WEST BERKSHIRE DISTRICT COUNCIL: CLOSING SUBMISSIONS

1. This is an appeal under section 78 of the Town and Country Planning Act 1990 ("TCPA") against the refusal of West Berkshire District Council ("WBDC") to refuse planning permission for unnecessary permanent residential development within 3160m of an Atomic Weapons Establishment Burghfield ("AWE B"). The development would result: in harm to, and loss of, green infrastructure and to site character despite available opportunities to keep, conserve and enhance remaining unexplored; to compromise public safety and well-being over an extended period of time; jeopardise ongoing operation of the AWE B and therefore the continuous at sea deterrent (CASD) for the strategic UK defence.

2. Lawfully interpreted HSA 16 is not an unconditional "allocation" as asserted by the Appellant. On its face, HSA 16 does not in itself expressly permit development of the area of land that it covers. Nor does HSA16 or GS1 provide for "phasing". There is no "phase 2" here. Instead, the envisaged unnecessary development for permanent residential accommodation would be in the vicinity of the AWEB. The AWEB has been operational from before the 1950s and is an establishment of national importance. Established as a WWI munitions factory, AWEB was upgraded during WW11 and then in the 1950's to supply the National nuclear weapons deterrent. Today, AWEB continues manufactures nuclear weapons for the National submarine deterrent. "*3. … The site is of national strategic importance. Nuclear weapons are assembled, maintained and decommissioned there*." *Ongoing operation* of this unique facility bears significant weight.

3. The situation of a munitions factory can have safety consequences *for* other land uses, *for* a Nuclear Licensed site itself, and incoming other land uses can have consequences *for* the munitions factory itself. See *Stringer*. Thus, three aspects arise: public safety (including of proposed residents) *from* an incident arising at AWEB, and the resulting *extended period* of incident Aftermath; ongoing AWEB operation as a result of increased demographic pressures including the development. These consequences are provided for by Policy CS8 that includes provision under its first sentence for the *changing* of the area of the "inner" zone, and with the result that the provisions of the first sentence can apply to a lesser or greater area than the area described as "inner" in the table within CS8.

4. Evaluation of the development against relevant plan policy demonstrates that the envisaged development be refused permission. No policy requires permission to be granted. By contrast, CS8 requires permission to be likely to be refused: a likelihood that remains *not* displaced by the Appellant's evidence; a likelihood supported and heavily weighted by the presence of the ONR and AWE and their evidence, in support of Officer Richardson's evaluative evidence in Appendix 5 to her PoE that the tipping point of cumulative population effects have been reached and remain surpassed *before* such development.

LEGAL FRAMEWORK

Preliminary Matters

5. Whereas the law requires consistency in decision-making, in the planning sphere it also requires each application to be evaluated on its own particular facts and merits and each decision turns on its facts.

6. Thus, reliance on the Boundary Hall (2011) is misplaced because it was determined before the current development plan for this District, risk was evaluated under different Regulations (the 2001 Regulations) that required a different test for all risk evaluation ("reasonably foreseeable" eg at paragraph 115-117) that evaluated the risk under *that* test as "extremely remote", it concerned AWE A (and not the AWE B establishment) that works with different materials and processes to B, was not considered in the context of a DEPZ extending beyond the AWE A boundary, concerned exposure of 30 msv (and not the 11 or so msv here), was concerned under a different development plan, and, at paragraphs 363-364, there was not a five year land supply. Thus, the balance at paragraphs 17-18 of the Secretary of State's decision was not the same as falls to be struck in this Appeal. So too reliance on Kingfisher Grove is misplaced.

7. The recent Kingfisher Grove decision of the Secretary of State was determined in a different district of a different local planning authority, with a different and conditionally permissive policy about AWE B (see paragraph 9), and where there was *less* than five year housing land supply (paragraphs 42-3). The exposure doseage was 1.5msv (and not the 11 or so msv here), the sector was on the Eastern side of the DEPZ (not the Western side), and the focus was on the emergency services and short term consequences of exposure over 2 days and *not* a longer period (as in this current Appeal). See paragraphs 10, 13 & 22.

Statutory Framework

8. By section 78 and 79(4) of the TCPA 1990, the Secretary of State is the local planning authority in this Appeal. By section 70(2), the local planning authority must have regard to (a) the development plan, (b) CIL, and (c) to material considerations.

9. By section 38 of the Planning Act 2008:

> *5) If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.*
> *6) 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.*

10. In this Appeal, section 38(5) is not - in fact – engaged and so cannot in law be engaged. This is because there is no *policy* in a development plan document that *conflicts* with a *policy* in the development plan in this Appeal that section 38(5) must arbitrate upon. The development plan in this Appeal comprises the

Development Plan Documents entitled: a) the Core Strategy; and b) the Housing Site Allocations DPD (2006-2026). Policy GS1, sentence 1 expressly beings into chronological alignment the Core Strategy with the Housing Site Allocations DPD (and see also Footnote 22: "The West Berkshire development plan *currently* consists of the saved policies of the West Berkshire Local Plan 1991-2006, the saved policies of the Replacement Minerals Local Plan for Berkshire, the saved policies of the Waste Local Plan for Berkshire, the West Berkshire Core Strategy, the West Berkshire Housing Site Allocations DPD…". There is no "last" document for the section 38(5) comparison to arbitrate. It remains not unreasonable for the local planning authority to evaluate the development against the "development plan" as a current whole.

Need or Desire

11. WBDC has a five year housing land supply.

12. Laid bare, there is *no actual need* for the development of the remaining area of the HSA16 not yet developed after Crest Nicholson developed part of it for 28 homes, being a development that was also permitted before the change to the area of the "inner DEPZ".

