APPELANT'S ADDITIONAL STATEMENT OF CASE

APP/P3040/W/23/3330045

Land East of Hawksworth and Northwest of Thoroton, Nottinghamshire, NG13 9DB

1 INTRODUCTION

1.1 This appeal was lodged in September 2023. An inquiry has been listed to commence in June 2024, with the exchange of evidence on 14 May 2024. On 9 April 2024, the Council sent an email to the Planning Inspectorate noting that "*following the instruction of an independent town planner and Council, the Council has been advised"* that the assessment of Best and Most Versatile (**BMV**) agricultural land was not wholly aligned with the guidance contained in the PPG; and that the conclusion expressed in the Officer's Report as to compliance with the sequential test was incorrect. Thereafter, the Council submitted a Statement of Case received via email on the 16th April 2024 which indicated that it wished to "*expand"* its case to include the loss of BMV and the lack of a flood risk sequential test.

1.2 At the outset, the Appellant wishes to put on record its serious concerns regarding the Council's conduct. Where a local planning authority determines to refuse permission, its decision notice must "*state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision"* (Article 35, Town and Country Planning (Development Management Procedure) Order 2015).

1.3 The decision notice was issued on 30 March 2023. The reasons for refusal do not mention BMV or flood risk. The officer's report on the application raised no concerns with respect to those matters. The decision notice confirms that other than the two reasons for refusal "*there are no other material considerations which are of significant weight in reaching a decision on this application".*

1.4 There has been no material change in planning policy since the application was refused such as to justify a change in the Council's position on BMV or flood risk. It is entirely inappropriate for the Council now, over 12 months since the decision was issued and 7 months after the appeal was lodged, to seek to significantly expand its case to introduce new matters that where not foreshadowed in the reasons for refusal. As to the suggested reasons for this change promulgated by the Council, it is not the role of counsel or independent advisors instructed on an inquiry to seek to influence the scope of the Council's case, which must be fully, clearly and precisely expressed in the decision notice.

1.5 From the date on which the Council first intimated that it sought to expand its case, there remain just five weeks until the exchange of evidence. Fairness requires that every party to a planning inquiry is entitled to know the case it has to meet and has a reasonable

opportunity to adduce evidence in relation to the opposing case (*Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [62]).

1.6 On 10 April 2024, the Planning Inspectorate issued a pre-Case Management Conference Note together with an "*Inspector's Note"* which:

(a) Requested a technical note from the Appellant to address the generating capacity of the Appeal Scheme in light of the judgment in *R (on the application of Galloway) v Durham County Council* [2024] EWHC 367 (Admin) and the representations by the Rule 6 Party, the Hawksworth and Thoroton Action Group by 16 April 2024;

(b) Noted that the Council's officer report and decision notice had been recently supplemented with the position of the Council on BMV agricultural land and the requirement for a flood risk sequential test, whilst noting that these were not matters set out in the Council's refusal notice.

1.7 In light of the request for the technical note along with the other issues now raised by the Council, the Inspector indicated that the Council and Appellant could submit an addendum to their Statements of Case by 22 April 2024. This document is submitted pursuant to that request, with the proviso that this has allowed fewer than two weeks for the Appellant to respond to the additional matters raised by the Council.

2 THE TECHNICAL NOTE ON CAPACITY SUBMITTED ON 16 APRIL 2024

2.1 Pursuant to the Inspector's request, a technical note on generating capacity was submitted on 16 April 2024. The material contained in that technical note is not repeated here. It confirms that the appeal proposal is properly considered under the Town and Country Planning Act 1990.

2.2 Any further questions relating to the justification for overplanting within the proposal or otherwise relating to that issue arising from the judgement in *Galloway (R on the application of) v Durham County Council* [2024] EWHC 367 (Admin) will be dealt with in evidence.

3 BEST AND MOST VERSATILE LAND

3.1 BMV land comprises land in grades 1, 2 and 3a of the Agricultural Land Classification.

3.2 The issue raised in the LPA in its email of 9 April 2024 and Statement of Case (paragraph 7.6) relates to the Appeal Scheme's compliance with PPG paragraph 013. That paragraph provides as follows:

What are the particular planning considerations that relate to large scale ground-mounted solar photovoltaic farms?

The deployment of large-scale solar farms can have a negative impact on the rural environment, particularly in undulating landscapes. However, the visual impact of a well-planned and well-screened solar farm can be properly addressed within the landscape if planned sensitively.

