documents show what became site reference SHI002 as two separate areas: BNSn5-129 is The Uplands site, and BNSn5-130 is the Site. The Bridgnorth study defines the zone landscape sensitivity of site 129 (Uplands) as “high/medium” and that of site 130 (the Site) as “medium”. Both sites are said to have zone landscape capacity for housing which is “medium/low”. These assessments are adopted, with further detail, in the SAMDev Pre-submission Draft Stage 2b assessment.

#### *Strategic Housing Land Availability Assessment (“SHLAA”) Reports*

21. The latest SHLAA report at the valuation date was the Shropshire SHLAA Final 2009 update published in August 2010. Site reference SHI002 was identified as a site outside a settlement. Such sites were placed into one of three categories: (i) currently available; (ii) rejected but with future potential; and (iii) rejected. SHI002 was in category (ii), i.e. it was a site “assessed as being contrary to existing policy but as having future potential for housing provision, subject to further consideration through the appropriate plan making process, as part of the Shropshire LDF.”

22. The SHLAA was updated in March 2014 and was prepared in the context of the adopted Core Strategy in 2011 and the three stages of consultation in the SAMDev process (March 2010, March 2012 and July 2013). Site reference SHI002 was shown on the Shifnal summary map as an “accepted site”, i.e. a site which was currently suitable, available and achievable.

#### *5-year Housing Land Supply*

23. In the development management report concerning the proposed development of land north of Houghton Road, Shifnal, submitted on 26 February 2013 to the Council’s South Planning Committee, the case officer stated at paragraph 6.1.3 that:

“Shropshire Council published an updated 2012 Five Year Housing Land Supply Statement for Shropshire and Shrewsbury on 1st February 2013... The assessment shows that for 2012, at the current time, there is a 4.1 years housing land supply for Shropshire as a whole...”

That was the most recent assessment of 5-year housing land supply as at the valuation date. Since the Council did not have a 5-year supply of deliverable housing sites at that time the local plan policies relating to housing were deemed to be out of date by virtue of paragraph 49 of the National Planning Policy Framework (March 2012) (“NPPF”). In those circumstances the NPPF’s tilted balance or presumption in favour of sustainable development applied.<sup>2</sup> A planning application for the residential development of the Site made at the valuation date would therefore have been considered by reference to the tilted balance.

24. An updated statement was published on 1 September 2013 (amended on 20 September 2013). This showed 4.95 years housing land supply for Shropshire. A further review on 12 August 2014, based on data to 31 March 2014, showed 5.47 years supply.

#### *Screening Opinion*

25. On 18 December 2012 a screening opinion was sought from the Council about whether the proposed development of 160 houses at the Uplands (including the Site) would require an environmental impact assessment (“EIA”). The Council replied on 21 January 2013 that the proposed development did not require an EIA.

#### *Joint venture agreement*

26. In March 2004 the deceased and her husband, Mr David Foster, entered into a joint venture agreement (“JVA”) with Newpool Construction Ltd (“Newpool”) relating to the Site. This was referred to as “the Development Site” in the JVA. Newpool owned The Uplands which joined the Site to the north. The duration of the agreement was six years and it was renewed in materially the same terms by the deceased for a further six years on 7 April 2010.

27. It was stated in the recitals that:

“The parties intend to jointly promote the Development Site and use all reasonable endeavours to obtain planning permission for residential and ancillary uses and either procure development of the Development Site in their own right or sell the same for development”.

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<sup>2</sup> NPPF paragraphs 11 to 16

The agreement was “intended to regulate the position and relationship of the parties generally to exploit the development potential of the Development Site in a practical and efficient and profitable manner.” The scope of the JVA was contained in, and limited to, the objects set out in clause 2.2. These included:

“2.2.1 To promote the Development Site for residential development either alone or in conjunction with other land so as to maximise the value of the Development Site so far as commercially viable and within the bounds of good planning practice.”

28. The objects also included the acquisition of additional land or interests “as an augmentation of the Development Site” (clause 2.2.3) and the sale of the Development Site and payment of the proceeds of sale to the parties in agreed percentages (clause 2.2.5). These percentages were 30% to Newpool and 70% to Mrs Foster (clause 1.1).

29. Newpool agreed to pay sums for promoting the Development Site through the planning process and obtaining planning permission for its development (clause 3.1).

30. Mrs Foster could not assign or dispose of her interest in the joint venture and Newpool could only do so to another company within the same group of companies (clause 7).

31. Unless otherwise agreed under the JVA or required by law each party covenanted so far as practicable to “keep confidential from third parties the affairs of the joint venture” (clause 10).

