Planning Rebuttal.

In Respect of Sheepwash Solar Farm.
On behalf of Statkraft UK Ltd.

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Appendix 1 – Embedded Capacity Register

1. Introduction

1.1. This Planning Rebuttal has been prepared principally in response to the Proof of Evidence prepared by Mr Martin Robeson (hereinafter referred to as "MRP") in respect of the planning appeal (APP/U2235/W/23/3321094) for the proposed solar farm development at Land North of Little Cheveney Farm, Sheephurst Lane, Marden.

1.2. Matters of landscape and heritage are principally dealt with in separate rebuttals. However, this Planning Rebuttal also refers to the Proof of Evidence prepare by both Mr Peter Radmall and Mr Jeremy Fazzalaro with regard to matters concerning the correct interpretation of relevant planning policy.

1.3. I have not sought to respond to every point where I disagree with the Council's witnesses and have instead limited my rebuttal evidence to those points where I consider the Inspector may be helped by having a written response in advance of the Inquiry.

1.4. It also refers to any relevant material changes to the publication of the revised NPPF in December 2023.

2. Proof of Evidence of Mr Martin Robeson

Paragraph 6.3

2.1. MRP says that as part of the first of three limbs of DM24, the definition of design and development of proposals 'should be interpreted so as to include matters relating to site selection'. I consider this is an incorrect interpretation of DM24.

2.2. I note that there is no mention of site selection within the six criteria listed by DM24. Moreover, it is evident that the first limb sets out relevant factors that are to be considered in assessing the specific impacts of low carbon energy projects and does not form a method or basis of assessment for site selection.

Paragraph 6.4 and 6.5

2.3. MRP says that any unacceptable impact against the six listed criteria would result in a failure to comply with policy DM24.

2.4. As a matter of fact, DM24 simply lists six criteria that are required to have been demonstrated to have been taken into account by planning applications, as the Appellant has done. DM24 does not state that an unacceptable impact will cause a conflict, or breach of policy DM24 as MRP suggests. Nor does MRP explain how DM24 assists in guiding the decision-maker in determining which impacts should be considered "unacceptable".

2.5. I note that the Local Plan provides policies relating to landscape, heritage, ecology and matters referred to by the other criteria listed in DM24. Importantly, the development plan must be understood as a whole, and the relevant topic specific Local Plan policies set out how impacts should be assessed. This approach to constructing and applying policy is endorsed in case law judgments; notably that of Sullivan J in Rochdale [R v Rochdale MBC ex parte Milne [2001] reported at 81 P&CR 365]. In this case, Sullivan J concluded that in

assessing compliance with the development plan it is not necessary to comply with all policies; there will be some core or site-specific policies that take precedence over others.

2.6. It is therefore not the case that an impact that causes some conflict with a particular Local Plan policy would automatically result in failure to comply with DM24, or indeed the Development Plan as a whole.

2.7. Furthermore, it is important to consider whether any impact is 'unacceptable' when assessing compliance with Development Plan policies. Policy DM24 is framed so as to allow for any adverse impacts to be assessed and weighed in the balance, rather than stating that any negative impact would cause conflict with the policy.

2.8. Paragraph 163 of the NPPF (December 2023) says that when determining planning applications for renewable and low carbon development, local planning authorities should approve the application if its impacts are (or can be made) acceptable.

2.9. I also note that paragraphs 7.2 and 7.3 of MRP wrongly assert that 'harm to the character and appearance of the area' would cause conflict with DM24. In addition, paragraph 7.1 concludes that the use of BMV agricultural land results in further conflict with DM24.

2.10. It is common ground that a solar farm in Maidstone would have to be located in the countryside. Some negative landscape impact and use of agricultural land would therefore inevitably arise. Interpreting planning policy in the manner suggested in MRP would mean that any solar farm proposal must conflict with DM24, whereas DM24 is in fact a policy that provides in principle support for new renewable energy developments. This further demonstrates that the MRP approach to interpreting planning policy conformity is incorrect.

