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Mr Christopher Dale
Head of Planning
Welwyn Hatfield District Council

4 March 2022

Email: c.dale@welhat.gov.uk

Dear Mr Dale,

Planning application reference 6/2020/3451/MAJ – further objection letter

Introduction

1. We act for [REDACTED], owner of Thorntons Farm, Northaw in relation to the planning application for the proposed erection of 14 dwellings at Wells Farm, Northaw Road, East Cuffley, Potters Bar, EN6 4RD ("**Site**") (reference 6/2020/3451/MAJ ("**Planning Application**")).
2. This letter follows and should be read in conjunction with the letter we sent regarding this matter dated 16 February 2022 ("**First Letter**"). In this letter we address the following:
 - (a) An overview of the relevant legal tests concerning the Green Belt.
 - (b) The decision of the Planning Inspectorate dated 15 February 2022 in relation to Colesdale Farm, Northaw Road West, Northaw, Potters Bar EN6 4QZ ("**Colesdale Farm Decision**").¹
 - (c) The letter of the Planning Inspector dated 16 February 2022 relating to housing need and site allocation ("**Inspector's Letter**").²

¹ Appeal reference APP/C1950/W/20/3253559.

² Reference EX283, Letter from Inspector Melvyn Middleton to Mr Christopher Dale.

10227005564 [REDACTED]

- (d) An explanation as to why the Planning Application does not satisfy the relevant legal tests.
- (e) Other policy considerations.

The relevant legal tests concerning the Green Belt

3. The tests for development in the Green Belt are set out in the National Planning Policy Framework:

*[147] Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in **very special circumstances**. [our emphasis]*

*[148] When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. **'Very special circumstances'** will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.*

("Very Special Circumstances Test")

There are some exceptions to what is considered "inappropriate development". In particular one exception is where the development involves previously developed land ("PDL"). The kind of development which can fall within this exception is set out below:

[149] (a) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:

- (i) *not have a greater impact on the openness of the Green Belt than the existing development ("**149(a)(i) Test**")*; or
- (ii) *not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority ("**149(a)(ii) Test**").*

4. This means that where a development involves PDL, it does not have to meet the Very Special Circumstances Test, but rather those requirements of the 149(a)(i) Test or 149(a)(ii) Test above.

5. The test for removing land from the Green Belt as part of a Local Plan examination is different again:

*[140] Once established, Green Belt boundaries should only be altered where **exceptional circumstances** are fully evidenced and justified, through the preparation or updating of plans [...]*

[141] Before concluding that exceptional circumstances exist to justify changes to Green Belt boundaries, the strategic policy-making authority should be able to demonstrate that it has examined fully all other reasonable options for meeting its identified need for development. This will be assessed through the examination of its strategic policies, which will take into account the preceding paragraph, and whether the strategy:

- a) makes as much use as possible of suitable brownfield sites and underutilised land;*
- b) optimises the density of development in line with the policies in chapter 11 of this Framework, including whether policies promote a significant uplift in minimum density standards in town and city centres and other locations well served by public transport; and*
- c) has been informed by discussions with neighbouring authorities about whether they could accommodate some of the identified need for development, as demonstrated through the statement of common ground.*

("Exceptional Circumstances Test")

Colesdale Farm Decision

6. The Colesdale Farm Decision granted an outline planning permission for residential development of a site of up to 34 dwellings following removal of the existing buildings and structures at Colesdale Farm, subject to conditions. While we note that each planning case is determined on its own merits, as recognised in the Colesdale Farm decision where the Inspector says: "*my decision does not set a precedent for other sites in the area,*"³ it is helpful to point out some key differences from the Colesdale Farm Decision to the Planning Application.
7. The parties had agreed in the Colesdale Farm case that the proposal could be considered the complete redevelopment of previously developed land ("**PDL**"). The upshot of this is that the Inspector did not need to consider the Very Special Circumstances Test.

³ Colesdale Farm Decision at [46].