32. It is agreed that the JVA was a contractual arrangement and not an interest in land.

#### *Great Crested Newts (“GCN”)*

33. GCN are a European Protected Species (“EPS”) to which a local planning authority must have regard under the Habitats Directive<sup>3</sup> in the exercise of its functions. The Habitats Directive was transposed into English Law under the Habitats Regulations<sup>4</sup> and these require that an assessment be undertaken before development affecting a site containing an EPS can be lawfully undertaken or authorised. To give effect to the Habitat Regulations the Council requires any major development involving ten or more dwellings within 500m of a pond to undertake a GCN Survey to assess GCN populations.

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<sup>3</sup> Council Directive 92/43/EEC 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora.

<sup>4</sup> At the valuation date these were the conservation of Habitats and Species Regulations 2010 (SI 2010/490).

34. The best time for undertaking a GCN Survey is from March to May and at the valuation date the earliest date for a survey to be started was March 2014.

### **Statutory Provisions**

35. Section 160 of the 1984 Act states:

“Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time.”

### **Issue 1: the residential development potential of the Site**

#### *The case for the appellant*

36. Mr Washbourne identified a number of reasons why he thought a planning application would have been refused at the valuation date:

- (i) The Site was safeguarded land and not allocated for potential housing development in the CS or the Local Plan. Such development would therefore have been contrary to policy.
- (ii) In the absence of a 5-year housing land supply at the valuation date it was necessary to apply NPPF policy to any planning application to develop the Site to determine whether it was sustainable development. He concluded that it was “plainly unsustainable”.
- (iii) The Site was ecologically sensitive and GCN were known to be present there. A survey would have been required to assess the ecological impact of development. The Site was important to, and formed part of, the ecology migration strategy approved by the Council. This required the retention of the Site’s open fields, pasture, hedgerows, trees and ponds.
- (iv) Detailed study work on the SHLAA had also shown that the Site ranked poorly for sustainability in terms of its landscape setting.
- (v) The SAMDev attitude towards residential development in Shifnal and, in particular, the Site was “rather fluid” and subject to change. At the valuation date the consultation process was continuing and the emerging document would have been afforded little weight when considering any residential planning application on the Site.
- (vi) The Site was effectively landlocked and there was no evidence that a satisfactory vehicular access could be provided.



- (vii) There would be strong opposition from the Town Council and the local community to more residential development given the heightened pressures caused by residential planning applications being considered elsewhere at broadly the same time.

37. Mr Taylor submitted that the Council's inclusion of Site SHI002 in the SAMDev Revised Preferred Options in July 2013 may not have been a genuine reflection of the Council's view about the sustainability of the Site given its desire to rapidly increase its 5-year housing land supply from the latest figure of 4.1 years as at February 2013.

38. Mr Taylor said that on any view, given the remoteness of its location from the town, the Site was less sustainable than the other sites then under consideration for housing development, e.g. Haughton Lane, Coppice Green Lane and Aston Street.

39. Ms Howie's opinion that in 2013 the Council's key consideration was the supply of housing land rather than its deliverability made no sense in the light of the NPPF. The tilted balance policy in favour of sustainable development introduced under the NPPF required that housing was delivered. A demonstrable 5-year housing land supply required that sites were deliverable otherwise the Council would have no incentive to grant planning permission. The importance of deliverability was apparent in the planning officer's reports on the Haughton Lane and Coppice Green Lane planning applications.

40. The lack of a means of access to the highway meant that the Site was not deliverable in the context of housing land supply and therefore the Council had no incentive to grant planning permission for its development. Ms Howie said that it was possible to submit an outline planning application which showed access included within a red line boundary but Mr Taylor submitted it was implausible that a hypothetical purchaser would proceed in this way.

41. Ms Howie's evidence about the prospects of the Site obtaining planning permission for housing was said to be ambiguous and confusing. In her written evidence she originally said there was a "reasonable expectation" of getting consent but later in her report she said a hypothetical purchaser of the Site at the valuation date would have thought planning permission "was highly likely to be forthcoming". Under cross-examination on the first day of the hearing Ms Howie said she thought a hypothetical purchaser would be more optimistic than a planning consultant. On the second day she changed her answer by suggesting that her oral advice to a hypothetical purchaser would have been that planning permission was highly likely but her written advice would have been more cautious (reasonable prospects). She finally reverted to her opinion that there was a reasonable expectation of consent being granted.

42. Mr Taylor submitted that as the number of planning applications increased so too did the level of local opposition. The "over subscription" of planning applications meant Redrow did not pursue the possible acquisition of the Site "due to an unusually

high number of residential development allocations being proposed for Shifnal at that time [March 2015]”.<sup>5</sup> Mr Taylor said Redrow’s concerns had been well founded since it had obtained planning permission on The Uplands “by the skin of its teeth” on 15 October 2014.