Particular factors a local planning authority will need to consider include:

- *encouraging the effective use of land by focussing large scale solar farms on previously developed and non agricultural land, provided that it is not of high environmental value;*
- *where a proposal involves greenfield land, whether (i) the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land; and (ii) the proposal allows for continued agricultural use where applicable and/or encourages biodiversity improvements around arrays. See also a speech by the Minister for Energy and Climate Change, the Rt Hon Gregory Barker MP, to the solar PV industry on 25 April 2013 and written ministerial statement on solar energy: protecting the local and global environment made on 25 March 2015.*
- *that solar farms are normally temporary structures and planning conditions can be used to ensure that the installations are removed when no longer in use and the land is restored to its previous use;*
- *the proposal's visual impact, the effect on landscape of glint and glare (see guidance on landscape assessment) and on neighbouring uses and aircraft safety;*
- *the extent to which there may be additional impacts if solar arrays follow the daily movement of the sun;*
- *the need for, and impact of, security measures such as lights and fencing;*
- *great care should be taken to ensure heritage assets are conserved in a manner appropriate to their significance, including the impact of proposals on views important to their setting. As the significance of a heritage asset derives not only from its physical presence, but also from its setting, careful consideration should be given to the impact of large scale solar farms on such assets. Depending on their scale, design and prominence, a large scale solar farm within the setting of a heritage asset may cause substantial harm to the significance of the asset;*
- *the potential to mitigate landscape and visual impacts through, for example, screening with native hedges;*

- *the energy generating potential, which can vary for a number of reasons including, latitude and aspect.*

3.3 PPG 013 has recently been considered by the High Court in *Bramley Solar Farm Residents' Group v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2842 (Admin).

3.4 In *Bramley,* an Inspector granted permission for a solar farm on extending to 85 hectares of agricultural land, of which 53% comprised BMV. In doing so, he dismissed a suggestion that permission should be refused because of the appellant's failure to consider alternative sites which would avoid use of BMV (*Bramley,* paragraph 29). The Inspector's decision was upheld by the High Court. The reasoning of both the Inspector and the judge are instructive, and are summarised below.

3.5 The Inspector found that:

(a) PPG 013 identified a range of facts that should be considered including whether the use of agricultural land is necessary; the temporary and reversible nature of the proposal; and the potential to mitigate landscape impacts through screening (*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 56);

(b) This will involve a range of inputs, from grid connection to land ownership, landscape and visual effects and mitigation. The submitted details set out the reasons for the selection of the appeal site, including connecting to the national grid (*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 56);

(c) There was no legal or policy requirement for a sequential approach to considering alternative sites with developments such as the appeal scheme (*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 57);

(d) Planning permission should not be withheld on the basis of a lack of alternative site assessment (*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 57);

(e) 53% of the appeal site comprised BMV land, but not all of this land would be covered by PV panels (*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 58);

(f) While the use of higher quality agricultural land is discouraged, the proposal is for a temporary period of forty years. The agricultural land would not be permanently or irreversibly lost, particularly as pasture grazing would occur between solar

panels. This would allow the land to recover from intensive use, and the soil condition and structure to improve ((*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 59);

(g) It was of note that Natural England, as statutory consultee on agricultural land, had raised no concerns as to the loss of BMV (*Bramley,* paragraph 169 which quotes the Inspector's decision letter, paragraph 56).

3.6 The judge endorsed those findings, which were in accordance with caselaw on the consideration of alternatives and with national policy and guidance. In particular, she found:

(a) The PPG does not mandate the consideration of alternatives in the context of BMV. Still less does it require a sequential test to be adopted. The Inspector was correct to observe that he had not been directed to any legal or policy requirements which set out a sequential approach in respect of BMV (*Bramley,* paragraph 79);

(b) Draft policy in NPS EN-3 (which has now been designated in the 2024 NPS) cannot be read as mandating a sequential search for alternatives as it only applies "*where possible"* and states that "*land type should not be a predominating factor in determining the suitability of the site location"* (*Bramley,* paragraph 180);

(c) The Inspector had considered the PPG guidance on the range of factors to be considered. He was entitled to find that the proposal would not be harmful to BMV land; that not all of the BMV land would be covered by panels; that there would be ongoing opportunities for pasture grazing; the improvement of the soil and biodiversity; and the temporary nature of the development (*Bramley,* paragraph 181);

(d) In view of his conclusion that the appellant was not required to demonstrate a sequential approach to alternative site selection, the Inspector did not have to address allegations raised by objectors as to the inadequacy of the appellant's alterative site search (*Bramley,* paragraph 185).

3.7 With those principles in mind, the Council's approach as set out in the officer's report is entirely appropriate and there is no justification for the Council to now seek to renege from the conclusions of both the officer and Council (as expressed in the decision notice) that BMV considerations did not warrant the refusal of permission.

