

Town and Country Planning Act 1990

Rebuttal Statement

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Oneleven Property Ltd

On behalf of Mead Realisations Ltd

**Land at Lynchmead Farm, Ebdon Road,
Weston-super-Mare**

PINS Ref: APP/D0121/W/22/3313624

LPA Ref: 20/P/1579/OUT

Our Ref: PR.41

Date

9th May 2023

1. Introduction

- 1.1 The following Rebuttal Statement has been prepared in response to the proof of evidence of Mr Marcus Hewlett who is the Council's witness in relation to the sequential test, exception test and overall planning balance.
- 1.2 Mr Hewlett's proof of evidence sets out how he considers the sequential test and exceptions test should be approached in relation to the appeal and in my opinion highlights the Council's inconsistent approach and selective use of policy and guidance.
- 1.3 This Rebuttal Statement specifically considers a number of key points raised by Mr Hewlett as follows:
- Approach to Policy
 - Overall Approach to the Sequential Test
 - Timescale for Delivery
 - Reasonably Available
 - Suitable Location
 - Reasonable Prospect
 - Exception Test part a) Wider Sustainability Benefits
 - Planning Balance
- 1.4 Where I have not commented on Mr Hewlett's evidence this does not indicate agreement.
- 1.5 For ease I refer to each of the relevant paragraph numbers from Mr Hewlett's evidence.

2) Approach to Policy

MH Summary Paragraph 1

- 2.1 At paragraph 1 Mr Hewlett refers to the dwelling requirement for Weston super Mare contained within Policy CS28 but fails to note that Policy CS28 requires that a **minimum** of 12,800 dwellings are **delivered** over the plan period. As I set out at paragraph 5.33 of my proof of evidence only 5,891 dwelling completions have occurred at Weston-super-Mare up to 2021/22.

MH Paragraph 5.11

- 2.2 Mr Hewlett suggest that the minimum requirement of 12,800 dwellings in Weston-super-Mare by 2026 is not a 'need'. This entirely ignores the adopted Core Strategy's Priority Objectives and the content of Policies CS13 and CS14 which seek to meet housing need and direct the largest proportion of that need to Weston-super-Mare. Notably policy CS14 relies upon development at the Weston Villages which lie within flood zone 3.
- 2.3 The table provided at paragraph 5.11 of Mr Hewlett's evidence confirms that completions at Weston-super-Mare (4,909) are far below the level expected by Policy CS14 (12,800 up to 2026). Whilst the table contains a figure for permissions and allocations the Council has not provided any up-to-date evidence to confirm when completions from these sources of supply will actually occur.

MH Summary Paragraph 2

- 2.4 Mr Hewlett accepts that Policy CS3 ‘*applies*’. As I set out at Section 5 of my main proof of evidence Policy CS3 is part of the adopted development plan. It is also consistent with the Framework and PPG. At paragraph 5.20 of my evidence, I explain the relevance of this in relation to Section 38(6) of the Town and Country Planning and Compulsory Purchase Act 2004. Mr Hewlett’s evidence appears to suggest that whilst Policy CS3 ‘*applies*’ this has been superseded by other advice.
- 2.5 Mr Hewlett states that ‘*The aim of the sequential test is to **avoid** development in areas at risk of flooding...*’ (my emphasis). This implies that the sequential test prohibits new development in areas of flood risk. In reality all flood zones have some risk of flooding. However, paragraph 162 of the Framework is clear that ‘*The aim of the sequential test is to steer new development to areas with a lower risk of flooding...*’ The sequential test is therefore a tool for the decision maker to use when assessing development proposals.

MH Paragraph 3.3

- 2.6 I note Mr Hewlett’s reference to Policy CS3 at paragraph 3.3, and specifically where the policy states “*Development in zones 2 and 3 of the Environment Agency Flood Map will only be permitted where it is demonstrated that it complies with the sequential test set out in the National Planning Policy Framework and associated technical guidance and, where applicable, the Exception Test [...]” (Mr Hewlett’s underlining)*
- 2.7 Mr Hewlett seems to be suggesting that Policy CS3 requires compliance with ‘technical guidance’ such as the Council’s Advice Note, which is based on the Environment Agency’s 2017 technical advice. However, it is clear to me that Policy CS3 refers to the technical guidance associated with the National Planning Policy Framework (2012) which was applicable when Policy CS3 was prepared but has subsequently been withdrawn. The Council’s Advice Note has not been prepared as a local plan or SPD and therefore cannot update Policy CS3. I understand that there is a body of High Court case-law to the effect that a local authority cannot lawfully promote and rely upon a document of a kind that Regulations 5 and 6 of the Town and Country Planning (Local Planning) (England) Regulations 2012 requires to be promoted as a DPD and tested at independent examination for soundness; yet based upon Mr Hewlett’s evidence this is precisely what the Council appear to be doing with the Advice Note. I am not in a position to comment on the law myself, but leading counsel will make submissions on this on behalf of the Appellant at the inquiry.