43. Ms Howie had accepted that a hypothetical purchaser at the valuation date would only have a reasonable expectation of obtaining planning permission during a narrow time window since the Council was doing everything it could to try and demonstrate a 5-year housing land supply. She agreed that it would have been necessary for the hypothetical purchaser to pursue a planning application while the Council could not show a 5-year supply, a period which she said lasted from February 2013 until August 2014.

44. Under cross-examination Ms Howie accepted that at the valuation date a hypothetical purchaser could not have known when the 5-year housing supply figure would have been achieved. She said such a hypothetical purchaser would have known a window of opportunity existed but not when it would close. However, it was reasonable for the purchaser to assume that it would remain open for some time.

45. Mr Washbourne’s evidence was that it could take up to two years to obtain planning permission for the Site and that an application was unlikely to go to committee in the identified window of opportunity. Ms Howie thought that an outline planning application could be submitted within four weeks without the need for pre-application work. Further information could be provided once the application was validated. But she accepted that the presence of GCN on the Site meant that any planning application would not proceed to a decision until the results of GCN surveys were known. Such surveys could not have taken place until April to June 2014 and their results would have been uncertain.

46. Mr Taylor summarised the factors which would have influenced the hypothetical purchaser’s attitude to the prospects of obtaining planning permission at the valuation date:

- (i) The housing land supply figure was uncertain and it was not established that the Council would admit at that time that it did not have a 5-year housing land supply. It had not been shown that the Council had published its February 2013 Housing Land Supply Statement online; the case officer’s report on the Haughton Lane application, which referred to the February 2013 figure, was in the public domain but may not have been published online; two planning consultancies, Urban Roots and Advance Land & Planning Ltd, who had produced planning statements on two major developments in July 2013 (Coppice Green Lane and Aston Road respectively) were apparently unaware at that time of the February 2013

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<sup>5</sup> Letter from Redrow dated 17 November 2017.

housing land supply figure; and Advance Land & Planning Ltd had been told that the Council did not admit a lack of 5-year supply as at July 2013.

- (ii) Even if the hypothetical purchaser knew about the housing land supply position in February 2013 it would also know that the window of opportunity to exploit it was of limited and uncertain duration and that the Council was working hard to close it.
- (iii) There were several constraints on any proposed development:
  - (a) there was no established means of access;
  - (b) although it was theoretically possible to submit an outline planning application without having resolved the question of access, to do so would be ill-advised because the owner of the proposed access might object or hold the applicant to ransom;
  - (c) there was a problem with GCN which would require surveys (not possible until spring 2014 at the earliest), the results and consequences of which were unknown.

47. Mr Taylor submitted that a sensibly advised hypothetical purchaser would know that he could not expect a determination of a planning application until the second half of 2014 at the earliest. He would further know that the window of opportunity might have closed by then. In the light of the foregoing factors Mr Taylor suggested that the hypothetical purchaser would not have acquired the Site with a view to making an immediate planning application but would have held it for its medium or long-term potential.

#### *The case for the respondent*

48. Mr Westmoreland Smith submitted that Mr Washbourne had focused solely on the development plan and had not taken account of other material considerations as required under section 38(6) of the Planning and Compulsory Purchase Act 2004. It was not disputed that residential development on the Site would not comply with the relevant policies of the CS and the Local Plan, but other material considerations applied in this case.

49. The first such material consideration was whether the Council could show a 5-year housing land supply at the valuation date. As a matter of fact the latest statement of such supply at the valuation date was that produced in February 2013 and which showed 4.1 years supply. The experts agreed that at the valuation date the Council did not have a 5-year supply of housing land and that consequently under the NPPF the Council would have to apply the tilted balance (presumption in favour of sustainable development) when considering whether the Site was appropriate for development in the event of a planning application. Mr Westmoreland Smith dismissed as unsustainable the appellant's suggestion that the February 2013 housing land supply figure had not been published. It had been referred to in terms and made

public in the development management report to the Council's planning committee on the proposed development at Haughton Road on 26 February 2013. The Urban Roots Planning Statement had erred in failing to identify the February 2013 statement but it showed the market was making its own judgement about the development opportunities in Shifnal regardless of the Council's stated position on housing land supply. The Advance Land & Planning Ltd statement was described by Mr Westmoreland Smith as taking a very soft approach but it did state in terms that Advance Land knew the Council did not have a 5-year supply as at April 2013.

50. The appellant made much of the formal window between February 2013 and August 2014 when the Council accepted it did not have a 5-year housing land supply. But Ms Howie had explained that the Council accepted its policies were out of date until the adoption of SAMDev in December 2015 or, at the earliest, until the inspector's report was issued at the end of October 2015. The tilted balance requirement therefore still applied whether or not there was a 5-year supply of housing land as from August 2014. At the valuation date the window of opportunity was open and a hypothetical purchaser was at risk as to when it would close; but by making diligent inquiries and investigations it would have known that at that time the Council faced a further period of housing land shortage.