Further, as the case involved affordable housing, the test for the Inspector was whether the development "*would not cause substantial harm to the openness of the Green Belt*" (ie the 149(a)(ii) Test).

8. By contrast, it has not been determined whether the Planning Application involves PDL. As mentioned in our client's planning objection letter (Appendix A to the First Letter), the planning history for the site does not show that two of the buildings have lawfully changed from agricultural use, and the change of use permissions for the remaining buildings do not extend to the wider site.
9. However, the Planning Application covers off both situations:
 - (a) If it is held that the Planning Application does involve redevelopment of PDL, the Council will need to be satisfied that the development would "*not have a greater impact on the openness of the Green Belt than the existing development*"; (ie the 149(a)(i) Test;⁴ or
 - (b) if it is held that the Planning Application does not involve redevelopment of PDL, the Council will need to be satisfied that the Very Special Circumstances Test is met.⁵
10. It can be seen from the outset that although the Colesdale Farm property and the Planning Application are similar in location, the facts to inform the relevant legal tests are distinct.
11. Even if the Council was satisfied that the Planning Application involved redevelopment of PDL land, it would need to be satisfied that the more prescribed 149(a)(i) Test has been satisfied. This requires that the development would "*not have a greater impact on the openness of the Green Belt than the existing development*".
12. This is not the same as the 149(a)(ii) Test to "*not cause substantial harm to the openness of the Green Belt*" which gives the decision maker more flexibility when reaching their conclusion and is what the Inspector in the Colesdale Farm Decision was required to assess.
13. Other differences between the Planning Application and the Colesdale Farm Decision include:

⁴ NPPF 145(g)(a).

⁵ NPPF 147 and 148.

- (a) In Colesdale Farm, the submitted information demonstrated that the proposal would result in a reduction in the volume and massing of the site – for the purposes of the Planning Application, the onsite buildings are increasing from seven to fourteen;
- (b) The site was described as having an "uncharacteristically commercial presence" – the same cannot be said for the Planning Application which involves rural styled buildings.
- (c) The site provided affordable housing, and the Planning Application does not.
- (d) With regards to the Planning Application, it has been recognised throughout the Local Plan examination that other sites (not HS30 where the Planning Application is proposed) are sequentially better located from a movement perspective.⁶

Inspector's Letter

- 14. It is important also to ensure that recent comments in the Inspector's Letter do not cloud the tests for the decision makers for the Planning Application. As described above, under the process for the Local Plan, the Exceptional Circumstances Test must be met. By contrast, the decision maker for the Planning Application must either be satisfied that Very Special Circumstances exist, or that the land is PDL so that the 149(a)(i) Test applies.
- 15. For context, HS30 is a site for allocation which was originally included in the Regulation 19 submission draft Local Plan (2016), ("**Draft Local Plan**"). However, the Council subsequently decided on 10 February 2020 it was not fit for inclusion owing to members considering that it would result in an unacceptable level of harm to the Green Belt.⁷ The Planning Application is proposed on HS30. Even though the Inspector's Letter states he considers HS30 sound, indicating he considers that the Exceptional Circumstances Test has been satisfied, this is by no means validation that the Very Special Circumstances exist required to justify the Planning Application, or in fact that 149(a)(i) Test has been satisfied. Further, it remains to be seen whether the Inspector's justifications for HS30 remaining as an allocated site in the Local Plan are robust.
- 16. The role of these conflicting communications between the Inspector and the Council should also be understood. At present, there is the Inspector's Letter dated 16 February

⁶ Inspector's Interim Report at [125].

⁷ Letter of Council to the Planning Inspector dated 10 February 2020, page 2.



2022 stating that HS30 should be allocated, and there is a decision of the full Council dated 27 January 2022 stating that HS30 should not be released from the Green Belt.

