Alison Ogley, Partner, Walker Morris LLP
On behalf of Mr Oliver Lund
Representor Reference: 05286
Sustainability Appraisal Site Reference: 446

Hearing Statement

M1. Legal and procedural requirements and other general matter (other than flood risk, and viability and developer contributions)

Q1.4. Is there any substantive evidence to demonstrate that the sustainability appraisal failed to meet the relevant legal requirements?

1 We have been instructed in this matter by Mr Oliver Lund, the owner of the land at Blaxton Quarry, Mosham Road, Auckley, Site Reference: 446 ("the Site").

2 This Hearing Statement sets out the factual and legal errors in the Council's Sustainability Appraisal ("the SA") (CSD7.1) and its Sustainability Appraisal Addendum ("the SA Addendum") (CSD7). The errors principally relate to the failure to acknowledge the previously developed nature of the land and the SA's assessment of the land as agricultural and latterly as Greenfield in the SA Addendum. These fundamental errors affect the scoring given to the Site in the SA.

3 Our representations to the Regulation 19 consultation (September 2019) on the Publication Version of the Local Plan (CSD3) set out the errors within the Sustainability Appraisal, which, without evidence or justification, classified the Site as Agricultural, whilst also acknowledging that the redevelopment of the site would bring back into effective use areas of contaminated land. The two conclusions in the SA were incompatible and this was highlighted in our representations to the Regulation 19 consultation (ref: 05286).

4 The Regulation 19 representation demonstrated that the Site had been previously developed as a sand and gravel quarry; there were no enforceable restoration conditions or development management procedures to ensure the land was restored; the Site had not blended into the landscape and it therefore fell within the definition of Previously Developed Land in the National Planning Policy Framework ("the Framework") (OTH39). The representations also concluded that the evidence base on which the Local Plan allocations are being made was unsound, flawed and inconsistent with the NPPF.

5 In response to the Regulation 19 consultation, the Council prepared the SA Addendum. The SA Addendum amends the scoring and assessment for the Site. However, it does not acknowledge the Site constitutes Previously Developed Land. Instead, it states the Site is not in agricultural use, but is nevertheless Greenfield. The SA Addendum provided no argument, evidence or justification to demonstrate that the Site is Greenfield.

6 Since the publication of the SA Addendum, we have sought to understand the Council's position in relation to its 'Greenfield' assessment of the Site. We have written to the Council, as part of the Brownfield Register submission, to reiterate the points previously made in relation to quarrying and sand/gravel extraction (Appendix A, contains photographs of the Site). A response was received from the Council on 16th July 2020 (Appendix B). This response set out that a planning
permission from 1987, which covered only part of the Site, contained conditions to restore the land following the development of settlement lagoons (the 1987 Permission).

However the 1987 Permission: i) was never implemented; and ii) has now clearly expired.

It would appear therefore that the existence of restoration conditions, attached to the 1987 Permission, which was unimplemented and has expired, is the only reason the Council have provided to justify assessing the Site as Greenfield and not PDL. This is the first and only correspondence from the Council which mentions the 1987 Permission and seeks to provide any explanation for the Council's position (as set out in the SA Addendum) that the Site is 'Greenfield'. The Council has repeatedly accepted that the Site has not blended into the landscape. Its sole reason for excluding the land from the PDL definition, therefore, is by reference to the expired and unimplemented 1987 Permission.

In our response to the Council on 7th August 2020 (Appendix C), we explained that pre-commencement conditions attached to the 1987 Permission for lagoons were never discharged; the access to the Site to construct the lagoons was never constructed; the restoration conditions required the submission and approval of a restoration scheme, which was never done and no works were undertaken to build the lagoons. The 1987 Permission therefore expired in 1992 without ever being implemented. No response from the Council has been received.

The Council's position therefore appears to be that the approval of any restoration scheme (or planning permission requiring the submission and approval of a restoration scheme) would be sufficient to trigger the exclusion in the PDL definition in the NPPF. However, such an interpretation would run counter to the fundamental aims of the policy itself. There appears to be no direct authority on the point although a conceptually analogous point regarding agricultural buildings was discussed by Mr Justice Ouseley in R (Lee Valley Regional Park Authority v Broxbourne Borough Council [2015] EWHC 185). The discussion in this case centred on whether a former agricultural building should still be excluded by the PDL definition even if some other lawful use had been granted planning permission. The Court was keen to avoid "some very odd consequences" from an overly strict interpretation which ignored the context of the key policy objectives.

A site should not be excluded from the definition of PDL simply because there was 'any' restoration scheme, irrespective of its enforceability. It would be a nonsense to exclude land from the definition of PDL where the restoration was never capable of being delivered. Likewise, for the policy to make sense, the relevant "provision for restoration" must be practically capable of securing a greenfield end state for the site. A restoration scheme which either (i) was never submitted or approved; (ii) was never triggered because the permission was not implemented and is no longer extant and/or (iii) failed to achieve a greenfield end state would not serve to trigger the exclusion.

The SA Addendum was the opportunity for the Council to re-assess the Site and properly score it as Previously Developed Land in full knowledge of the evidence submitted at the Regulation 19 consultation. This was not done.

The persistent mis-assessment of this site as Greenfield is not matter of planning judgement. The Council has repeatedly accepted the point made on behalf of our client that the Site has not blended into the landscape. The Council have presented no evidence which provides any reasonable basis for its dispute regarding the previously developed status of the land. The existence of a historic and expired planning permission (the 1987 Permission), which cannot be enforced, does not constitute a development management procedure to restore the land.