13. The envisaged development is not necessary, however desirable it may be. This informs the weight that may be given to either the market or affordable housing. See below.

Policy Framework

14. In respect of the development plan, no party can make the policy say what it would like to mean. See *Tesco*. The reasoned justification for a policy is not itself policy but informs or sheds light on the policy terms. See *R(oao Cherkeley Campaign Limited) v Mole Valley DC* [2013] EWHC 2582 (Admin).

15. The development plan policies include the following of particular interest: ADPP1; ADPP6; CS1; CS6; CS8; CS14; CS17; CS19; and GS1 and HSA16.

16. The area of the Appeal site falls within the area covered by HSA16. HSA16 does *not* expressly permit planning permission and the Appellant cannot write in such words to suit. Rather, the HSA16 terms provide for "parameters" of *a masterplan* to be adhered to. In this Appeal, there is in fact no master plan for the area of HSA16. Nor is there any reference to "phasing" in HSA16 or in GS1. The Appellant cannot write in such words to HSA16 or GS1 to suit. Reliance on phrases in a planning obligation between two parties relating to an adjacent site cannot subvert or rewrite the terms of HSA16 or GS1 of the development plan as between the WBDC and the Appellant nor found a legitimate expectation of parameters *different* to those stated in HSA16 and the requirement of GS1 to adhere to the GS1 requirements including:

> *Each allocated site will be masterplanned and delivered as a whole to achieve a comprehensive development that ensures the timely and coordinated provision of infrastructure, services, open space*

and facilities. A single planning application will be submitted for each allocated site, either an outline or full application, to ensure this comprehensive approach to development is achieved.

17. The *crie de couer* of the Appellant that its development is an "allocation" is mere arm-waving.

18. A reading of the key policies in this District shows the identification of an area in HSA16 (as with other HSA areas) to be *conditional* upon compliance or accord with other policies in the development plan.

19. That contingency in this Appeal, and appropriately for a site within the current DEPZ, relates to CS8 and that is threaded through other policies that relate to the development of the East Kennet Valley in which AWE B is situated.

20. In this respect, see: GS1, first sentence and first bullet point; ADPP1, paragraph 2 ("Most" development and not "all" development), and its reasoned justification paragraph 4.12:

    Development within the East Kennet Valley will take into account the presence of AWE Aldermaston and Burghfield, as set out in Policy CS8.

    that informs the Policy phrase "most development".

21. So too, ADPP6 provides for "Housing" including in this way: (Emphasis added)

    - *With regard to the presence of AWE Aldermaston and Burghfield, the Council will monitor housing completions and <u>population levels in conjunction with the ONR and neighbouring authorities</u>. Residential development in the <u>inner land use planning consultation zone</u> <u>is likely to be refused planning permission in accordance with Policy CS8</u>. Aldermaston will continue to play the wider role of a service village, in terms of the provision of a range of services to the community and surrounding areas…*

22. Paragraph 4.44 informs the important of the AWE sites:

    The Atomic Weapons Establishment (AWE) has two bases in this area, at Aldermaston and Burghfield. AWE is an important provider of local jobs but has implications for the future level of development in this area.

23. CS1 provides for Delivering New Housing:

    The Site Allocations and Delivery Development Plan Document will identify specific sites to accommodate the broad distribution of housing set out in the Area Delivery Plan policies. Greenfield sites will need to be allocated adjoining settlements in all four of the spatial areas to accommodate the required housing… All settlement boundaries will be reviewed in the Site Allocations and Delivery DPD.

24. The Housing Sites DPD thereby derives *from* CS1. And relates back to ADPP1 and 6. Thus, the DPD is a daughter document of the Core Strategy and so section 38(5) cannot apply to it for that reason either.

25. What, then, about CS8?

POLICY CS8

26. Policy CS8 is of key importance in this particular Appeal.

27. CS8 is a sophisticated policy.

28. As Policy ADPP6 adverts, CS8 regulates residential development around AWE B by reference to population levels. CS8 regulates such development "in the interests of public safety".

29. The scope of "public safety" is not limited to the public who may inhabit the local area but encompasses wider public safety – national security - because of the unique function of AWE B to build, maintain and dismantle the "Continuous At Sea Deterrent" ("CASD"). CS8 is concerned to inhibit development for "residential development" within a certain geographic area and encompasses (as Footnote 59 makes clear) "any development resulting in permanent resident night time population" as well as regulating non-residential development. Thus, CS8 inhibits both *market* and *affordable* housing in that geographical area and is blind to that distinction since people are people. Consequently, the public interest in affordable housing is of no benefit in that area. There being no need, there is also no benefit from market housing in that area. Rather, the placing of more people in harm's way operates in reverse to reduce such weight.

30. The Appellant's case on CS8 is simple - but flawed - because it has to assume that CS8 is frozen in time from 2012 to the end of the Plan period and is incapable of change in any way without recourse to extrinsic means such as SPD. But that case: ignores the 5 paragraphs of Reasoned Justification informing Policy CS8; ignores the Footnotes that are *part* of the Policy; *requires* a literal reading of the terms; and, ultimately results in a gap in coverage (and so in public safety protections for the local and national public and the AWE B) from the date in January 2020 when the 2019 Regulations superseded the 2001 Regulations. That extreme approach falls to be rejected as in error as resulting from an impermissible inflexible, out of context, and literal reading of CS8.

31. As was said in *Tesco v Dundee City Council* [2012] UKSC 13 at 19: (Emphasis added)

> *18. "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."*
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> 19. *… Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad*

statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment…

"If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."