MH Paragraph 3.6

- 2.8 I do not agree with Mr Hewlett’s suggestion that Policy CS3 has been the ‘superseded’ by the PPG, appeal decisions or the Council’s Advice Note. As I explain in my evidence Policy CS3 is consistent with the PPG.

MH Paragraph 3.8

- 2.9 With reference to Policy CS28 Mr Hewlett suggests that the Weston Villages comprises ‘*...mainly of previously developed land*’. At **Appendix 1** of this Rebuttal Statement, I attach a Google Earth image of the site in April 2011 just before it was first allocated for development which clearly shows that a large proportion of the site is greenfield.

MH Paragraph 3.16

- 2.10 At Paragraph 3.16 of his evidence Mr Hewlett accepts that the Advice Note is only guidance prepared by the Council and not an adopted SPD. However, Mr Hewlett still attributes significant weight to the Advice Note ‘..given it’s consistency with the Framework’. I find this approach untenable as the Advice Note is at odds with adopted Core Strategy Policy CS3.
- 2.11 As I have set out at paragraph 8.31 of my main proof of evidence Policy CS3 is consistent with the Framework and PPG whereas the Advice Note is in places inconsistent with these documents.
- 2.12 At Paragraph 3.16 Mr Hewlett states that the Advice Note has been ‘referred to and/or given weight in recent planning appeals.’ Of the three appeal decisions Mr Hewlett relies upon to support this statement all of them were dealt with via the Written Representations procedure and no legal submissions appear to have been made. The Advice Note is only given weight in the Albert Road, Portishead decision (CD9.4) with the other two decisions (CD9.5 and CD9.6) simply refer to the Advice Note. The Inspector in the Albert Road, Portishead appeal (CD9.4) states “*The approach in Government Guidance, post-dating the CS, is similarly articulated in the Council’s Development Management Advice Note on ‘Development and Flood Risk Issues’ dated November 2019 (DMAN). I accept that approach diverges somewhat from Policy CS3. Nevertheless, I give the approach in Government Guidance, as the latest iteration of the Government’s position on this matter, significant weight.*” (para 22). In my view this does not mean that the Advice Note was given ‘significant weight’
- 2.13 All three of those appeals related to minor development proposals of no more than 2 dwellings. I therefore consider they have little relevance to this appeal. Ultimately, to the extent that their interpretation of the relevant planning policy framework for this appeal differs from the Appellants, then these decisions (which do not appear to have benefited from any legal argument let alone of the detail that will be provided to this inquiry) are wrong in law. It is well established that the interpretation of planning policy is a ‘right or wrong’ question of law. A later appeal decision which misinterprets planning policy will not be saved from being quashed by the High Court just because an earlier decision also committed the same misinterpretation. Therefore, the Council’s reliance on these minor appeals is not of any real assistance to the Inspector in the present case.

MH Paragraph 3.20

- 2.12 Mr Hewlett suggests that adopted Core Strategy Policy CS3, which was the subject of extensive consultation and independent examination, has now been updated by the Council’s Advice Note. This clearly cannot be the case. Even supplementary planning documents, which are subject to formal consultation before adoption, are only intended to “*build upon and provide more detailed advice or guidance on policies in an adopted local plan*”. The PPG advises that “*As they do not form part of the development plan, they cannot introduce new planning policies into the development plan. They are however a material consideration in decision-making.*” (Paragraph: 008 Reference ID: 61-008-20190315)
- 2.13 Based on Mr Hewlett’s evidence it appears to me that the Council accepts that the appeal proposal accords with the approach set out in Policy CS3 but suggests that the Advice Note represents a material consideration which indicates that planning permission should be refused. If Policy CS3 was at odds with the Framework or PPG then it would be reasonable to give less weight to it. The decision maker would then need to consider what weight to give to

the Advice Note. However, in this case there is no conflict between the Framework, PPG and Policy CS3.