51. The second material consideration was that of the emerging policy under SAMDev which had had three rounds of public consultation by August 2013. The first two rounds did not alter the Site's status as safeguarded land but the third round in July 2013, which identified "Revised Preferred Options", showed the Site, together with The Uplands, as allocated for housing and included within the Shifnal development boundary. Although this allocation was not retained in the Pre-submission Draft (Final Plan) published in March 2014, Mr Westmoreland Smith submitted that the Revised Preferred Options allocation would have encouraged the hypothetical purchaser. There were also other reasons for taking a positive view of the planning prospects. For instance, when the planning application for the development of the Haughton Road site was validated in November 2012 it was not shown in the SAMDev Preferred Options as an allocated site. That application was made at a time when the Council had not accepted it did not have a 5-year housing land supply. Neither factor discouraged the applicant from pursuing residential development on safeguarded land.

52. Thirdly, at the valuation date not only had planning permission been granted on safeguarded land at Haughton Road but planning applications had also been made in respect of two other such safeguarded sites at Coppice Green Lane and Aston Street, both of which subsequently received planning permission. There had also been a screening opinion in January 2013 for the combined development of the Uplands and the Site. The market had clearly identified safeguarded land as having immediate prospects of development.

53. The Council's approach to such applications could be discerned from analysis of the planning officers' reports which Mr Westmoreland Smith identified as:

- (i) the 5-year housing land supply position was highly significant;
- (ii) development plan policies were out of date;
- (iii) the tilted balance applied; and
- (iv) refusal on the basis that the sites were outside the Shifnal development boundary on safeguarded land was unlikely to be sustainable on appeal.

This approach was maintained throughout 2013 and well into 2014, e.g. at The Uplands. The market clearly recognised at or around the valuation date that it was the right time to make an application to develop safeguarded land.

54. Fourthly was the issue of sustainability. The Council recognised in its officer's report on the planning application for The Uplands that the allocation of a site for development in the SAMDev Revised Preferred Options Consultation in July 2013 demonstrated the Council considered it to be an appropriate location for residential development and that it was satisfied the principle development on the Site would meet the three dimensions of sustainability set out in the NPPF, i.e. economic, social and environmental.

55. Mr Westmoreland Smith said that Mr Washbourne's conclusion that the Site was "plainly unsustainable" came down to landscape issues. Contrary to Mr Washbourne's assertion, the Council had never treated Site SHI002 as two different sites (The Uplands and the Site). It was the Bridgnorth Landscape Capacity Study that had considered the component sites separately and that had identified The Uplands as being more sensitive in landscape terms than the Site. If The Uplands was granted consent despite being on more sensitive land, why would landscape have been an issue on the Site (which had the same level of sensitivity as the other sites for which planning permission was granted)?

56. Fifthly was the GCN issue which Mr Westmoreland Smith said Mr Washbourne had misunderstood. Ms Howie's rebuttal evidence showed that the GCN mitigation measures contained in the approved mitigation strategy for the Uplands development did not involve any land that formed part of the Site. That materially undermined Mr Washbourne's evidence. The presence of GCN was not a bar to development but involved a process of survey and mitigation planning which could have been completed by May 2014. That was well within what would have been the hypothetical purchaser's understanding of its window of opportunity.

57. Finally, Mr Westmoreland Smith addressed the question of access. It would be necessary to obtain access through third party land. There were three viable options: The Uplands, Beech House, or farmland to the south and the solution would be a matter of negotiation.

58. Mr Westmoreland Smith submitted there was no reason to suppose the outcome of an application for the residential development of the Site would have been treated

any differently by the Council to the several other applications on safeguarded land which it had approved. Ms Howie had been consistent in saying that her written advice of “reasonable prospects” of obtaining planning permission would be interpreted by her clients as meaning “highly likely” given the material considerations described above. The hypothetical purchaser would consider the planning prospects warranted an application for planning permission in the short term.

### *Discussion*

59. I am satisfied that at the valuation date a hypothetical purchaser would have considered there to be a reasonable prospect of obtaining planning permission for the residential development of the Site in the short term. The purchaser would have been encouraged by several factors:

(i) The Council’s lack of a 5-year housing land supply. At the valuation date the Council could only show 4.1 years supply; this figure having been published in February 2013. The appellant argued the Council might not have published this figure on its website and noted that two planning consultancies had failed to refer to it in reports dated July 2013. But this figure is referred to in the development management report dated 26 February 2013 to the Council’s planning committee on the proposed development of land north of Haughton Road, where it is said to have been “published” on 1 February 2013. I think a properly advised hypothetical purchaser would have known that this was the housing land supply figure at the valuation date.