17. At present, the fact remains that the Draft Local Plan has not been adopted. It cannot be said on what terms the Draft Local Plan will be adopted (if it in fact will be adopted). Deliberations in relation to the key issues of site allocation and housing supply are in a state of flux, and it would be inappropriate to give undue weight to one view over another at this stage, when key issues such key issues remain in dispute. Even in cases where a site has been allocated in an emerging Local Plan, (and there is no such controversy as to whether it should remain as such) a decision maker will generally only attach limited weight to a draft allocation.⁸
18. A similar approach can be taken with regard to the Inspector's conclusions in his interim report regarding the harm ratings for HS30. The report prepared on behalf of the Council assessed that there would be a high harm rating for the release of HS30 from the Green Belt.⁹ The Inspector's Interim Report recorded that the site only made a partial contribution to the relevant Green Belt purposes and suggested mitigation.¹⁰ Similarly, the Planning Application suggests mitigation, and records its view that the degree of harm arising would be "low".¹¹ The Council in its letter to the Planning Inspector records HS30 as a high harm site.¹² It therefore should not be accepted that the Inspector's view and that put forward by the Planning Application on the harm rating is a foregone conclusion.

Reasons why the Planning Application does not satisfy the relevant tests

Very Special Circumstances Test

19. If, as we believe, the site is not PDL then the Very Special Circumstances Test will apply. Case law has established there are some typical factors which may give rise to Very Special Circumstances are as set out below:
 - (a) If the Council is unable to demonstrate a 5-year housing supply;

⁸ As seen in the Colesdale Farm Decision at [3].

⁹ As referenced in the Welwyn Hatfield Green Belt Study Stage 3, dated August 2018 prepared for Welwyn Hatfield Borough Council at page 57.

¹⁰ Inspector's Interim Report at [123].

¹¹ Planning Statement for the Planning Application at [6.52].

¹² Letter of Council to Planning Inspector dated 10 February 2020.

- (b) If a site where the development is going to take place has been allocated in an emerging Local Plan;
- (c) Development which provides social / public benefits; and
- (d) Development which is visually contained.

Lack of 5-year housing supply

20. As set out in the 2015 Written Ministerial Statement,¹³ a shortfall in housing land supply can, as a matter of policy be a very special circumstance, although the occasions when it is likely to suffice by itself to warrant the grant of permission for housing development in the Green Belt are few and far between. This has been confirmed by the Courts.¹⁴
21. In the case of the Draft Local Plan, the Council has stated that its proposed housing trajectory is very close to meeting the requirements of paragraph 47 of the NPPF 2012 (which is the relevant version of the NPPF for the examination) and providing a specific supply of sites for the first 10 years of the Local Plan.¹⁵ We note that the Inspector's Letter disagrees with the Council's suggested dwelling requirement of 13,279 and requires that his Full Objectively Assessed Housing Need number of 15,200 is met and that the Council's submitted housing trajectory does not evidence a full 5 year supply.¹⁶ However, as has recently been clearly set out by the Minister for Housing it is important to remember that the formula for housing need is a starting point, not an end point. It is for local authorities, working with the Planning Inspectorate to determine the right number of homes based on the constraints and ambitions they may have.¹⁷ For the purposes of considering the Planning Application, the Council has demonstrated on its revised list of sites for inclusion (ie with HS30 excluded as exceptional circumstances do not exist) that it can deliver 15 years of housing to meet what it has set out is the right number of houses (i.e.13,279). In the *Colney Heath* decision (by way of contrast), the Council was unable to even show five years of housing supply.¹⁸

¹³ Green Belt protection and intentional unauthorised development – statement made on 17 December 2015 by Minister for State Housing and Planning.

¹⁴ As referenced in *R(Lee Valley Regional Park Authority) v Broxbourne Borough Council* [2015] EWHC 185 at 23.

¹⁵ Letter of Council to Planning Inspector dated 10 February 2020.

¹⁶ Letter of Planning Inspector to the Council dated 16 February 2022 at [3] and [11].