3. Overall approach to the Sequential Test

MH Section 5

- 3.1 At section 5 of his evidence Mr Hewlett criticises the Appellant's approach to the sequential test. However, the approach was based on the Council's initial pre-application advice and supplemented by additional information over a period of 2 years. As far as I am aware Mr Hewlett was not directly involved in the appeal application during the determination period, nor does he suggest as much in his evidence.

4. Timescale for Delivery

MH Summary Paragraph 8

- 4.1 Mr Hewlett's evidence suggests that the Appellant's approach to the sequential test, specifically the consideration of alternative sites, is overly restrictive favouring his opinion that timescales for delivery should be within 5 years. At paragraph 9 of his evidence Mr Hewlett suggests that *'The test is to assess whether there are simply sequentially preferable alternatives that are capable of delivering the proposed development, at a lower risk of flooding and to a **similar** timeframe.'* I consider this to be a misconceived approach which casts further doubt as to the Council's understanding of the sequential test and may explain why the Council's position changed over the course of the appeal application. The PPG clearly states that *"Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time **envisaged for the development.**"* (Paragraph 028 Reference ID: 7-028-20220825) (my emphasis)
- 4.2 As Mr Henderson's rebuttal evidence explains, even if Mr Hewlett's 5-year timescale is preferred, then the housing need will still not have been met. Quite simply the test is not whether 75 homes can be accommodated elsewhere in an area of lower flood risk but whether the identified need for the relevant timeframe can be accommodated on areas of lower flood risk..
- MH Paragraphs 4.30 and 5.21*
- 4.3 Mr Hewlett refers to an appeal at Ferry Road, Rye (CD9.8), and specifically paragraph 11 of the inspector's decision which states: *"However, the test is not that other sites must be available now. It would be short-sighted to exclude sites that might come forward in the near future given the primary purpose of the test."* That appeal considered different development plan policies and different evidence. However, in relation to this appeal the timeframe should not be *'in the near future'* but the specific point in time explained by Mr Henderson in his evidence. I therefore consider that the Rye appeal has little relevance to this appeal

5. Reasonably Available

MH Summary Paragraph 9

- 5.1 At paragraph 9 of his Summary Mr Hewlett states that ‘*Such alternative sites do not need to be owned by the appellant or be necessarily available to the appellant...*’. This contradicts Mr Hewlett’s evidence where he states at paragraph 2 that Policy CS3 applies. Policy CS3 is clear that:

*A Site is considered to be reasonably available’ if **all** of the following criteria are met:*

- *The site is within the agreed area of search.*
- *The site can accommodate the requirements of the proposed development.*
- *The site is either:*
 - a) owned by the applicant;*
 - b) for sale at a fair market value; or*
 - c) is publicly-owned land that has been formally declared to be surplus and available for purchase by private treaty.*

- 5.2 Mr Hewlett’s approach, which appears to selectively rely on parts of the Council’s Advice Note is contrary to the Council’s own adopted Development Plan policy, namely Policy CS3.

Paragraph 3.6

- 5.3 At paragraph 3.6 Mr Hewlett seems to accept that adopted development plan policy CS3 specifies the criteria by which reasonably available sites should be assessed although then suggests that material considerations; namely the PPG, appeal decisions and the Council’s Advice Note indicate otherwise. Mr Hewlett refers to these appeal decisions again in more detail at paragraph 3.16.

- 5.4 The Appellant’s evidence has demonstrated that the sequential test has been undertaken in accordance with PPG in as much as ‘Reasonably available sites’ have been assessed as those in “*a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development*” (PPG 7-028). The PPG goes on to state in the same paragraph that “*lower-risk sites do not need to be owned by the applicant to be considered ‘reasonably available’* (para. 7-028). Such sites do not need to be owned by the applicant to be considered ‘reasonably available’ by Policy CS3. Under Policy CS3 reasonably available sites need to be owned, **or** available for sale at a fair market value **or** publicly owned land which is available for purchase. There is therefore no inconsistency with Policy CS3 or the PPG. There is an adopted development plan policy which explains how, in North Somerset, it is to be judged that there is a reasonable prospect that a site is available to be developed at the point in time envisaged for the development, as required by national policy, and that policy does not fall foul of the proviso in national policy that such sites do not need to be owned by the applicant to be considered reasonably available. There is therefore no conflict between Policy CS3 and the PPG (or the NPPF, on which the PPG provides practical guidance).