3.8 In particular, the officer noted that:

(a) An agricultural land classification report had been submitted in support of the application which indicated that 2% of the appeal site was classified as Grade 2;

36% was classified as Grade 3a and 58% was classified as Grade 3b (i.e. not BMV);

(b) The amount of BMV land equated to some 35.4 hectares, which was above the threshold requiring consultation with Natural England. Natural England had been consulted on the application and had advised that they had no objection to the scheme. In particular, they advised that given the temporary nature of the scheme "*it is unlikely to lead to significant permanent loss of BMV agricultural land, as a resource for future generations because the solar panels would be secured to the ground by steel piles with limited soil disturbance and could be removed in the future with no permanent loss of agricultural land quality likely to occur, provided the appropriate soil management is employed and the development is undertaken to high standards";*

(c) Secondary agricultural use would be maintained through sheep grazing;

(d) The proposed development is temporary and reversible. It would not result in the permanent loss of good agricultural land and the land would not be permanently unavailable for agricultural use, together with biodiversity enhancements.

(e) While part of the development would remain permanent, such as the base for the grid substation, the overall amount of BMV land lost as a result of the proposal would not be significant;

(f) Overall, the appeal scheme would not have an unacceptable impact on agricultural land and would comply with relevant local and national policy.

3.9 There is no error in the reasoning or conclusions reached by the officer, which is entirely consistent with the approach endorsed by the Court in *Bramley*. It is entirely unclear why now, over a year later, the Council seeks to revisit that issue. The Applicant is entitled to rely on the Local Planning Authority's determination that there is no issue in relation to land quality and for that position to be reversed now is unreasonable of the Planning Authority.

3.10 Whilst the applicant is willing in the time available to produce such information as it can on the subject, (the extent of which will only be clear at exchange of proofs) doing so is entirely without prejudice to its primary contention that the Local Planning Authority's intention to introduce this as a main inquiry issue at this point is unreasonable.

3.11 Flood Risk

3.12 The NPPF addresses flood risk in Chapter 14. That Chapter explains at paragraph 157 that the planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to shape places

in ways that contribute to radical reductions in greenhouse gas emissions and support renewable and low carbon energy and associated infrastructure. Paragraphs 160 and 163 exhort local planning authorities to make positive provision for renewable and low carbon energy schemes and to approve applications where their impacts are, or can be made, acceptable. The very purpose of the appeal scheme is to support reductions in greenhouse gas emissions in the energy sector, thereby contributing to the primary objective expressed in Chapter 14 NPPF and National Policy Statements for energy infrastructure.

3.13 NPPF paragraph 165 provides that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk but recognises that development may be acceptable in such areas, provided they can be made safe for their lifetime without increasing flood risk elsewhere. Paragraph 169 recognises that in considering whether development could be located in areas of lower flood risk, wider sustainable development objectives may be taken into account. Wider sustainable development objectives plainly encompass the urgent need for renewable energy projects which benefit from an existing grid connection offer.

3.14 A Flood Risk and Drainage Impact Assessment (titled Technical Appendix 4: Flood Risk and Drainage Impact Assessment) was submitted in support of the refused planning application. It provides an assessment of flood risk at the site that falls predominantly within low risk flood zone 1 with small areas of medium risk flood zone 2 and high risk flood zone 3a associated with watercourses and ditches that run through the appeal site. Mitigation measures were also proposed.

3.15 Paragraph 4.23 of the Flood Risk Assessment confirmed it has been prepared in accordance with National Planning Policy Guidelines and paragraph 4.25 that the authors of the Flood Risk Assessment are qualified drainage engineers with significant relevant experience. The Sequential Test and Exception Test were considered within this assessment. This document provides sufficient sequential test, exception test as well as flood risk and drainage impact assessment information.

3.16 The Local Planning Authorities delegated Officer report considers Flood Risk at the end of page 25 to the first paragraph of page 27 of that report. The officer's findings were as follows:

(a) Most of the appeal site lies within Flood Zone 1, defined as land having a less than 1 in 1000 annual probability of river or sea flooding. Small areas of the site falls within Flood Zone 2 and 3a which follow the watercourse/drains within the site. However, only a small area of solar panels are located in flood zone 2 and 3a;

(b) In relation to Flood Risk Vulnerability and Flood Zone 'Compatibility', the Local Planning Authority accepted the development passed both the Sequential Test and the Exception Test. Furthermore, the Local Planning Authority also accepted a small proportion of the solar array in Flood Zones 2 is compatible with respect to flood risk;