(ii) The absence of a 5-year supply of housing land meant that under the NPPF relevant policies for the supply of housing should not be considered up to date. The Council considered this to be “highly significant” in the context of its February 2013 housing land supply figure and the tilted balance applied in favour of sustainable development. The Council were acutely aware of the risk of an award of costs against it were it to refuse the Haughton Road application solely because it was contrary to Development Plan housing policy by being outside the Shifnal development boundary. The same analysis was applied in the planning officer’s reports on the Coppice Green Lane, Aston Street and The Uplands development proposals. The Site would have been treated in the same way.

(iii) The Site was identified for housing as part of a larger site in the SAMDev Revised Preferred Options published in July 2013. That indicated the Council considered the Site, at least in conjunction with The Uplands, to be sustainable. I do not accept Mr Washbourne’s conclusion that the Site was “plainly unsustainable”. His analysis was not accurate for the reasons given by Mr Westmoreland Smith.

(iv) A screening opinion had been sought on the SHI002 site in December 2012. This indicated that the Site was recognised by, and of interest to, the market.

(v) Although the affairs of the JVA were to be kept confidential from third parties, its existence (if not its content) was known in the market by the valuation day. Redrow stated in a letter dated 19 June 2018 that three months before they entered into an option agreement with Newpool to acquire The Uplands in July 2013 they “were made aware of [the Site] and the JV agreement.” This would suggest to a hypothetical purchaser that the site had been identified as a development prospect.

60. Although I think a hypothetical purchaser would have viewed the Site as a development opportunity in the short-term at the valuation date, as Mr Taylor said it would not assume this was “an open goal”. There were several problems to overcome:

(i) The Council was striving to achieve a 5-year supply of housing land and it was evident that the window of opportunity for developers to exploit its failure to do so would be time limited. The hypothetical purchaser would have to act quickly.

(ii) There was no possibility of achieving vehicular access to the Site without relying on a third party. It may have been possible to submit an outline planning application on the Site with access as a reserved matter, but the hypothetical purchaser would have been aware of the likelihood of being held to ransom by an adjoining landowner.

(iii) The possible presence of GCN on the Site was a development constraint. But, as with The Uplands, I think it would have been possible to devise a mitigation strategy to overcome the problem. The GCN mitigation strategy for The Uplands was self-contained and did not restrict the development of the Site. The main constraint facing the hypothetical purchaser was the time required to undertake the necessary surveys which could not be done until spring 2014 with the results and mitigation strategy probably not being available until the summer.

(iv) Only limited weight would be given to the emerging SAMDev policy and although the identification of the Site for housing would encourage a hypothetical purchaser it would not be a definitive factor.

(v) There had been something of a feeding frenzy in the market with several major residential planning applications being submitted shortly before the valuation date. There was a real danger of the oversubscription of sites; a point that discouraged Redrow from pursuing the Site at the time it entered into an option agreement with Newpool in July 2013.

61. These problems would be reflected in the price that the hypothetical purchaser would be prepared to pay for the Site.

## Issue 2: the correct valuation approach

62. The two valuation experts took fundamentally different approaches to calculating the open market value of the Site. For the appellant, Mr Beer treated the Site as strategic land, i.e. “land that has not reached its development potential. Planning consent or planning allocation is needed before it becomes viable and valuable development land.” Mr Beer valued the Site by a “bottom up” approach based upon an analysis of four comparable sales of relatively small parcels of land the price of which reflected amenity value with a small uplift. These comparables showed a range of values from £9,284 to £25,000 per acre. He also exhibited a schedule of strategic land prices produced by his firm giving details of sales across England and Scotland for land unallocated for alternative uses. These showed what he described as a “tone of the list” for strategic land of between £6,667 to £56,818 per acre.

63. Mr Beer valued the Site by reference to both planning experts’ reports. Given Ms Howie’s findings he concluded that the Site would be viewed by the hypothetical purchaser as strategic land with a prospect of achieving planning permission in the short to medium term, but subject to the constraints outlined in paragraph 60 above. Adopting the higher end of the range from his schedule of strategic land sales he took £50,000 per acre giving a value of £320,000. Given Mr Washbourne’s findings he concluded that a hypothetical purchaser would view the Site as strategic land with only a remote prospect of achieving planning permission in the short to medium term. Under those circumstances Mr Beer referred to his four local comparable transactions and adopted £20,000 per acre giving a value for the Site of £128,000.

64. For the respondent Mr Coster based his valuation on Ms Howie’s findings only. He did not consider Mr Washbourne’s report. He said he was not persuaded “as a valuer” by Mr Washbourne’s findings. Mr Coster adopted a “top down” valuation approach the starting point of which was the assessment of the value of the Site assuming it had residential planning permission for 50 dwellings at the valuation date. He analysed sales of comparable development sites and adjusted them for time to the valuation date by using a residential index produced by Savills (not exhibited). This showed a development value of £445,000 per acre which gave a value for the Site of £2,843,550 assuming it had planning permission. From this he made deductions for access risk (40%) and for planning risk and deferment (50%)<sup>6</sup>. This gave an open market value for the Site of £850,000 (rounded).

