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7 September 2022

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Dear Members of the Development Management Committee ("**Members**"),

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. For the reasons set out in this letter, we request that the Planning Application is **refused**.

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3. We have reviewed:
 - (a) the Officer's Report prepared in relation to the Planning Application published on 8 June 2022, for the Development Management Committee meeting on 16 June 2022 (reference 21/3304 Part I) ("**June Report**"); and
 - (b) the amended report published on 31 August 2022 for the Development Management Committee on 8 September 2022 ("**Report**").

4. This letter follows and should be read in conjunction with the letters we sent regarding this matter dated 16 February 2022, 4 March 2022 and 27 May 2022. In this letter we address the following:
 - (a) Analysis of key errors and misleading statements in the Report and Planning Application with reference to:
 - (i) the correct legal tests for determining the Planning Application and the role of previously developed land ("**PDL**");
 - (ii) the substantial harm of the Planning Application on Green Belt openness;
 - (iii) the status of the draft Local Plan and plot HS30;
 - (iv) prematurity of the Planning Application; and
 - (v) demand for housing and loss of employment land,
 - (b) risk of appeal and costs awards.

The correct legal tests for determining the Planning Application and the role of PDL

Previously Developed Land

5. As Members will be aware, development in the Green Belt is considered inappropriate development unless one of the limited exceptions apply. Inappropriate development is, by definition, harmful and should only be approved in "very special circumstances". The National Planning Policy Framework 2019 ("**NPPF**") says:¹

"When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special

¹ NPPF at 148.

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."

("VSC Test").

6. One of the limited exceptions to the VSC Test exists for PDL. Where an application involves PDL, it is not subject to the VSC Test. Instead, an application involving PDL must: ²
 - (a) *not have a greater impact on the openness of the Green Belt than the existing development; or*
 - (b) *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.*

("PDL Test").

7. The Report is prefaced on the fact that the Site is PDL, and therefore should not be regarded as inappropriate development. As an affordable housing contribution is being made, the Planning Application is assessed under the second limb of the PDL Test (see 6(b) above).³
8. In our view, it has not been demonstrated that the whole Site is PDL. PDL is defined as:

*"Land which is or was occupied by a permanent structure, **including the curtilage of the developed land** (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This **excludes: land that is or was last occupied by agricultural or forestry buildings**; land that has been developed for minerals extraction or waste disposal by landfill, where provision for restoration has been made through development management procedures; land in built-up areas such as residential gardens, parks, recreation grounds and allotments; and land that was previously developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape." [our emphasis]*

² NPPF at 149(g).

³ We note however, that there are no details provided to confirm what form the affordable housing will take (for example, tenure mix and unit sizes), nor certainty on exactly how it will contribute to meeting the specific needs of Welwyn Hatfield Borough.

9. The Report identifies that there are existing buildings on the Site, labelled A-G, which were formerly in an agricultural use. The June Report asserted that Buildings A, B, D, E and F do not fall within "agricultural use". However, no comments were made with respect to Buildings C and G in the June Report. Updates to the Report provide additional commentary in respect of all buildings A – G. The Report concludes that:⁴

"Whilst lawful uses for every part of the site have not been confirmed, it is considered reasonable to conclude on the balance of probabilities that the application site is previously developed land. On that basis the proposal can be considered as the complete redevelopment of previously developed land." [our emphasis]