(c) Rain falling onto the photovoltaic panels would runoff directly to the ground beneath the panels and infiltrate into the ground at the same rate as it does in the site's existing greenfield state. Existing drainage features would be retained, and the site would remain vegetated through construction and operation of the solar installation to prevent soil erosion;

(d) The photovoltaic panels would not result in a material increase in surface water run-off and proposed Sustainable Drainage Strategy (SuDS) arrangements would result in a betterment in comparison to the sites current drainage arrangement because extreme flows are not currently managed;

(e) A SuDS was proposed, involving the implementation of sustainable drainage in the form of swales at the low points of the application site to intercept extreme storm run-off flows which may already run offsite and, as previously mentioned, are a betterment in comparison to the sites current drainage arrangement that does not manage or mitigate extreme storm run-off flows. The swales do not form part of a formal drainage scheme for the development but are provided as a form of 'betterment';

(f) The proposed drainage strategy would ensure that the development would have a negligible impact upon site drainage, and surface water arising from the developed site would mimic the surface water flows arising from the site prior to the proposed development. The natural drainage regime would be retained except in the extreme storm event when a benefit is achieved by reducing the extreme storm run-off flows;

(g) Nottinghamshire County Council is the Lead Local Flood Authority had raised no objections to the scheme from a surface water or flood risk perspective. It should be noted that under the Flood and Water Management Act of 2010 the LLFA has the duty of leading the coordination of flood risk management from surface water, groundwater and ordinary watercourses in the local area. LLFAs are county councils and unitary authorities. LLFAs are required to prepare and maintain a strategy for local flood risk management in their areas, coordinating views and activity with other local bodies and communities through public consultation and scrutiny, and delivery planning. They must consult Risk Management Authorities and the public about their strategy. LLFAs are also responsible for carrying out

work to manage local flood risks in their areas. Under the Land Drainage Act of 1991 they have the power to regulate ordinary watercourses to maintain a proper flow by issuing consents for altering features on ordinary watercourses and enforcing obligations to maintain flows in watercourses. They undertake a statutory consultee role providing technical advice on surface water drainage to local planning authorities regarding major developments (10 or more dwellings) and play a lead role in emergency planning and recovery after a flood event;

(h) The Environment Agency has not objection to the scheme on the basis that finished flood levels would be set no lower than 18.20m AOD and the finished floor levels of other vulnerable infrastructure would be set no lower than 300mm above ground levels;

(i) Overall, the development was acceptable in terms of flood risk and drainage and in accordance with relevant planning policy.

3.17 PPG paragraph 029 makes clear that the application of the sequential test is the responsibility of the decision maker. The manner of application of the sequential test is dependent on the particular circumstances of the site, there being no preset standard for how extensive search for alternative sites should be. In determining the application, officers and the Council were satisfied that matters pertaining to flood risk had been appropriately addressed and were acceptable. The Appellant was entitled to rely upon the Council's clearly communicated position that it was satisfied on flood risk matters. For the Council to now maintain that it has made a mistake on this matter and seek to place a burden on the Appellant to remedy that within the timescales under which this appeal is operating is unreasonable.

3.18 It should be noted that any flood risk to users of the Appeal Site would be low: the site would attract on average one vehicle movement per month for maintenance when the development is operational. Furthermore, the Scheme would have a negligible effect on flooding on the site. The proposed panels would be around 0.7m above the ground, at a minimum of 300mm which in practical terms would raise them out of the flood risk zone, as recognised by the Environment Agency. The panels would be held on racking supported by a steel pile system on support posts of around 0.1m diameter, spaced to allow for the free flow of water and the design would only introduce a small area of impermeable surface. It is also important to note that the scheme would not increase flooding or give rise to detrimental effects elsewhere and indeed, would result in betterment in the event of a storm as recognised in the officer's report. Vegetation would grow below the panels which would prevent and reduce the erosion of sediment from the site. A swale system would provide surface water runoff storage. There would be significant benefits in comparison to typical farming activity because the fields would not be ploughed; they would retain vegetation throughout the year and would not be regularly

traversed by heavy farm machinery. The likelihood is therefore that runoff rates from the site would be reduced, and ground infiltration would be improved.

3.19 Whilst the Appellant will do what it can in the time available to provide information to assist the inspector on the Council's belated concerns in relation to the sequential test (the extent of which will only be clear at exchange of proofs) in doing so it again wishes to make clear that it is unreasonable conduct by the Planning Authority to maintain now that planning permission should be refused because of inadequate information on flood risk.

22 April 2024