Paragraph 6.11

2.11. It is alleged (by inference) that the development is in fact not temporary because paragraph 163, c) of the NPPF (December 2023) provides that 'significant weight' can be given to the benefits of repowering or life extension of an existing renewable energy site.

2.12. This is an incorrect approach to assessing the proposed development. A planning Inspector set out the correct at paragraph 108 of appeal decision 3319421 (CD 7.23)

> *"…The Council suggested that recent changes to the NPPF relating to future re-powering and life extension of renewable and low carbon energy developments (paragraph 155a) would make it more likely that the development would become permanent. However, I must deal with the development on the basis of what is applied for. Decisions regarding any future use of the site would be made having regard to circumstances and policies in force at that time"* (my emphasis).

2.13. As also indicated by the Inspector above, it is noted that the NPPF has only very recently been amended and there is no way knowing what it may say with regard to extending the lifetime of projects in 37 years time.

2.14. Paragraph 6.10 of MRP does acknowledge that a proposed planning condition will ensure provision for the return of the land to its previous use when the installations have ceased operation, and thus the proposal will indeed be a temporary one.

2.15. In failing to consider the proposal as temporary, MRP has failed to acknowledge that the impacts are also temporary, and has therefore overstated the negative impacts of the proposed development. The planning balance undertaken by MRP is consequently flawed.

Paragraph 6.13

2.16. MRP suggests that DM24 provides a test for a 'binary question' with regard to using BMV land and paragraph 7.1 then goes on to argue that the use of BMV land causes a breach of policy DM24.

2.17. This is an incorrect approach and reading of DM24. As discussed in my Proof of Evidence at paragraphs 8.40 to 8.42 and 8.52, DM24 does not set out a mandatory sequential test or approach and does not prohibit the use of BMV land.

Paragraph 6.15 to 6.17

2.18. MRP says that the land types listed with DM24(2) are 'strictly 'better' than those land types that are not listed, and that only if the proposal could not be located on those land types not listed could proposals on any other land be compliant with DM24(2)'.

2.19. That reading is a misunderstanding of the policy. It is agreed that DM24 sets out a preference for certain types of land, but the policy does not specify or require that only those types of sites are suitable and neither does it specify that sites on other types of land (e.g. BMV land) are unacceptable.

2.20. In addition, the drafting of the policy does not indicate that limb 2 (potential preferred land) should be read as preceding any consideration of, or should be considered separately from, limb 1 (site considerations).

2.21. As stated above, there is no 'binary question' on the use of BMV. But if that were the case, it would be reasonable to assume that DM24 would be laid out and drafted in a way that would reflect this, with the other factors for consideration following passing the 'binary question'. But that is not the way DM24 is drafted.

2.22. MRP argues (6.16) that it is 'logical' that consideration of BMV should take the form of an assessment of alternative sites. First, I note that no evidence is provided in MRP to support that conclusion. As paragraphs 8.46 to 8.52 of my Proof of Evidence demonstrate, there is no mandatory sequential test set out in DM24 or national policy. Second, paragraphs 8.43 and 8.44 of my Proof of Evidence set out that MRP 6.16 contradicts the Council's own Planning Policy Advice Note: Large scale (>50kW) solar PV arrays guidance which clarifies how the use of BMV land should be justified. The approach to justifying the use of BMV land required in that document is not an assessment of alternative sites.

2.23. MRP 6.17 argues that the relevant 'test' must be whether a proposal could be located on lower quality land, demonstrated only through consideration of alternative sites. My Proof of Evidence demonstrates that relevant considerations for the use of BMV land include whether the proposed use is temporary, whether any actual loss of agricultural land will result and the overall context and supply of BMV land (see the table at paragraph 8.129 that refers to other planning appeal decisions).