10. The applicant has sought to provide further evidence with respect to all buildings, with a particular focus on Building C. However, for the purposes of the Report, the applicant has produced a statutory declaration from the landowner which details that Building C has been the principal storage area in use by Blue Jigsaw⁵ since 2010. This asserts that Building C is now in a lawful storage use.
11. The applicant has however notably failed to provide any robust evidence with respect to Building G. The use has been assessed by the Planning Officer as storage incidental to the use of the commercial and residential components of the Site. However, this assessment is based upon a statement by the applicant, and a single site visit by the Planning Officer on 14 June 2022. No evidence (aside from one site visit by the Planning Officer) or statutory declaration has been provided with respect to Building G, a noticeable difference to the supporting evidence for Building C. Therefore, the position of Building G and whether it comprises PDL remains unclear.
12. Buildings B, D, E and F have planning consent for non-agricultural uses. However, no evidence has been given that these permissions have been implemented. Further, the Site comprises soft landscaping and no explanation has been given that this soft landscaping falls within the curtilage of the existing buildings. Where such landscaping did not fall within the curtilage, it would not be considered PDL. The Report itself acknowledges that the lawful uses for the whole of the Site have not been confirmed. Despite this ambiguity, the Report analyses the Site only with reference to the PDL Test. In our view, for those parts of the Site where the status as PDL is unclear, the VSC Test should have been used.

⁴ Report at [10.13].

⁵ The entity who leases buildings B – E.

13. As set out in *R (on the application of Lee Valley Regional Park Authority) v Broxbourne Borough Council and Britannia Nurseries*, a committee must be advised where only part of a site is PDL, and to the significance in Green Belt policy in terms of that fact.⁶ In that case the southern part of the site was PDL and the northern part of the site was not. However, for the purposes of the assessment the whole site was considered PDL. In this case the permission was quashed, owing to that material error.
14. It has been acknowledged by the Planning Officer that lawful uses of every part of the Site have not been confirmed. Therefore, granting a permission on the assumption that all of the Site is PDL would be a material error of fact and of law as the wrong test would be applied.

Effect on Green Belt openness

15. Even on the assumption that the entire Site is PDL (which we dispute), the Planning Application still fails to satisfy the PDL Test, which requires that the development will not cause substantial harm to the openness of the Green Belt (see paragraph 6(b) above).
16. The Report acknowledges that the heights of the 14 proposed two-storey dwellings in the Planning Application would result in a greater adverse effect on openness in a spatial sense when compared with the extant development. Further, it says that the proposal would introduce more prominent built development when viewed in proximity.⁷ In simple terms, where there were previously seven buildings which blended into the landscape, there will now be 14 dwellings, in a mix of two, three and four bedroom units.
17. The Report states that the ridge heights of the buildings will be taller than the existing and a significant increase in volume is anticipated and acknowledged. The Planning Application does not involve a volumetric analysis, which is presumably because such analysis would have quantified this "significant increase in volume."⁸ While acknowledging the increase in massing, when viewed in close proximity, the Report relies heavily on screening ameliorating the visual effects and any harm arising from the introduction of taller buildings at the Site.
18. It is contradictory to say that screening is an appropriate tool to mitigate effects on openness, as screening by its nature compromises openness. The Design and Access Statement demonstrates that "improved and reinforced landscape screening" will be

⁶ *R (on the application of Lee Valley Regional Park Authority) v Broxbourne Borough Council and Britannia Nurseries* CO/2496/2014 at [49].

⁷ Report at [10.38].

⁸ Report at [10.32].

present to the rear of the Site, which will add to the partitioning of Green Belt openness. The screening will therefore not mitigate the substantial harm caused by the increased volume and massing on the Site,⁹ but instead exacerbate these effects.

19. We appreciate that this analysis concerns matters of planning policy, for which wide discretion is given to local planning authorities. However, Members can only assess such policy within the boundaries of public law (i.e. ensuring decisions are not illegal, procedurally unfair or irrational) and given the facts of this case, Members should critically assess whether they agree with the conclusions on the effects on Green Belt openness (or otherwise).

Status of the Draft Local Plan and HS30

20. Plot HS30,¹⁰ of which the Site forms part, is a Green Belt site which was originally included for allocation in the Regulation 19 submission draft Local Plan 2016 ("**Draft Local Plan**"). However, the Council subsequently determined it was not fit for inclusion, owing to the high harm that would result from its removal:¹¹

"The Council is concerned that the exceptional circumstances do not exist for removing so much land from the Green Belt to meet the entirety of the FOAHN when reforms of the planning system expected this year could reduce this need. Whilst an updated plan to reflect a changed approach could reduce the quantum of development it would not be able to reinstate land back into the Green Belt. This concern particularly relates to releasing land which would result in high harm to the Green Belt."