32. That case was applied in *Hopkins Homes* [2017] 1 WLR 1865: (Emphasis added)

22. … statements should not be construed as if they were statutory or contractual provisions …
25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. ..

33. The "context" encompasses the Reasoned Justification of CS8 that sheds light on its terms and provides context. By contrast with the Appellant, WBDC does not ignore that Justification. Nor does WBDC mesh the Justification with the Policy terms of CS8. Rather, the Justification sheds light on the terms of CS8.

34. Whilst CS8 is a simple policy, it is also a sophisticated and nuanced Policy, regulating - as it does - the interface of extrinsic regulations about hazard risk evaluation and keeping people safe from hazards, and land use planning (that the 2019 Regulations in themselves do not do) to ensure "public safety".

35. At first blush, CS8 comprises 3 sentences of which the *last* relates exclusively to the *undertaking* of consultation whereas the first two relate to the outcome of that consultation.

36. Importantly in this Appeal, the *first* sentence *makes* the ONR's *opinion* a planning land use consideration for the purposes of CS8 because the Policy expressly refers to the ONR and its opinion: "advise against".

37. The ONR's expression of opinion arises *after the event* of its having been consulted. The last sentence of CS8 has an express purpose ("for") and that sentence relates to "consultation *for* planning applications" (not "*for* hazard evaluation"). That sentence expressly relates to "the table below" and the table has references to AWE A and B, to "zone", distances referable to "Inner", "Middle", and "Outer", and types of development "all residential or non-residential". On any view, the last sentence makes clear that the table concerns the "consultation arrangements" and no more. See the purpose of the table: "for".

38. The Appellant, in essence, relies on the title of the table: "Development within the Land Use Planning Consultation Zones: Office for Nuclear Regulation" to leap to the conclusion that the reference in the first sentence of CS8 to "inner land use planning consultation zones [all lower case]" is exclusively tied to and fixed by the table contents. But that contention requires the terms of Footnote 60 to be ignored and deleted. This is because in the first sentence, the phrase "inner land use planning consultation zones" is a

defined term under the Policy and is expressed as: "Consultation Zones *as defined* by the ONR and shown on the West Berkshire Proposals Map".

39. On any view, Footnote 60 expressly allocates definition of the "Consultation Zones" to an extrinsic third party (the ONR) and one whose function apparently is *not* related to land use planning: the ONR. Except that it is. As the ONR described on Day 5: "following the HM Report on Fukushima, CD 12.15 (September 2011), at paragraph 7.94, the practicability of countermeasures is *inextricably* linked to land use demographics". That report reflects the language of the then time and includes: (Emphasis added)

> *793. The radii established for emergency planning zones must, of course, depend on the radiological releases that are considered reasonably foreseeable and the practicability of implementation of the emergency plans. However, as it is considered that licensees should review on-site measures to improve resilience to severe accidents in the light of the Fukushima accident, it follows that the practicability and effectiveness of the arrangements for extending countermeasures beyond a small DEPZ in the event of more serious accidents should also be reviewed. It is therefore considered that NEPLG should examine the need to enhance the UK's extendibility arrangements for extending countermeasures beyond the DEPZ in the event of more serious accidents.*
>
> *794. The practicability of implementing off-site countermeasures is inextricably linked to the density and distribution of people around the nuclear site. A site that was acceptable for emergency planning purposes when it was first established may not continue to be acceptable unless planning controls limit population growth in the site's locality, or action can be taken to ensure the off-site emergency countermeasures can cope with the changed demographic. In making decisions on planning consent for developments near to nuclear sites, it is therefore vital that ONR's expert advice on these matters continues to be given full consideration by the relevant planning authorities. In light of the events at Fukushima, we consider that it is timely for the relevant Government departments in the UK to examine the existing system of planning controls for developments in the vicinity of nuclear sites and consider the need for improvements.*

40. The defining function of Footnote 60 is not stated to be a once and for all event. Rather, Footnote 60 and the Reasoned Justification makes clear that CS8 contemplates change to the extent of the "inner" zones of AWE A and B. If Footnote 60 were a once and for all event, then the Reasoned Justification references to change would make no sense and be otiose to shed light on the Policy.

41. By contrast, the Secretary of State's Local Plan Inspector's Report (July 2012) at paragraph 84 (of Appendix 6 to Mr Bashforth's Appendices) reveals the build-in extendability of the area of the "inner" zones of CS8 and that CS8 aligns to that inextricable link referred to above: (Emphasis added)

> *84. At the outset of the Examination I was concerned that the Core Strategy did not sufficiently grapple with this issue and focused too much on the consultation process rather than the likely outcomes and any implications for the strategy. From all the information now available, I draw the following conclusions:…*
>
> - *The scale of housing in this spatial area does not need to be specifically capped at the figure proposed in ADPP6 on the grounds of the constraint of the AWE sites. There is scope to accommodate more housing than proposed in the Plan if required or otherwise justified. Whether or not ONR the advise against such proposals would depend on the scale and location*

of the proposal, other planned developments and future updates to its modelling process arising from changed circumstances.

- *The complexity of the ONR's modelling process, the scope for different outcomes from different inputs and the likely material changes in relevant data and other circumstances over the plan period preclude any firm policy beyond the inner zone.*
- *The need for the extendibility of countermeasures (arising from an incident at either site) beyond the detailed emergency planning zones (as outlined, for example, in CD10/98) does not need to be replicated in the land use planning approach…*

85. In the light of the above, I consider that the submitted plan is unsound in its response to the AWE sites. It is ineffective in addressing the likely spatial implications. A clear policy should be set out reflecting the high degree of constraint likely to be applied in the inner consultation zone, with a clear explanation of the implications over the wider area. A new policy to this effect was proposed by the Council as part of the first round of consultation on possible changes and refined again, with amplification of the text, following the hearings in June 2011. This new policy and related text is necessary to make the plan sound.