MH Paragraph 4.18

- 5.6 At Paragraph 4.18 Mr Hewlett underlines the following text from Policy CS3:

“...available to be developed at the point in time envisaged for the development.”

- 5.7 However, this contradicts his earlier statement at Paragraphs 8 and 9 of his summary where he dismisses the point in time approach taken by the appellant in favour of delivery within 5 years.

MH Paragraph 4.19

- 5.8 Mr Hewlett refers to a 2018 appeal decision at Christchurch, Dorset (CD9.7) which was considered via the Written Representation procedure. In that case the appeal related to 2 x 4 bed water compatible dwellings. The appeal also related to a different development plan policies. I do not consider that this appeal has any particular relevance to this appeal.

6. Suitable Location for the Type of Development (search area)

MH Paragraph 4.21

- 6.1 At Paragraph 4.21 Mr Hewlett suggests that emerging policy is a relevant consideration in relation to identifying a suitable location for the type of development (in this case up to 75 dwellings). Firstly, Mr Hewlett accepts at paragraph 3.11 that the emerging local plan is only of limited weight due to the stage it has reached. Mr Hewlett accepts that ‘...*alternative sites need to conform to policies controlling the broad distribution of housing, in the case of North Somerset Policy CS14: Distribution of new housing and the associated ‘Area policies’ – Policies CS28 to CS33 inclusive.*’ However, he then suggests that if the tilted balance is engaged the policy constraints associated with Policy CS14 and CS28 to CS33 may be relaxed. This implies that all speculative development in unsustainable locations may be suitable. understandably, the Council has not gone as far as suggesting that any site outside flood zone 3 is a reasonable alternative as this most likely would result in conflict with other policies of the development plan. It is important to remember that the Appellant has undertaken the sequential test on a district-wide level considering over 300 separate sites. In any event the sequential test and exceptions test must be passed before the tilted balance is applied.

MH Paragraph 5.18

- 6.2 The Appellant agrees with Mr Hewlett that “*The absence of a 5-year supply is not a relevant consideration for the sequential test for individual applications*” (Paragraph 028 Reference ID: 7-028-20220825). Specifically, it is clear to me that the absence of a 5-year supply does not mean that the sequential test is automatically passed. However, housing need is clearly relevant to the decision makers approach to the sequential test. Oddly, Mr Hewlett suggests that the Appellant incorrectly interpreted flood risk policy because the sequential test prepared in July 2021 did not reflect later updates to the PPG published on the 25th August 2022. The Sequential Test (December 2022) specifically addresses the latest PPG.
- 6.3 The sequential test is simply a tool for the decision maker to identify whether there are other ‘reasonably available’ sites in areas of lower flood risk. The need for housing is therefore a relevant material consideration. The question is not whether there is one reasonably available site in the relevant timeframe that could accommodate 75 dwellings but whether there are enough of those sites to meet the identified need in that timeframe. If there are not, then it follows that development will need to be accommodated in higher flood zones, if that need is to be met. Mr Henderson’s evidence shows that of the 39 disputed sites, none of them are sequentially preferable.

MH Paragraph 5.51

- 6.3 Mr Hewlett suggests that housing proposed within a high-risk flood area is inherently unsustainable. This is contrary to the approach set out at paragraph 8 of the Framework in relation to the three roles of sustainable development.

7. Reasonable Prospect

MH Paragraph 4.28 onwards

- 7.1 At paragraph 4.29 Mr Hewlett provides his own narrative on what timeframe should be applied stating that:

“In practice this requires a reasonable timeframe to be applied for the delivery of any alternative housing site that should not be so restrictive as to rule out any suitable alternatives at a lower risk of flooding. In my view this should be driven by the need to expedite housing delivery where it is reasonable to conclude that any alternative site could broadly deliver housing to a similar timeframe or within the short-term.”

- 7.2 However, the PPG tells us that to be ‘reasonably available’ a site must have a reasonable prospect of being available “...at the point in time envisaged for the development.” Mr Hewlett’s suggestion is that a timeframe of 5 years should be applied based on the unrelated advice contained at a paragraph 68 of the Framework. In my view, this approach is directly contrary to the express terms of the PPG. However, the point appears to be academic anyway, because as Mr Henderson’s rebuttal evidence explains it makes no overall difference to the outcome of the sequential test.