65. In his rebuttal report Mr Beer, without prejudice to his view that the valuation should be undertaken on a “bottom up” approach, was instructed to value the Site using Mr Coster’s “top down” approach. Rather than use a value per acre Mr Beer adopted a site value of £53,000 per dwelling based on an analysis of the sale of The Uplands and assuming the Site would accommodate 40 dwellings, the figure adopted

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<sup>6</sup> These risks were not summated, i.e. the total risk was not 50% + 40% = 90%. Mr Coster, in effect, calculated the risk adjustment factor (the amount of the deduction) by means of the following formula:  $1 - (0.5 \times 0.6) = 0.7$  or 70%.



in Mr Washbourne's rebuttal report. This gave a development value assuming planning permission of £2,120,000. He then discounted this figure by 50% for lack of access, 50% for lack of planning permission and 25% for the lack of allocation of the Site in the development plan<sup>7</sup>. This gave an open market value for the Site of £397,500.

### *Discussion*

66. It follows from my analysis of the first issue that I consider Mr Washbourne's view of the prospects of the Site obtaining residential planning permission to be unduly pessimistic. Consequently, I do not accept there was only a remote prospect of obtaining such planning permission in the short term.

67. That being so, I do not accept Mr Beer's valuation based on Mr Washbourne's evidence. In any event that valuation rested on four comparable transactions in the broad locality, none of which was in Shifnal. Only one transaction, that of a 3.99 acre site in Newport, was of strategic land. Mr Beer accepted the other three transactions were not sales of strategic land but were sales of land used as pasture or for equestrian purposes. None of the sites was safeguarded land and at least three of them were in the Green Belt. The Newport site sold for £25,000 per acre while the other three sales averaged just over £12,500 per acre. I do not consider these sites to be sufficiently comparable to the Site to form a proper basis for its valuation. In my opinion, unlike Mr Beer's comparables, the Site was "in play" in the market at the valuation date as a short term residential development prospect and it should be valued as such.

68. Mr Beer also valued the Site (under instruction) on the basis that Ms Howie's more optimistic planning evidence was to be preferred. He did so by reference to a nationwide schedule of strategic land sales which he said set the "tone of the list" for the value of such land and which could properly be applied to the Site. I disagree. It seems to me the only thing the 45 sites on the schedule had in common was their "unallocated" planning status. They otherwise varied in size, location, date of sale and terms of sale, e.g. many of the sales included an overage provision. 10 of the sites were in Scotland, none were in Shropshire and the nearest site was over 60 miles away. Mr Beer's evidence was that there was a value distinction between large and small sites, with the Site being an example of the latter. But 15 (one third) of the sites in the schedule were over 100 acres and only three sites were under 10 acres. The effect of an overage clause on the base price was not considered. Over half the sales post-dated the valuation date and the earliest sales were three years before it. The provenance and comprehensiveness of the schedule were not established. I accept the respondent's submission that this schedule is of no assistance in valuing the Site and I reject the notion that the schedule establishes a nationwide tone of the list for strategic land.

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<sup>7</sup> Mr Beer adopted the same method as Mr Coster for calculating the risk adjustment factor. Thus his total discount was:  $1 - (0.5 \times 0.5 \times 0.75) = 0.8125$  or 81.25%.

69. In the circumstances of this case I prefer the respondent's "top down" valuation approach. Mr Beer criticises this approach as being remote from direct market evidence and for its reliance on subjective judgements about the nature and levels of risk. These are valid points but Mr Beer's market evidence, whether of local comparables or as contained in his schedule of strategic land sales, does not provide a sound basis for the estimation of the open market value of a site which has a reasonable prospect of obtaining planning permission in the short term. Mr Beer says there is no evidence that the market pays high levels of hope value in such circumstances. I think that is because purchasers of this type of site would rather manage their risk by taking an option or entering into a conditional contract subject to planning than by purchasing the site unconditionally. But the statutory requirement is to assess the open market value and that means assuming an unconditional sale. The best starting point, in my judgment, is the value of the Site with planning permission. There are reasonable comparables to assist in this task, including the sale of the immediately adjoining site at The Uplands.

70. The appellant criticised Mr Coster as having over-stepped the mark by acting as a legal and planning advisor as well as a valuation advisor to the respondent; roles which he continued after his appointment as an expert witness. Mr Taylor submitted that this put him in a position that he may have felt the need to defend and meant he was inflexible in the light of new information. Such factors went to the weight to be attached to Mr Coster's evidence.