42. Turning to CS8 itself again, its Reasoned Justification shedding light on that Policy is replete with references to potential changes including: (Emphasis added)

5.44 During the plan period there is likely to be changes of inputs to the ONR's model which may result in a less restrictive approach being taken by the ONR… As a result, the consultation zones may change as well as ONR's advice on particular proposals.

43. The plural "consultation zones" refers back to the two "inner" zones referred to in the first sentence of CS8. When Footnote 60 is read in the light of paragraph 5.44, it is clear that the Policy attribution in Footnote 60 would entitle the relevant third party - then ONR - to *change* the extent of the area of the "inner" zones of the "Consultation Zones" so that – so changed - they would not necessarily align to the ("inner") area of the *three* areas identified in the table to which sentence three of CS8 refers.

44. The table in CS8 refers to an "inner" zone for each of AWE A and B. It can be reasonably concluded, in the *absence* of any other document showing a different extent of inner zone, that the "inner" zone referred to in the first sentence aligned originally in 2012 with the "inner" zone referred to in the table. But that does not mean that the table references to "inner" zone radii are fixed in aspic. They are not.

45. Indeed, the Local Plan Inspector's Report on CS8 affirms the extendability of the inner zones by expressly describing the potential for "extendability" of such zones and of counter measures arising from material changes in *data and modelling* – but not to *other* zone types.

46. Thereby, the first sentence of CS8 refers to the "inner land use planning consultation zones" (and where "zones" refers to those (plural) of the AWE A and B) and the table includes two references to "inner". Properly *construed*, Footnote 60 enables the change in the *geographical area* of the "inner" "land use planning consultation zones" of each of AWE A and B.

47. WBDC submits that, properly *construed* (as opposed to it being re-written by WBDC), the provisions of CS8 fall to be interpreted as contemplating *changes to the area* covered by the "*inner land* use planning consultation zones" by either reduction or enlargement of that geographical area. (The reference here to "zones" (plural) is because the defined phrase in the first sentence refers to *both* AWEA and B).

48. The means of the change is through Footnote 60. Whilst the *publication* of CS8, and the table in it, resulted to freeze frame CS8 for the plan period, it does not follow that the *whole* of CS8 was so frozen (as the Appellant's case contends it must be by its reliance on being situated in the "Middle Zone"). Rather, Footnote 60 entitles the defining of the "Consultation Zones" by an extrinsic party expressed as "the ONR".

49. Surely it would be unfair to have a policy able to change over its life time? Yes - but only in the absence of notice of a potential change. Here, no unfairness arises because that notice is provided for in Reasoned Justification paragraph 5.41 that informs the CS8 Footnote 60 phrase "as defined by" and enables "inner" zone mismatch to be *shown*:

> *Applicants considering new development within the land use planning consultation zones provided by the ONR and as shown on the proposals map, are strongly encouraged to enter into early discussions with the Council.*

50. A developer properly reading *both* CS8 and its reasoned justification, and then *having* the encouraged "early discussions" with the Council, would be told (in the event of a changed extent of inner zone) by the Council of the exercise by the definer under Footnote 60 of any changes (by their reduction or increase) to the "Consultation Zones".

51. Thus, CS8 and Footnote 60 provide the potential for a fair change in the geographical area of the "*land use planning consultation zone"* for AWE B within the terms of that Policy. The Appellant's application form confirms it had no pre-application discussions. There is no unfairness here resulting from the changed extent of the inner zone and the engagement of CS8 sentence one here.

FOOTNOTE 60; The DEPZ AND THE RELATED OFF-SITE EMERGENCY PLAN

52. Footnote 60 refers to the definition of the Consultation Zones (ie the inner zones) by a relevant third party.

53. The DEPZ has been declared under the 2019 Regulations. The DEPZ represents an area at risk and that contains, importantly, a population at risk also as well as property and homes at risk. The OSEP applies to the area of the DEPZ. The Officer's Report also refers to the "inner DEPZ".

54. The "DEPZ" is not a new feature and is referred to in the Boundary Hall decision that was made under the 2001 Regulations. Since then, the 2019 Regulations have replaced the 2001 Regulations. The 2019 Regulations introduced the allocation of the function of defining the DEPZ to the relevant third party: the Council, here, WBDC. Regulation 2(1) defines the scope of the emergency to be evaluated – and it is wider

than the evidence provided by Dr Pearce who focused on radiation and did not evaluate (as CR did) wider effects covered by Regulation 2(1).

55. On the proper *interpretation* of Footnote 60 in its context, the *function* of Footnote 60 to enable change is not tied exclusively to the party described as the ONR in the footnote but is tied to the relevant *definer*. That is, the phrase "Consultation Zones as defined by the ONR" *means* "Consultation Zones as defined by the [relevant definer]". That is a matter of policy *interpretation* and *not* its re-writing.

56. If that interpretation is not correct, then the 2019 Regulations resulted in a gaping hole in the coverage of CS8 from the date when the ONR ceased to be the definer. WBDC reject that potential as being an inflexible and literal reading of Footnote 60 that renders Footnote 60 otiose and devoid of meaning, in turn resulting to freeze frame CS8, to remove protection for the public and for the CASD under the first sentence of CS8 in relation to the "inner zone" of each of AWE A and B, and to leave a gaping hole in public safety for both AWE B and A. In turn, that has consequences for hazard risk evaluation and AWE B operation.