¹⁷ The Minister for Housing, Christopher Pincher, Hertfordshire Green Belt: National Planning Policy, Volume 704 debated on Tuesday 23 November 2021.

¹⁸ APP/B1930/W/20/3265925 and APP/B1930/W/20/3265926.

22. Whilst there remains disagreement between the Council and the Planning Inspector the Council have demonstrated close to a full 5-year supply (on the Planning Inspector's FOAHN) and the Council can yet propose Main Modifications to the Draft Local Plan in order to meet the Planning Inspector's position. As such the position is very different to Colney Heath and the current uncertainty as to the final position means that it would be inappropriate for this to amount to one of the "few and far between" circumstances which would justify it meeting the Very Special Circumstances Test.

Allocation in the Draft Local Plan

23. As previously discussed, the status of HS30 and whether a Local Plan would be adopted that includes HS30 as an allocated site has been subject to considerable deliberation and the outcome for HS30 is yet to be determined. Therefore this factor carries very little weight in this case. Even in decisions where a site has been allocated in an emerging Local Plan (without the associated disagreement as is occurring in Welwyn Hatfield), Inspectors will generally only attach limited weight to the draft allocation. As such, the current status of HS30 is not persuasive in this case.

Development which provides social / public benefits

24. The Planning Application does not propose anything by way of schools, public space, elderly care or affordable housing. While it does propose to "improve accessibility. It is not considered that would be a material social / public benefit in this case. In addition, we reference our comments above at 13(d) which highlight the issues with HS30 from a movement perspective.

Visual containment

25. For the reasons discussed at 26 below, in relation to the effect on openness, it is our view that the development will not be "visually contained".

149(a)(i) Test

26. If the Planning Application was considered to be on PDL and therefore the 149(a)(i) test applied, it would have a greater effect on openness than the existing development. The word "openness" is open textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case.¹⁹ At present the site has 6 buildings in rural typology, which are mostly single-storeyed with one building which is damaged and unused. By contrast, the Planning Application

¹⁹ *John Turner v Secretary of State for Communities and Local Government, East Dorset Council* [2016] EWCA Civ 466 at [14].

involves 14 houses, all of two storey buildings meaning a more intensive use of the site, with associated domestic amenities. The houses will spread the built form across the site to areas where there is currently no development.

27. Further, the presence of 14 houses in this location would begin the process of merging the two villages of Cuffley and Northaw while immediately compromising the Green Belt openness of the area.
28. Therefore, the Planning Application will clearly have a greater effect on the openness of the Green Belt than the current development on the site.

Policy

29. As a final point, the assessment methodology for housing need is also likely soon to be up for review. A recent statement from Conservative MPs notes that there will become pressure on the algorithms which calculate housing need and can impose large scale developments on small communities, with further changes to the current system of housing targets which are creating intolerable pressure for over-development.²⁰ Therefore, it would appear premature to enable development to meet housing need, when the quantum of that housing need may well be readjusted in the near future. The Levelling Up White Paper, which says that enhancing and maintaining protection of the Green Belt is a priority, is also relevant.²¹

Costs

30. As the Council will know, in any appeal (in the event the present application reached an appeal), there is a risk of costs. However, the general position is that each party should bear their own costs. Costs awards are made where one party has acted unreasonably throughout proceedings. It would be far-fetched to consider that a refusal by the Council at the planning application stage would give rise to a costs award against the Council as part of any appeal in this matter and completely inappropriate to base a planning decision on the basis of a potential exposure to costs should that decision be appealed.

²⁰ Reference to the Daily Telegraph article "Michael Gove scraps radical planning law following fierce Tory backlash" dated 25 February 2022.

²¹ Levelling up White Paper "Levelling Up the United Kingdom", dated 2 February 2022 at page 211.



Conclusion

31. For the reasons stated above and for those given in the First Letter, we seek that the Planning Application is refused.
32. We would be grateful if you could please confirm safe receipt of this letter.

Yours faithfully



Clifford Chance LLP

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