21. The ongoing correspondence between the Council and the Inspector on this matter in relation to the Draft Local Plan is summarised at 10.14 – 10.23 of the Report. In short, the Inspector has sought on several occasions for HS30 to be allocated in the Draft Local Plan. However, based on the high harm that would result from removing these parcels from the Green Belt, the Council has forcefully resisted its inclusion.
22. The Council's decision dated 26 July 2022, with follow up letter dated 10 August 2022 confirmed this. Here the Council concluded that there is no case for removing additional sites (HS30 included) from the Green Belt, stating:¹²

⁹ Design and Access Statement at "7 Proposals – Scale and Massing".

¹⁰ For completeness, the references to HS30 can also be read to include HS29 which a neighbouring plot. However we have focused on HS30 as that is where the Planning Application is located.

¹¹ Letter of the Council to the Planning Inspector dated 31 January 2022.

¹² EX289 at page 5.

*"Whilst it is recognised that there is an urgent need for additional housing, the Council felt that there was no case for it to meet more than its share at this time **particularly when this would require the release of high harm land from the Green Belt.**"*

23. At some places in the Report this is appropriately recognised, for example at page 5:¹³

*"Members are advised that in relation to the Green Belt assessment and the planning balance in this case, **no positive weight** should be afforded to the proposed allocation of HS30." [our emphasis]*

24. However, there are other elements of the Report where the necessary corrections have not been made to reflect the status of the Draft Local Plan and HS30.

For example, at [11.4] the Report says:

"The application site has been identified as sound in the draft Local Plan as a suitable location for such a development."

25. While that may be the Inspector's view, the Council's decision of 26 July 2022 states the opposite. By determining that HS30 should not be allocated for housing, Members have determined that the Site is not a suitable location for development.¹⁴ Further, even if the Draft Local Plan was proceeding on the basis of HS30 being allocated, the analysis in the Draft Local Plan is undertaken with regard to a different legal test, being whether "exceptional circumstances" exist to justify removing HS30 from the Green Belt. It is wholly separate to the assessment of the Planning Application and does not provide a basis to say that the extent of the development in the Planning Application is suitable. In any event, the Council has now made it clear on numerous occasions that HS30 is not an appropriate site for development.

Prematurity of the Planning Application

26. The Report uses the incorrect statement at 24 above to justify that it would not be premature to grant the Planning Application. We acknowledge that there are limited circumstances in which prematurity can justify a refusal, namely where:¹⁵

"the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by

¹³ Report at 10.23.

¹⁴ Meeting of Council, Tuesday 26 July 2022 at 7.30pm minutes from item 17a.

¹⁵ NPPF at 49.

predetermining decisions about the scale, location or phasing of new development that are central to an emerging plan" [...]

27. While, in our view the Planning Application does bring about substantial harm to the openness of the Green Belt, we acknowledge that it is for the Members to consider whether the proposed 14 market dwellings is a development of enough significance to justify a refusal on the basis of prematurity. However, it remains that this statement is based on a false premise - the Site has not been identified as sound in the Draft Local Plan as a suitable location for such a development.
28. In addition, Members should be under no illusions about the substantial flow on effects that granting the Planning Application could have. This could trigger a slew of further applications, which will successively become easier to justify as the Green Belt in this area is steadily eroded. The Planning Application will not be an isolated application of its type in the Borough.