57. The better and correct interpretation is that, lawfully interpreted and applying appropriate flexibility to a policy underscored by *changing circumstances including population levels*, Footnote 60 is itself able to *ensure* that change for the plan period by *meaning* as WBDC contends. Regulation 8(1) of the 2019 Regulations requires the Council (a third party to the local planning authority) to "determine" the detailed emergency planning zone on the basis of the operator's recommendation [under paragraph 2 of Schedule 4] and may extend that area in consideration of [specified factors including vulnerable groups]". Here, the Council (also as definer under Footnote 60 of CS8 by dint of the 2019 Regulations) *determined* the area of the DEPZ and the High Court held in early 2021 that it was entitled to do so determine that area. The DEPZ *extends* the geographical area at risk of a hazard engendered by AWE B and resulted to change through the mechanism of Footnote 60 the extent of the "inner land use planning consultation zone" for AWE B. The wider extent of the "inner land use planning consultation zone" also encompassed the Appeal Site from the date of the determination of the DEPZ by operation of Footnote 60 and the first sentence of CS8.

58. In further consequence, WBDC, as local planning authority, was entitled in law to use the description in its Officer's Report: "inner DEPZ" because the extent of the "inner land use planning consultation zone" could not now equate to a distance also referred to in the table in CS8 but could only equate to an area of wider extent referred to in the DEPZ determination. So too is the Secretary of State in this Appeal.

59. The Off-Site Emergency Plan is in Officer Richardson's Appendix 4. It provides for arrangements regulating a future crystallised hazard within the DEPZ. Appendix 4 evidences, including in: Section 8.2 (DEPZ); Sections 3.1 (Plan Triggers); Section 3.9 (Immediate Actions for AWE Staff & Public); Section 7

(Decontamination, Evacuation, and Reception and Rest Centres), page 96(a)(ii) and Section 7.4.1 and 7.4.4); Section 9 (Recovery); Section 9.6 (Remediation Phases and Considerations); Section 10.1 (Stand Down); Section 10.6.6 (Recovery of Costs).

CS8 First Sentence

60. Two further matters arise under CS8, sentence one: the *terms* of sentence one, and the *meaning* of "advise against" by the ONR. When triggered, the first sentence of CS8 engenders a clear and simple obligation that a planning application is "likely to be refused". This "high degree of constraint" falls to the *Appellant* to displace and not to WBDC or others to displace.

61. Further, what does "advise against" mean and who are the ONR? The Reasoned Justification to CS8 describes in paragraph 5.42-5.44 that the cumulative effects of any population increase surrounding the AWE B results to require monitoring of committed and future development; that WBDC – as local planning authority - would normally follow the ONR advice; and that its model for testing informs the acceptability to it of further residential development. The ONR is the national regulator and the terms of CS8 make its "advice against" a land use planning consideration. The Inquiry heard from ONR witnesses about its advice and what it meant. That advice should be afforded significant weight.

62. The ONR evaluation is guided itself by CD5-46, Land Use Planning, that includes: (Emphasis added)

> *3. ONR will state that it does not advise against the proposed development on planning grounds if, in its opinion, the following statements apply:*
>
> - *the local authority emergency planners, if consulted, have provided adequate assurance that the proposed development can be accommodated within their existing off-site emergency planning arrangements (or an amended version); and*
> - *the development does not represent an external hazard to a nuclear site or the planning function for the site that may be affected by the development has demonstrated that it would not constitute a significant hazard with regard to safety on their site…*
>
> *5. In all other cases, where the above statements do not apply, the ONR Inspector will determine that ONR **advises against** the proposed development.*

63. It is clear from the ONR that "adequate" is a binary matter and not (as in the planning sphere) a spectrum.

64. In this Appeal, Officer Richardson's Consultation Response evaluated the development as resulting in a significant risk of failure informed by population increases as at 2022 in the DEPZ and in Sector M. See Appendix 5, Consultation Response to her PoE. In response to her evidence in that consultation response, the ONR issued an "advise against" the development because the Off-Site Emergency Plan ("OSEP") *could not* accommodate the hazard situation if the development were permitted. As just said, the ONR has explained in oral evidence that "adequacy" of the OSEP is binary: thus, the risk of failure identified by CR was properly understood by the ONR as evidence to the national regulator of a not adequate OSEP. The

then not adequate OSEP results in a gap in Level 5 of the Defence in Depth concept and the ONR's input today to redress that actual threat. See below. But adequacy must be *sustained,* as the ONR advises. So the *threat* of not being adequacy remains not removed yet because the ONR remains alongside WBDC.

65. Consequently, in line with paragraph 5.43 of the Justification to CS8, ("CS8 reflects the Council's intention to normally follow the ONR's advice in the inner zone"), WBDC properly refused the application that resulted in the Appeal and, in the absence of evidence from the Appellant to displace the "likely to refuse" provision of CS8, WBDC was entitled to give the ONR objection (operating at a national level in relation to a nationally important facility at AWE B) significant weight against the development, and at local level given the large numbers of people in the (extended DEPZ and in Sector M) to ensure that "more people were not put in harm's way" (Officer CR in XX). WBDC was entitled to refuse the Application for the reasons set out in the Reasons for Refusal and did so.

66. Since then, CR's Appendix B has been updated from 2022 to June 2023 and the following can be extrapolated from that updated table: the total residential population of the DEPZ has increased from 18571 by a further 2719 residents as a result of existing approved applications prior to the change in REPPIR legislation; within Sector M, the number of residents has increased from 6,158 by 242 residents. The addition of 242 in Sector M is a c.300% comparative increase on the 77 additional residents resulting from the permitted development of the Appeal site and reinforces CR's evaluation of her significant concern at the *risk of failure* of the OSEP. As CR forcefully responded in cross-examination to the effect that: it is non-sensical "to put people in harm's way".