2.24. In addition, paragraphs 8.120 and 8.122 of my Proof of Evidence demonstrate that in bringing forward housing sites in the emerging plan, the Council has considered the overall

context of BMV land in the Borough and has taken into account other considerations, namely achieving a sustainable pattern of growth when making decision involving BMV land. This further contradicts the MRP approach that the use of BMV land is a binary question that can only be answered through a sequential test.

2.25. It is acknowledged that national policy (i.e. NPPF footnote 62) seeks to use poorer quality agricultural land in preference to higher quality land. The Appellant has set out how this has been considered and why the appeal site is acceptable, as explained in Chapter 8 of my Proof of Evidence.

Paragraph 6.19

2.26. An extract copy of the Embedded Capacity Register maintained by UK Power Networks provided at Appendix 1 (see Register Part 1 tab, line 1084, under 'Marden Generation' (NB: Solar Century has since been purchased by Statkraft)) confirms the export grid offer of 50MW.

Paragraph 6.21

2.27. MRP incorrectly assumes that the Connection Action Plan announced by Ofgem to speed up grid connections is a solution that will mean grid connections will be easier and quicker and that grid connections are therefore not a sound basis for conducting an assessment of alternative sites.

2.28. As the extract of Appendix 1 of MRP says, the Connections Action Plan will help the UK achieve net zero by 2050, that urgent reform is needed if the 2035 national target to decarbonise the power system and that Ofgem unlocked the £20bn of capital investment in the transmission framework.

2.29. In other words, the Connections Action Plan is being put in place because there are significant problems that exist today that will otherwise prevent the UK from achieving its decarbonisation targets. It is a strategy plan, not a solution.

2.30. The MRP suggestion that the Connection Action Plan signals a success story that means grid connections will somehow become easier to find and the UK will now have little or no trouble meeting the 2035 energy commitments is a fundamental misunderstanding of the rationale for introducing Connections Action Plan, and also relevant national policy including EN-1 and EN-3 which set out a Critical National Priority for renewable energy.

2.31. Paragraph 2.10.8 of recently published EN-3 confirms that a network connection is a relevant factor for influencing site selection and design. I address the relevance and importance of a grid connection in paragraphs 8.79 to 8.92 of my Proof of Evidence.

Paragraph 6.25

2.32. MRP questions why the search area was terminated at Hartley. As the below image demonstrates, the section of overhead line between Hartley and Ninfield is within the High Weald Area of Outstanding Natural Beauty (dark green land on the image) and is therefore subject to greater planning restrictions than the land north of Hartley.

2.33. In addition, it had been identified that the Northfleet substation (to the north) could accommodate the proposed generated capacity and was therefore suitable.

2.34. Paragraph 6.26 incorrectly states that the Carter Jonas work only focussed on land in Maidstone. As Appendix 2 and 3 of the Updated Sequential Analysis demonstrate, land that fell into adjoining planning authorities was considered. Paragraphs 8.79 to 8.92 of my Proof of Evidence set out why the site search area was reasonable and proportionate.

Paragraph 6.34

2.35. Electricity generated by the proposed development would be fed into the wider distribution network. Its point of final consumption would be determined by a number of supply and demand factors, such that it is impossible to determine geographically, who would use the energy. That said, it is typical that a high proportion of the energy generated by the proposed development is likely to be consumed in the local area.

Paragraph 6.38

2.36. MRP suggests that the large size of the site has predetermined the site selection exercise, and by implication, that it is not appropriate to search for a site suitable for a scheme of the size for which planning permission is sought. Paragraphs 8.70 to 8.78 of my Proof of Evidence demonstrate why that is an incorrect approach.

Paragraph 8.3

2.37. MRP says that the Local Authority has considered whether or not to identify suitable areas for a solar farm to inform the emerging local plan and has chosen not to do so.

2.38. I am unaware of any evidence or work that the Council has undertaken as part of the local plan review process to proactively consider whether there are any potential available sites or land for solar farm development.

2.39. As a point of fact, the Council has not pointed to any alternative site or area for the proposed development as part of this planning appeal, but has instead suggested that the Appellant should look elsewhere in the UK.