8. Exception Test part a) Wider Sustainability Benefits

MH Summary Paragraph 14

- 8.1 At paragraph 14 of his Summary Mr Hewlett’s assessment of the exception test seeks to downplay the weight that should be attributed to the economic benefits of the appeal proposal. This is contrary to Paragraph 81 of the Framework which confirms that ‘...the Government places significant weight on the need to support economic growth.’ More specifically, Mr Hewlett appears to have disregarded the inspector’s findings in relation to the Rectory Farm, Yatton appeal (CD9.2) where at paragraphs 150 and 151 ‘significant weight’ is given to the economic benefits.

MH Paragraph 3.22 to 3.24

- 8.2 Mr Hewlett states that the Council’s Advice Note sets ‘local criteria’ for the application of the Exceptions Test. However, no such criteria are actually set. Mr Hewlett then goes on to explain that the Advice Note provides ‘Examples of benefits beyond the application site.’ There is no suggestion within PPG or the Advice Note that the list of ‘wider sustainability benefits’ is exhaustive.
- 8.3 As I have set out at Section 8 and 9 of my evidence there are a number of wider sustainability benefits associated with the appeal proposal which outweigh the flood risk.

MH Paragraph 4.9

8.4 At paragraph 4.9 Mr Hewlett accepts that a balancing exercise is required between the risk, which Mr Bosanko deals with in his evidence, and wider sustainability benefits. To pass the exception test it is the case that part a) and b) of the exception test must be met. However, Mr Hewlett seems to suggest that the exception test represents a further requirement for exceptional circumstances as, for instance is required for major development in a National Park or Area of Outstanding Natural Beauty. This is not the case. In simple terms if the wider sustainability benefits outweigh the risks then that the exception test is passed. Importantly, in relation to part b) Mr Bosanko’s evidence demonstrates that the development will be safe for its lifetime.

MH Paragraph 5.46 - onwards

8.5 Mr Hewlett sets out his approach to how he has considered wider sustainability benefits and concludes at paragraph 5.48 that there is “*no alignment*” between the appeal proposals and the PPG/Advice Note examples. However, as I have already stated these examples are not an exhaustive list.

8.6 Mr Hewlett then applies an assessment of the wider sustainability objectives against 4 categories. These criteria do not appear to be found in the sustainability appraisal (CD.8.24) and seem largely irrelevant to the exception test which does not require that proposals ‘*...align well with the majority of the SA objectives*’ as he suggests. Part a of the exception test simply requires that “*the development should provide wider sustainability benefits to the community that outweigh the flood risk.*” I set out these wider benefits at Section 8 of my main proof of evidence.

MH Paragraph 5.54

8.7 Mr Hewlett refers to “*more general benefits*” which he suggests may carry weight in the application of the tilted balance. This suggests that Mr Hewlett would apply no weight to these benefits in the situation where a flat balance is applied. It is telling that Mr Hewlett uses expressions such as ‘exceptional benefits’, ‘reasonable benefit’ and ‘exception to the norm’ all of which have no basis in planning policy when undertaking the exception test (part a). The wider benefits do not have to be exceptional or come from an exhaustive list. They simply need to outweigh the flood risk.

9. Planning Balance (Benefits of the Appeal Proposal)

MH Paragraph 5.55 to 5.57

9.1 Mr Hewlett seeks to significantly downplay the benefits of the appeal proposal. This is in stark contrast to the findings of recent appeals in North Somerset. I summarise the position in the table below:

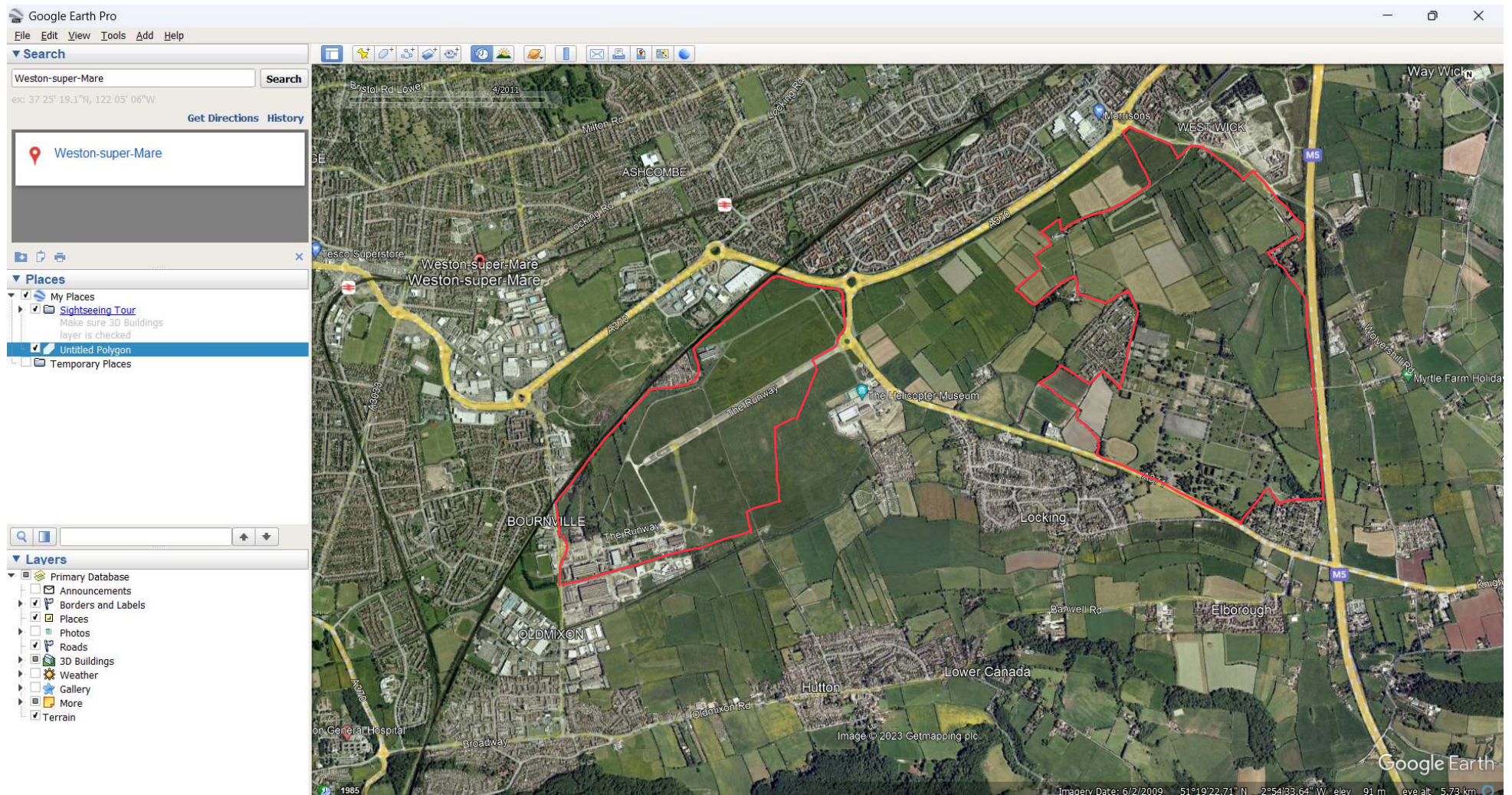
	Marcus Hewlett PoE	Rectory Farm, Yatton (CD9.2)	Farleigh Farm, Backwell (CD9.1)
Market Housing	Significant weight	Very Significant weight	Very Significant weight
Affordable Housing	Not specified	Very Significant weight	Very Significant weight

Market housing at the appeal site	Less than significant weight	n/a	n/a
Affordable Housing at the appeal site	Less than significant weight	n/a	n/a
Economic (Temporary construction jobs/additional spend)	Limited Weight/Very Limited Weight	Significant weight	Moderate weight
Environmental Benefits	Not specified	Significant Weight	Modest weight

10. Summary

10.1 Having reviewed Mr Hewlett's evidence I consider that the Council's approach to the appeal proposal is inconsistent and at odds with relevant policy and guidance. As Mr Henderson's evidence and rebuttal confirm, of the 39 disputed sites none of them are sequentially preferable.

Ian Jewson Rebuttal - Appendix 1



Google Earth historic image dated 4/2011 showing approximate boundary of Weston Villages edged Red