67. The level of harm is largely agreed between the parties in this Appeal.

68. The scope of "all" risks that arise from AWEB today includes: [Paragraph 9.1 of MoD PoE Person AW]

> *The hazardous event assessed from 2019 Safety Case is still a detonation leading to release of radiological material resulting in an inhalation dose to members of the public. The likelihood of the event is such that a*
> *consequence assessment is required to be undertaken in line with REPPIR 2019.*

69. Risk evaluation includes "Quantity Distance explosives calculations" used to ensure site and public safety. [Paragraph 4.2 of MoD PoE Person MD]; and, significantly, guidance on the use of weather conditions for atmospheric dispersal, and resulting longer term intake pathways, and to an As Low as Reasonably Practicable ("ALARP") standard. [Paragraph 5.12-5.16, 6.2, 10.1.3, 10.7 of MoD PoE Person AW].

70. Exposed population would receive about 11.8msv dose of plutonium from a cloud of that material moving under pressure out of the AWE B in the event of an identified hazard occurring: an explosion involving that material. That level of dosage is many times the national baseline annual dose level in this District (c. 2.7msv). So too is the 6.8msv level discussed in XX. Unlike the naturally occurring situation in Cornwall,

the inhabitants do not consent to the *imposition* on them of a dose resulting from a hazard at AWE B. In contending otherwise, the Appellant confuses consent to a baseline with consent to the result of a risk crystallizing.

71. The scope of harm would: involve inhalation by population under the cloud of plutonium with the result of an imposed increased incident of risk of cancer; involve property contamination; and would involve psychological and well-being effects of people for an extended period of months, even years, pending certification of peoples' homes as safe to return to. As case law makes clear, these are planning considerations because they *relate* to, or arise from, land use. See *Stringer; West Midlands; Smith*.

72. The Appellant's evaluation of the harm is flawed: it is overly narrow in scope in assessing only radiation effects (by contrast with the *wider* scope of "radiation emergency" as defined in Regulation 2(1) of the 2019 Regulations) and not the wider effects that fall within the scope of CS8 "public safety" that include psychological and well-being effects; it is based on a single site risk assessment that is not sanctioned by any guidance or regulations and ignores the cumulative effects of population increases referred to in paragraph 5.42 of CS8; and it applies a now superseded test of "reasonable foreseeability" to both the hazard evaluation and its consequences within Sector M. As the Approved Code of Practice Guidance makes clear, a significant change to the 2019 Regulations was the *removal* of that test from the regulatory compass for the "assessment" of such hazards (i.e. including consequences). See page 6, paragraph 7, bullet 6 of that Guidance. The Appellant cannot now re-introduce by the back door of implication the test that the Secretary of State removed from the 2001 Regulations. Bullet 6 precludes the implied test asserted by the Appellant. See also the evidence of AWE in relation to the Appellant's evidence on hazard evaluation.

73. At this stage, it is helpful to see where the OSEP fits in to this situation. As was explained by Person AW, the concept of Defence In Depth has five layers - like a Swiss Cheese – and the OSEP *supplies* Layer 5. Thus, as the ONR said on Day 5, the practicability of countermeasures is inextricably linked to land use demographics – as here, the cumulative increase in DEPZ population, and the population increase in its Sector M, results in a significant risk of failure (as evaluated by the EP Officer). See Appendix 5 to OR's PoE.

74. The updated evidence of CR's RPoE Appendix B – in response to the Secretary of State's request for confirmation of the DEPZ population of residents at 13th June 2023 for the purposes of the OSEP – evidences that CR's evaluation has not been reinforced and her concern necessarily increased in force from her original evaluation as a result of the increase in the DEPZ population and that of Sector M. Further, the ONR has explained in oral evidence (Mr Ingham) that the ONR is coming alongside the EP of WBDC more than any other site in England and remains concerned to ensure that the OSEP is able to be sustainably "adequate" (as opposed to drifting across the line to not being adequate).

75. AWE has explained that the ONR would be entitled to impose restrictions on AWE operations – that would in turn compromise CASD operations and, in turn, reduce CASD effectiveness.

76. On the basis of the foregoing, and given the national level of weight attributable to the first sentence of CS8, the 'local' weight that would notionally be applied to the development of the Appeal site does not outweigh the "likely to be refused" provision of CS8 that is triggered in this matter.

77. Since the ONR regards the presence of the risk of a hazard that cannot be accommodated by the OSEP as the key evidence, questions of doseage and effects from plutonium contamination of people and property have no added value to the agreed *presence* of the risk. It is enough that there *is* evidence of a risk of people being placed in harm's way and of the OSEP being *unable* to protect them from some harm that requires the ONR's presence; as opposed to the degree of risk.

78. In this Appeal, the Appellant has failed to displace the evidential burden of that Policy imperative including because it has failed to even ask the AWE B for information about the hazard to enable evaluation of the risk and to rebut the "likely to refuse" provision of that sentence. Thus, the Appellant's contention that the AWE and ONR have failed to evidence certain matters operates in reverse *against* the Appellant.

79. The Appellant has not, on its evidence submitted with its Application nor on Appeal, demonstrated that the "likely to be refused" high degree of constraint be displaced by the Secretary of State in this Appeal. See below.

80. It follows, on the basis of the foregoing, and noting that no policies require the development to be permitted, that section 38(6) requires the Appeal to be refused planning permission on the basis of Reason for Refusal 1. The material considerations referred to below reinforce that refusal.