71. Mr Westmoreland Smith rejected the impugment of Mr Coster's evidence and submitted that it was common for Valuation Office Agency staff to adopt a broad role as advisor and negotiator. He said Mr Coster was aware of his duty to the Tribunal and had fulfilled that duty when giving evidence. It was necessary for Mr Coster to consider planning and legal matters in his role as a valuer. That was not unusual and, despite his denials, Mr Beer had done the same. Mr Coster had changed his opinion because new evidence had enabled him to adopt a comparative valuation rather than a residual valuation. That was what an expert witness should do.

72. I am satisfied that Mr Coster was aware of his duty to the Tribunal and that he complied with it. I do not think he strayed beyond the bounds of his expertise by referring to planning and legal matters, both of which reasonably informed his valuation approach. I consider him to be an objective and impartial witness who properly changed his valuation in the light of new evidence.

73. Mr Coster valued the Site at a rate of £445,000 per acre assuming it had planning permission. He referred to nine comparable land sales, two of which were historic sales in 2005 and 2006. Of the remaining comparables Mr Coster said the best evidence in terms of date and location was the sale of 1.62 acres at The Brooklands, Wolverhampton Road, Shifnal in 2012 for £447,530 per acre. He acknowledged this was smaller than the Site and would therefore command a higher value per acre, but he thought this was offset by the rise in land values between 2012 and the valuation date. He found support for this figure in the sale of the Haughton Road site (44.48 acres) in early 2015 for £435,000 per acre (time adjusted). Mr

Coster also considered the sale of the Coppice Green Lane site (25.7 acres) in 2015 for £323,000 per acre (time adjusted). Like Haughton Road this site was affected by the proximity of the M54 but required greater noise mitigation measures which thereby reduced its value. Finally, Mr Coster considered the sale of The Uplands for £382,772 per acre which he assumed to be as at 26 July 2013, which he said was the date of the contract. The purchaser, Redrow, said in a letter dated 19 June 2018 that they took an option over The Uplands in July 2013. There are no details of the pricing structure of the option and Mr Coster's opinion that the price was fixed in July 2013 appears to be speculative. He also speculated that the figure may be comparatively low because Newport and Redrow enjoyed a business relationship but there was no evidence to support this.

74. In his rebuttal report Mr Beer undertook a top down valuation and in so doing he considered Mr Coster's comparables. Instead of confining himself to an analysis of the price per acre of the gross site area, Mr Beer also considered the price per dwelling, i.e. he took account of the density of development (a reflection of the net developable area). This showed a land price of £145,000 per dwelling at Brooklands; £48,322 per dwelling at Haughton Road; and £53,030 at The Uplands. Mr Beer said this showed Brooklands was an inappropriate piece of evidence; it was a much smaller site located within Shifnal's development boundary and had been developed at a low density; only 3 houses per acre compared with 8.9 per acre at Haughton Road and 7.2 at The Uplands. I agree with Mr Beer's analysis and I do not find Brooklands to be a helpful comparable.

75. Mr Coster identified nine comparable land sales with planning permission. Two of these were historic; one was sold nearly 4.5 years after the valuation date; two were in Newport and not Shifnal; and one (Brooklands) was much smaller. Of the remaining three comparables Mr Coster distinguished Coppice Green Lane as being in an inferior location close to the M54. That left two sites, Haughton Road and The Uplands, which I think are the most helpful comparables.

76. I agree with Mr Beer that the density of development is a relevant consideration in the valuation. Mr Beer adopted a residential density of 6.3 houses per acre for the Site, i.e. a total of 40 houses, which he obtained from Mr Washbourne's evidence. Mr Washbourne said his approach to the assessment of the development capacity of the Site was "essentially instinctive" and "not a robustly evidenced or scientific viewpoint". He said his estimate of 40 houses was arrived at "through rational thought" and based on "experience of planning and development matters". I do not find such a subjective approach helpful where there is clear evidence of development densities permitted on similar sites in the locality.

77. I think the best indicator of density is The Uplands which adjoins the Site and shares its locational, physical, landscape and ecological characteristics. Planning permission was granted for a gross density of 7.2 houses per acre. At Haughton Road the gross density was 8.9 houses per acre and at Coppice Green Lane 7.9 houses per acre. The density of development in the application for a screening opinion on site

reference SHI002 (a combination of the Site and The Uplands) was 8.5 houses per acre<sup>8</sup>.

78. Mr Coster assumed the Site would accommodate 50 dwellings which he said was based on the same gross density as that in The Uplands planning permission. That figure represents a density of 7.8 houses per acre. Applying the correct density of 7.2 houses per acre gives a total of 46 houses which is the figure I adopt.