2.40. However, the Council's approach for delivering renewable energy proposals in the next plan period is to roll forward the criteria based approach of DM24 and continue to rely on speculative planning applications coming forward. There is no analysis undertaken in the emerging Local Plan evidence base which assesses how much new solar generating capacity its current approach is expected to produce.

Paragraph 8.24

2.41. MRP alleges that no weight should be given to grazing because it will not be secured by condition. The absence of a condition or other means of control does not prevent a decision-maker from affording a benefit weight in the planning balance.

2.42. The Judgment in R (SASES) v. SSESNZ [2022] EWHC 3177 (Admin) CD 7.21) confirms that:

> *"Aside from the requirements of section 15(3) PA 2008, there is no legal or policy requirement for the generating capacity to be formally secured. Furthermore, as a general principle, there is no legal requirement that all benefits which are given weight in a planning balance must be formally secured, in order to be treated as material considerations. In this case, the decision to give weight in the planning balance to the generating capacity was a matter of judgment for the Defendant".*

2.43. At paragraph 20 of appeal decision 3315877 (CD 7.15) the Inspector concluded that 'given the height and angle of the proposed panels I consider grass will be able to grow under the panels satisfactorily as well as between the rows of panels, enabling such grazing to take place'.

3. Proof of Evidence of Peter Radmall

3.1. At paragraph 5.26 of Mr Radmall's evidence, he makes the same suggestion as paragraph 6.11 of MRP that 'use of the site for renewable energy generation could effectively become permanent".

3.2. The implications for inaccurately assessing the impacts of the proposed development set out in relation to MRP at paragraph 2.15 above also apply to Mr Radmall's evidence.

4. Proof of Evidence of Jeremy Fazzalaro

4.1. Paragraph 6.02 of Mr Fazzalaro's evidence says that:

> *"The development is a breach of Section 66 and is contrary to Policy, SP 18, DM 4 and DM 24 in that the development does not preserve or enhance the setting of the listed buildings. The less than substantial harm will need to be considered in the planning*

balance as well as the great weight to be given to the heritage assets mentioned above as outlined under para 199 of the NPPF".

4.2. I note that neither the Council's reasons for refusal or the Council's Statement of Case refer to policy SP18 or Section 66 of the Act.

4.3. I disagree that the heritage harm the Council alleges leads to conflict with policies SP 18, DM 4 and DM 24. Policy SP 18 does say that heritage assets will be protected and, where possible, enhanced and DM 4 says that *'applicants will be expected to ensure that new development affecting a heritage asset incorporates measures to conserve, and where possible enhance, the significance of the heritage asset and, where appropriate, its setting'*.

4.4. I take the references to 'conserve and enhance' heritage assets within the above polices to reflect Section 66 of the Listed Building Act, which confirms that in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

4.5. Section 66 does not prevent the grant of planning permission in cases where harm is found to exist. Nor does the grant of planning permission in those circumstances lead to a breach of section 66. The Act requires particular consideration to be given to the desirability of avoiding harm when striking the planning balance. Harm can be, and often is, outweighed by other considerations in the planning balance.

4.6. Moreover, paragraph 28 of the Mordue judgment provides that:

"…Paragraph 134 of the NPPF (now 205 on) appears as part of a fasciculus of paragraphs, set out above, which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty…".

4.7. Indeed, notwithstanding the incorrect approach of Mr Fazzalalro that failing to conserve or enhance heritage assets would cause a policy breach, I note that he does recognise (in the same paragraph quoted above) that the less than substantial harm needs to be weighed in a balance.

4.8. I therefore conclude that if the Inspector finds that less than substantial harm results as the Council alleges, and that public benefits outweigh that harm, the proposal would accord with policies SP18 and DM4 and no breach of section 66 would result.

5. NPPF December 2023

5.1. I consider that no material changes have been made to the parts of the NPPF that are relevant to this planning appeal.

Town & Country Planning Act 1990 (as amended)
Planning and Compulsory Purchase Act 2004

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