81. The wider evaluation that has been canvassed at the Inquiry relates to the second sentence of CS8.

CS8 Second Sentence

82. The Appellant's case relies on the freeze framing of CS8 as at 2012 and the second sentence of CS8 that means that the phrase "likely to refuse" is not triggered.

83. In essence, for the reasons given above, the approach of the Appellant adds nothing to the evaluation save to remove the "likely to refuse" provision. This is because the extended DEPZ remains a material consideration in any event and sentence two of CS8 requires an evaluation of the factors under its provisions and other planning criteria. Thus, sentence two requires a merits evaluation.

84. In this respect, the OSEP is characterized in sentence two as a "planning criteria" for the purposes of CS8. The OSEP provisions are "arrangements" that would be applied in the future by the EP and others. The OSEP is owned by WBDC EP and its evaluation of the circumstances cannot be prejudged pending the

actual occurrence of an event. Officer Richardson has explained in her evidence the trigger of the OSEP resulting in the triggering of the population in the DEPZ to "shelter", and the consequential "subsequent evacuation" of DEPZ population for example should this be necessary beyond the 48hrs post the incident and/ or to enable de-contamination under the plume pathway as well as de-contamination of people and the "worried well".

85. The Appellant's asserted required reduction in scope of evacuation is misconceived. A proper reading of paragraph (d) of the STAC Guidance in the OSEP shows that STAC will come in after the trigger of the OESP and after the sheltering and "subsequent evacuation" commences of population required by the *Council's* EP. The OSEP arrangements remain clear: STAC does not have exclusive control over "subsequent evacuation" and as the tables describing shelter and evacuation types make clear, "subsequent evacuation" results from *either* the Council requiring the same or, if advised, STAC advising the same.

86. The longer term effects on health and well-being of shelter, of evacuation, and of property de-contamination, have been canvassed in the WBDC evidence and that of the AWE and MOD.

87. Significant weight falls to be given to each of the AWE and ONR by dint of their actual *presence* at this Inquiry: each is so concerned at the risk of further increase in DEPZ population (here, of 77 residents) around AWE B in consequence of a planning permission, that each has *turned up* to tell the Secretary of State that they are concerned. Further, each of these parties has tendered weighty evidence to the Secretary of State of the threat to people and to national security if permission were granted. These matters fall properly within the scope of "public safety" under CS8.

88. The provision if unnecessary further local housing does not outweigh the weight attributable to the Objections of the AWE and ONR, nor the threat to Level 5 of the Defence in Depth concept relied on to sustain the CASD.

Material Considerations relating to Reasons for Refusal 2

89. The characterization of the objections as material considerations reinforces that planning permission be refused in this particular case.

90. The Emerging Plan is a material consideration and Policy SP4 reinforces the approach set out above, but couched by reference to the most recent version of the Regulations (2019).

91. The scope of material considerations includes "all considerations that *relate* to the development or use of land". See *Stringer v Minister of Housing* [1970] 1 WLR 1281. Such relationships exist in this matter. The circumstances underpinning the engagement of CS8 also engender material considerations against the development.

92. The "likelihood of interference with the work of the telescope is both a planning consideration and a material consideration". *Stringer* at 270. Development there would result in sparks from the dwellings electrical cables interfering with the readings of the electrical telescope and so disrupting telescope interference. In the same way here, and to like effect as CS8, the resulting increase in *permanent residential population* from the Appeal development within the area of the DEPZ (derived from the Consequences Report) affects adversely the risk calibration underpinning ongoing operation of the Atomic Weapons Establishment Burghfield to ensure the national deterrent on behalf of the Secretary of State for Defence.

93. "If permission is sought to erect an explosives factory next to a school, [the Secretary of State] must surely be bound to consider the question of safety". *Stringer* at 270. In the same way here, and to like effect as CS8, the Secretary of State for Communities is bound to consider the question of public safety arising from the nuclear munitions factory at Burghfield constructing and decommissioning nuclear weapons on behalf of the Secretary of State for Defence.

94. Justified fear and genuine concern can be a material consideration where "intimately connected with the use of land". See *West Midlands Probation Committee* (1998) 76 P&CR 589. So too in this matter, and to like effect as CS8, the potential for radiation contamination of the Appeal land residents, as well as the fear of radiation, are intimately connected to the nature of the Appeal development as permanent residential development, and from which any required evacuation would engender a fear and genuine concern of no return within a long period.

95. In *Newport* [1998] Env LR 174, at page 183, the Court of Appeal held that it was an error of law for a "*genuine* concern" and "*perceived* safety risks" to be invariably required to be objectively justified in order for them to quality as a material planning consideration refusing permission. In *Smith* [2005] EWCA Civ 859, paragraph 9, the Court of Appeal held that the "fear and concern must be real", as in, having some reasonable basis, though falling short of *requiring* the feared outcome to be proved inevitable or highly likely".

96. In the same way, there can be no doubt in this matter from both the *presence* of the parties (including the national regulator and national manufacturer objecting) and on the *evidence*, that there is a genuine concern as to public safety relating to the particular (residential) purpose of the development of the Appeal site and to ongoing safe operation of the factory, both during and in the aftermath of (as the AWE pithily describe): "the detonation of a nuclear device [within 3.160m of the Appeal site]".

97. The *Gateshead* case relied on by the Appellant supports the refusal of planning permission. This is because if the effects in that case ("discharges") had been (but in that case, were not) bound to result in refusal of

an environmental authorisation, then the Secretary of State was required to refuse planning permission. Because in that case there was no clear evidence about the air quality, then he was not required to refuse permission. In this Appeal, there is clear evidence about environmental impacts and the resulting effects (once triggered) for potentially *prolonged* sheltering and subsequent evacuation under the Off-site Emergency Plan elsewhere than the Appeal site in order to ensure public safety against the risk from an incident is not compromised.