The Council's mis-assessment of the land is an error of fact and one which infects the assessment of the Site overall in the Sustainability Appraisal. Not only this, the mis-assessment has
consequences for the consideration of the Local Plan as a whole. The four requirements to establish an error of fact at judicial review were set out by Carnwath LJ in *E v SSHD [2004] EWCA Civ 49* and include:

a) First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. The fact must be uncontentious;

b) Secondly, the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable.

c) Thirdly, the appellant (or his advisers) must not have been responsible for the mistake.

d) Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning.

15 The SA and SA Addendum therefore contain errors of fact, where (i) the evidence of the PDL status was available to the Council at the time of drafting the SA Addendum through the Regulation 19 consultation; (ii) the facts of the planning history are objectively verifiable and uncontested by the Council; (iii) our client has provided ample evidence to the Council throughout the Local Plan consultation process and in representations for them to make an informed decision on the status of the land and for the Council to conclude that the Site is PDL; and (iv) the error has consequences for the reclamation and restoration of a large brownfield site in Doncaster and on the NPPF requirement to make as much use as possible of suitable brownfield sites and underutilised land before releasing Green Belt land for development (INSP Q4.1, Q4.2).

16 The SA and SA Addendum before the Examining Inspector therefore presents an inaccurate picture of (i) a thorough assessment of the merits of not allocating the site for housing/employment on the basis that it falls within the countryside and is Greenfield; and (ii) of all suitable brownfield sites having been considered for allocation before releasing Green Belt and Greenfield sites.

Q4.1. Were all reasonable options for meeting identified development needs in non Green Belt locations fully examined during the preparation of the Plan? In particular:

(a) Does the Plan make as much use as possible of suitable brownfield sites and underutilised land?

(b) Would the Plan be effective in optimising the density of development and making effective use of land in line with chapter 11 of the NPPF?

(c) What would the consequences be for sustainable development of accommodating all development needed during the Plan period in non Green Belt locations?

(d) Was the Plan informed by discussions with neighbouring authorities about whether they could accommodate some of the Borough’s identified need for development?
Q4.2. Assuming it is necessary to remove land from the Green Belt, did the approach taken in the Plan give first consideration to land which has been previously developed and/or is well served by public transport?

17 The Local Plan proposes the release of 1,002 dwellings on Green Belt land. Of these 1,002 dwellings, 540 are proposed on Green Belt sites adjacent to five Service Towns and Villages. The rationale for releasing Green Belt land is to meet the identified housing need across the district as well as in those Service Towns and Villages, Main Urban Area and a Main Town.

18 The Framework requires strategic planning policies to set out a clear strategy to make as much use as possible of previously-developed or ‘brownfield’ land (para 117). The Framework also requires the plan-making authority to be able to demonstrate that it has fully examined all other reasonable options for meeting its identified need and whether its strategy makes as much use as possible of suitable brownfield and underutilised land (para 137).

19 The SA and SA Addendum has failed to identify this Site as PDL and the result of this failure is that it is inconceivable all suitable PDL sites have been considered before releasing Green Belt land.

20 Auckley is not constrained by a Green Belt boundary. The Site is also not constrained by any other ecological or environmental designations which would eliminate it from consideration as a potential allocation. The mis-assessment of the Site as Agricultural and then Greenfield were clearly cited in the SA and SA Addendum. In the light of the evidence before the examining Inspector, the plan-making authority could not have given first consideration to all previously developed land prior to releasing Green Belt land in the SA or SA Addendum, as these documents erroneously categorised the Site as Greenfield and Agricultural.

21 In Q4.2, the Inspector also asks whether first consideration was given to land which was well served by public transport. In addition to constituting PDL, the Site's public transport credentials were discussed in the Regulation 19 representations (prepared jointly by DLP Planning and Walker Morris LLP). The Site falls within the within the DSA Masterplan area, where there are proposals for the DSA railway station on the southern boundary of the Site or a station closer to the airport terminal. The planning permission for the DSA railway station includes its northern platform on the southern boundary of the Site. The development of a DSA railway station is supported in the Local Plan (CSD3) at Part I) of Policy 7: Doncaster Sheffield Airport and Business Park (Strategic Policy) and within Part B) of Policy 13: Strategic Transport Network. The DSA railway station is described as crucial to the future growth of the airport and surrounding settlement (para 7.14).

22 The development of a DSA railway station, either on the southern boundary of the Site or closer to the terminal building would enhance the public transport connections to the Site. The failure to give first consideration to this brownfield Site, which is also well served by, and potentially instrumental to the provision of, public transport, is a double failing within the SA and SA Addendum.

23 The Local Plan therefore fails to take account of at least one large unconstrained brownfield site within the District which is adjacent to an existing settlement and adjacent to a proposed railway station. The Site measures some 16 Hectares and could accommodate approximately 400 dwellings and/or commercial uses. This Site should be considered as a useful, sustainable and important contribution to housing supply, given there are extensive Green Belt releases in the Service Towns and Villages in Doncaster. The allocation of the Site for housing/commercial would provide much needed flexibility in the Service Towns and Villages around the airport.
24 The Local Plan therefore fails in its requirements at paragraphs 117 and 137 of the Framework to give first consideration to brownfield land, more generally, and in advance of releasing Green Belt land. The Inspector is therefore requested to find that the Local Plan is unsound.

25 To make the plan sound, the Inspector is requested to make Main Modifications to:

(i) Address the error within the SA and SA Addendum and request that the assessment for the Site is carried out again as a large-scale PDL site;

(ii) Request that the Site Selection methodology is applied to this large PDL site;

(iii) Request that an addendum to the Green Belt Review is undertaken to take account of a large unconstrained PDL site on the edge of an existing settlement and within the DSA Masterplan area.

(iv) Recommend that the Site is allocated for housing/commercial use in the Local Plan.