79. I accept Mr Beer's view that as a comparator to the Site the Houghton Road development was complex and involved several factors that would probably have reduced its value, e.g. the provision of a medical centre, community allotments, a buffer zone against the M54, a swimming pool and open space. I think the provision of affordable housing at or around 15% was a standard requirement for all the comparables and would be reflected in their respective prices. Mr Beer relied upon a site value of £53,000 per dwelling which was obtained from the sale of The Uplands and which assumes this was the value at the date of the option to Redrow (July 2013) rather than the date of completion in March 2015. I think this is a reasonable valuation approach and I adopt the same figure of £53,000 per dwelling.

80. In my opinion the value of the Site with planning permission at the valuation date was therefore £2,438,000<sup>9</sup> or approximately £381,500 per acre.

81. Both valuation experts made deductions for risk to allow for the lack of planning consent and the lack of vehicular access. In addition, Mr Beer makes an allowance for the Site not being allocated in the development plan. In each case the risk factors are allowed for by applying consecutive percentage discounts to a reducing balance of value (see footnotes 6 and 7). The amount at risk is not the whole figure of £2,438,000 since if planning consent was not granted in the short term the site would remain, as Mr Beer describes it, strategic land of medium or long-term interest worth £20,000 per acre or £128,000.

82. I deal firstly with the lack of access which Mr Beer takes at 50% and Mr Coster at 40%. The Site had no independent vehicular access and the hypothetical purchaser would know that it could well be held to ransom if, as I think would be necessary, it made an early planning application before the issue of access was resolved. There was more than one possible access to the Site but it seems to me the most satisfactory highway solution would be for access to be taken over The Uplands. There was no obligation upon Newpool to grant such an access and its provision depended upon negotiations with Newpool and/or Redrow. A hypothetical purchaser would consider the success of such negotiations to be a serious risk and would discount the price it was prepared to pay by a substantial amount.

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<sup>8</sup> The screening opinion referred to a site area of 18.8 acres (7.6 Ha). The valuation experts both adopted a combined area of 15.51 acres for the Site and The Uplands. The discrepancy in the total area remains unexplained.

<sup>9</sup> £53,000 x 46 = £2,438,000.

83. There was no evidence about the acceptability of the two alternative access arrangements from a planning or highways perspective. It seems likely that another estate entrance a short distance along the A464 to the south of the improved access on to The Uplands site would be contentious.

84. I think the hypothetical purchaser, in circumstances where it knew there was a need to act quickly in applying for planning permission, would be particularly cautious about the prospects of negotiating a satisfactory access agreement in a timely manner and would recognise the significant weakness of its negotiating position. I therefore accept Mr Beer's allowance of 50% to reflect this risk.

85. Mr Beer identified two elements of planning risk. He took the risk due to the absence of planning permission at 50% and allowed a further 25% risk factor because the Site was not allocated for development. The effect of this double allowance is effectively a risk adjustment of 62.5% for planning<sup>10</sup>. Mr Coster took an overall figure of 50% for all planning risk.

86. It is agreed that the Site was not allocated for development at the valuation date. It was safeguarded land outside the Shifnal development boundary similar to the Haughton Road site which received planning permission in March 2013. The Site was shown as a consultation draft option in the SAMDev Revised Preferred Options Plan published in July 2013. This suggested that the Council considered the Site to be sustainable. The Council could not show a 5-year housing land supply at the valuation date and there was febrile market activity in promoting sites and seeking planning permission during a window of opportunity that the Council was trying hard to close. The hypothetical purchaser would have been encouraged by these factors but would recognise the risk that development opportunities were being oversubscribed and that progress in determining a planning application on the Site, even if made and validated quickly, would depend upon the resolution of access and GCN issues. The latter could not be resolved until the summer of 2014 at the earliest. There remained substantial planning risks which the hypothetical purchaser would heavily discount in making an unconditional bid. In my opinion the hypothetical purchaser would make a 60% discount for all planning risk.

87. The total risk adjustment factor is therefore 80%, comprised of 50% for access and 60% for planning:  $1 - (0.5 \times 0.4) = 0.8$  or 80%.

## **Determination**

88. I determine the open market value of the Site at the valuation date at £590,000 as shown below:

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<sup>10</sup>  $1 - (0.5 \times 0.75) = 0.625$  or 62.5%

Value of the Site with planning permission:	£2,438,000
Less value without planning permission as strategic land with medium to long term development potential (“base value”):	<u>£128,000</u>
Value at risk:	£2,310,000
Less risk adjustment at 80%:	<u>£1,848,000</u>
	£462,000
Plus base value:	<u>£128,000</u>
Open market value of the Site:	£590,000

89. I therefore allow the appeal in part.

90. This decision is final on all matters other than the costs of the appeal. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

Dated 30 September 2019

A J Trott FRICS