Reason for Refusal 3

98. Reason for Refusal 3 concerns unnecessary tree loss for an unnecessary housing development.

99. As was summarised by WBDC on Day 5, and as is explained by the PoE of Mr Thomas, in essence, the loss of 4 quality trees would result in significant harm to the character and appearance of the Appeal site and its area. The so-called mitigation would compete with the current situation of trees on the site. Reasonable alternatives remain unexplored – for example, the routing of the proposed road through lesser quality trees. Opportunities have not been maximized to achieve net gains but minimized by increased housing units.

100. Reason for Refusal 3 is made out also.

CONCLUSIONS

101. The development for permanent residential accommodation would be in the vicinity of the AWEB. The AWEB has been operational from before the 1950s and is an establishment of national importance. Established as a WWI munitions factory, AWEB was upgraded during WW11 and then in the 1950's to supply the National nuclear weapons deterrent. Today, AWEB continues manufactures nuclear weapons for the National submarine deterrent. "*3. … The site is of national strategic importance. Nuclear weapons are assembled, maintained and decommissioned there*." Its *ongoing operation* bears significant weight.

102. The situation of a munitions factory can have safety consequences *for* other land uses, *for* a Nuclear Licensed site itself, and incoming other land uses can have consequences *for* the munitions factory itself. See *Stringer*. Thus, three aspects arise: public safety (including of proposed residents) *from* an incident arising at AWEB, and the resulting *extended period* of incident Aftermath; ongoing AWEB operation as a result of increased demographic pressures including the development.

103. Planning permission falls to be refused in order to keep people out of harm's way and to ensure ongoing public safety at local and national level.

CHRISTIAAN ZWART

14th June 2023

APPENDIX A

104. The Government's key changes to risk and emergency planning are explained in [2021] EWHC 289 (Admin):

> *2. … to require risk assessment and planning for events which have a low likelihood of occurrence but high impact in the event they do occur; as with the Fukushima disaster. Another change, specific to the Regulations, concerns a shift in responsibility for deciding on the extent of a geographical zone in which it is proportionate to plan for protective action in the event of a radiation emergency. The zone is referred to in the Regulations as a 'Detailed Emergency Planning Zone' (DEPZ). Responsibility used to lie with either the Office for Nuclear Regulation or the Health and Safety Executive but now rests with the relevant local authority, who must designate the zone on the basis of a recommendation from the site operator…*
>
> *76… The word 'planning' in the term DEPZ is used in the sense of planning to deal with a radiation emergency to mitigate radiological risk to members of the public. The Regulations are not land use planning regulations…*
>
> *80. The work undertaken at AWE Burghfield is the assembly, maintenance and decommissioning of nuclear weapons. The Secretary of State for Defence considers some of the information in play in the decision making under scrutiny to be of the utmost sensitivity to the national security of the UK. This includes the materials held at the site, the circumstances under which they are held; the potential risk of accidents involving the materials; the nature of those accidents and their consequences. This sensitivity is recognised and reflected in REPPIR 19 (see above). The sensitivity of the documents mean that the Hazard Evaluation and Consequence Assessment have not been put before the Court…*
>
> *82. The decision at the heart of this challenge is a paradigm example of a highly scientific, technical and predictive assessment. It concerns an assessment of the consequences for public safety of a radiation emergency at the Burghfield site. The assessment has been undertaken by AWE which has contracted in appropriate specialist skill to oversee the project (witness XY) and has employed a project team with specialist skill in mathematical modelling. Through its work the project team identified the worst case scenario to be planned for as an explosion at the site releasing plutonium (an Alpha emitting actinide) in the form of fine particulates of plutonium oxide. The primary safety concern is the public's exposure to "first-pass inhalation of air in the plume of contamination". The project team modelled the resulting plume based on weather conditions which are likely to occur for 12% of the time. In doing so, the team identified a radial distance of 3.16 km from the centre of the site as the distance where taking the recommended urgent protective action of sheltering indoors with doors and windows closed would avert the public's exposure to a specified lower 'Emergency Reference Level', of 3 millisieverts (mSv)…*
>
> *94. The choice of weather conditions was understood by the ONR and PHE to explain the significant enlargement of the DEPZ compared with the previous designation of 1600m under REPPIR 01. In particular, the move away from assessing the dispersion of any radiation plume by reference to weather conditions present at the site for 55% of the time to weather conditions at the site 12% of the time. This aspect of AWE's work was carefully scrutinised by the ONR…*
>
> *101. There is clearly a rationale of some sort in the Consequences Report. Part 3 is headed 'Rationale' and there follows seven paragraphs of text. Paragraph f) of the text explains that the extension of the DEPZ to a minimum radius of 3160m was due to the consideration of the weather conditions that occur for 12% of the time. …*
>
> *110. … The Consequences Report is produced as part of a process which leads to the designation of the DEPZ…*

113. … The purpose of the Consequences Report is to assist the local authority in designating the boundary. It is not to enable the local authority to review AWE's work…

120. … [I]t was not reasonably practicable to finalise the DEPZ; the emergency plan and the public information booklet before May 2020…

129… [D]isclosure is not necessary to resolve the matter fairly and justly. Mr Harris conceded the point in submissions when stating that disclosure was sought in the event the Court did not quash the decision, on the basis it "was hugely important to the Claimants' understanding of the impact of the DEPZ on its land going forward". Acceding to an application for disclosure made on this basis would subvert the statutory regime in the Regulations which contain a carefully formulated regime of information disclosure which Parliament has endorsed.