Consideration under the operative local plan and housing demand

29. As Members will be well aware, decisions on planning applications should be made in accordance with the development plan, unless material considerations demonstrate otherwise.¹⁶
30. For the purposes of considering what comprises the development plan, the Welwyn Hatfield District Plan 2005 is the operative local plan ("**District Plan**"). It has already been noted that no positive weight can be given to the initial allocation of HS30 in the Draft Local Plan.
31. Policy GBSP1 of the District Plan specifies "*The Green Belt will be maintained in Welwyn Hatfield as defined in the Proposals Map*".¹⁷ The Site falls within the Green Belt as defined in the Proposals Map and therefore the Planning Application conflicts with Policy GBSP1.
32. In addition, the Planning Application conflicts with District Plan policy RA10 which states that "*proposals for development in the rural areas will be expected to contribute, as appropriate to the conservation, maintenance and enhancement of the local landscape character of the area in which they are located, as defined in the Welwyn Hatfield Landscape Character Assessment.*"

¹⁶ Planning and Compulsory Purchase Act 2004 at section 38(6).

¹⁷ Welwyn Hatfield District Plan – District Wide Policies, GBSP 1 at page 28.

33. These policies demonstrate the Council's desire to protect its existing Green Belt land.
34. The Report does acknowledge that the Planning Application contradicts policy EMP8 of the District Plan as it results in the loss of employment land. However, this is justified by the "demand for housing", which the Planning Officer says is particularly high in the area. As a first point, we disagree that EMP8 is the only policy that the Planning Application contradicts, as in our view the Planning Application also contradicts Green Belt policy GBSP1 and Local Policy RA10 as described above. Also relevant to EMP8 is NPPF policy at paragraph 81 which provides that planning decisions should help create the conditions in which businesses can invest, expand and adapt. This is contradicted by the reduction of this employment land.
35. Further, given recent Council decisions relating to housing in the area, we also disagree that such demand for housing exists on this Site. The Council has committed to providing 12,775 new houses over the Draft Local Plan period, and in doing so specifically excluded the allocation of HS30. The Council has arrived at the figure of 12,775 because it does not agree with providing housing to address a shortfall based on an increase in employment land when in reality the Borough has seen an overall loss in employment land.¹⁸ We do not dispute that there is housing demand in the Borough, however the Council has demonstrated that 12,775 houses can be provided over the period of the Draft Local Plan (without allocation of HS30), making it clear that such demand does not need to be serviced by providing housing on the Site.¹⁹

Risk of appeal and costs awards

36. For the reasons identified above, the Planning Application should be refused. As with any application, there is a risk of appeal to the Secretary of State. However, (again for the reasons emphasised above), we believe that the Secretary of State would be well placed to uphold any refusal.
37. It is also worth emphasising that in any appeal (in the event the Planning 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, for the avoidance of doubt, it would

¹⁸ EX 289 at page 6.

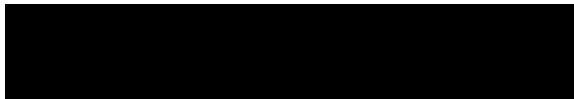
¹⁹ EX282B "Trajectory".

be completely inappropriate to base a planning decision on the basis of a potential exposure to costs should that decision be appealed.

Conclusion

38. There are key deficiencies in the Planning Application and the Report, which Members must be aware of before making their decision on the Planning Application. In summary:
- (a) the case that the entire site is PDL has not been proven and no consideration is given to the consequences of the Site not being wholly PDL;
 - (b) the Planning Application will cause substantial harm to Green Belt openness;
 - (c) the Council has shown on numerous occasions that HS30 is not an appropriate site for housing;
 - (d) the Council Officer's justification that the Planning Application is not premature is made on an incorrect premise; and
 - (e) the Planning Application contradicts key policies of the District Plan. The demand for housing has not been proven on this Site, and therefore is an unconvincing justification contradicting such policies.
39. The above points mean any decision granted on the basis of the Report will be wrong in planning and at law and thus will be exposed to legal challenge. In light of the above, we request that the Members **refuse** the Planning Application.
40. We would be grateful if you could please confirm safe receipt of this letter.

Yours faithfully



Clifford Chance LLP