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TOWN AND COUNTRY PLANNING ACT 1990

APPLICATION BY LW Developments Ltd

Site Address: Cheshunt Football Club, Theobalds Lane, Cheshunt, EN8 8RU

Housing Land Supply

Rebuttal of SPRU Proof of Evidence

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1. This document sets out my rebuttal in respect of the Proof of Evidence submitted by SPRU on behalf of the Appellant in relation to the five-year housing land supply. This rebuttal is structured in the same order as the section and paragraph order provided in the Proof of Evidence provided by Mr Bolton. The intention remains to provide a Statement of Common Ground as originally requested by the Inspector, having regard to the evidence presented by both sides.

Section 2) Scope of Evidence and Key Conclusions

2. Most of the points within this section summarise other points made elsewhere in the document, with the exception of paragraph 2.5, a point which does not occur elsewhere.

Inclusion of sites refused planning permission

3. Paragraph 2.5 SPRU states *“The councils land supply .. is based on a heavy over reliance on ...sites including local plan allocations which in two circumstances including this appeal have been refused planning permission.”*

The first of the sites referred to is the **Newgatestreet Road site** in Goffs Oak (Local Plan site GO4). As set out in our evidence, this is not a new site and the adjustment made to its contribution was simply to provide a factual update as to the latest position – that the site was granted full planning permission for 38 dwellings in March 2021, having initially been refused permission.

4. The second site referred to is the **Scania House and Amwell Street site** in Hoddesdon (part of Local Plan allocation HOD2. Application 07/19/0653/F (Demolition of existing buildings and erection of 62no. retirement living (sheltered housing) apartments) refused 7 April 2020. I agree that on closer inspection this site should not have been included and therefore within my Proof of Evidence I proposed removal of the site from the five year supply.
5. In my Proof of Evidence and updated calculations I have removed the appeal site from the five-year housing supply.

Section 3) National Policy: Planning for Housing

a) Introduction

6. The points Mr Bolton makes about the ‘housing crisis’ within this section should not obscure the fact that the basis for planning decisions is the National Planning Policy Framework (NPPF). Paragraph 7 of the NPPF makes clear that the purpose of planning is the achievement of sustainable development, which is defined in paragraph 8 and referred to in paragraph 11 in respect of the five year housing land supply. Broxbourne Council seeks to give appropriate weight to all the dimensions of sustainable development in decision-taking.

b) National Planning Policy Framework and Guidance

Appeal decisions

7. The Woolpit, Longdene and Darnhall School (Winsford), and Hedgehog Lane decisions referred to all make the same point, namely that it is not legitimate to introduce new sites into the supply from outside the assessment period. However, none of these appeal decisions suggest that adjustments to the number or phasing of units should not be made in light of new evidence from outside the assessment period. Indeed, the PPG recommends the use of up to date evidence, a point explicitly acknowledged by Mr Bolton at paragraph 3.14 of his Proof of Evidence, and in the statement by the Hedgehog Lane inspector cited at the top of page 13.

Admissible Evidence

8. At paragraph 3.16 of Mr Bolton's Proof, he asserts that the Council relied on the use of proformas signed by developers. That is not the case. The Council approached the developers and asked them for their timetable for delivery in order to supplement evidence of lead-times from the Council's planning database, as set out at Appendix B to my Proof of Evidence.
9. The appeal decisions presented by Mr Bolton do not prescribe what form of evidence may be admissible. In paragraph 3.33, Mr Bolton refers to PPG paragraph 68-007 that advises on the use of up-to-date evidence. That paragraph provides examples of evidence as follows:
 - *“current planning status – for example, on larger scale sites with outline or hybrid permission how much progress has been made towards approving reserved matters, or whether these link to a planning performance agreement that sets out the timescale for approval of reserved matters applications and discharge of conditions;*
 - *firm progress being made towards the submission of an application – for example, a written agreement between the local planning authority and the site developer(s) which confirms the developers' delivery intentions and anticipated start and build-out rates;*
 - *firm progress with site assessment work; or*
 - *clear relevant information about site viability, ownership constraints or infrastructure provision, such as successful participation in bids for large-scale infrastructure funding or other similar projects.”*
10. The evidence provided by the Council falls within the scope of the examples provided within the PPG. Neither the PPG nor the appeal decisions cited suggest that a local planning authority should not consider the evidence in the round and reach its own conclusion as to the deliverability or phasing of any particular site.

Windfall

11. This is briefly mentioned in paragraph addressed in more detail within Section 5 of Mr Bolton's Proof of Evidence and I address in relation to section 5 of his report.

Section 4): The Local Plan

'Slippage'

12. At paragraph 4.12 of his Proof Mr Bolton suggests that the AMR displays a '*lack of awareness of slippage*'. The reason for the slippage from 2018 to 2020 is that the Local Plan examination took over two years, meaning that the planned Green Belt releases were delayed and consequently applications were delayed. This was a one-off historical factor.
13. Looking forward as the five-year housing land supply must, the key consideration is not whether there has been slippage, but whether there is clear evidence of a realistic prospect of delivery within the assessment period. The evidence demonstrates significant progress in relation to site assembly, appointment of developers, and progress with planning applications, such that delivery within the assessment period is demonstrably realistic.

Section 5) Windfall

14. Mr Bolton refers to the 'Housing Windfall Report' (EXAM4G, Inquiry document CD2.12) and explains that there appears to be no explanation of the windfall allowance of 70 dwellings per annum referred to in paragraph 159 of the Local Plan inspector's report. The evidence is to be found within the Local Plan examination documents on the Inquiry website as explained below.
15. Following a challenge to the Council's 'Housing Windfall Sites' report (to which Mr Bolton) at a hearing session in 2018, the Local Plan inspector set the Council an 'Action Point' (no. 4) to consider windfall in relation to the latest evidence. The reason for this was that the Local Plan objectors' grounds for objection was on the basis of the arbitrariness of limiting a windfall allowance only to minor development.
16. The Council's response to Action Point 4 (EXAM14D – Inquiry website document CD3.18) provided data on housing supply between 2006 and 2018, including both minor and major development sites. From that data, sites that would have been Local Plan sites (if there had been an up-to-date Local Plan at that time – to address the point made by Mr Bolton in paragraph 5.14 of his Proof), Green Belt sites, and 'one-off' redevelopment sites were subtracted. Over the 12-year period this yielded an average of 79 dwellings per year. A downwards adjustment of 9 dwellings per year was then made in recognition of the potential that windfall may not continue to deliver at the same rate. This is the "compelling evidence" referred to within paragraph 159 of the Local Plan Inspector's report. Mr Bolton's observations on windfall rely on a superseded document.

Double counting

17. At paragraph 5.3 of his Proof, Mr Bolton states the following:
“In respect of windfall the inspector did not apply this from the base date of the plan (2018) but from 2020 onwards (CD2.10 Inspectors Report 159). The reason not to apply windfall to the first two years of the five year period was to avoid double counting.”
18. Mr Bolton’s interpretation of paragraph 159 extrapolates a meaning that does not exist in the Local Plan Inspector’s words, i.e. that windfall should not be applied in years 1 and 2 of a five year housing land supply calculation.
19. The Inspector’s report makes a different point, namely that an adjustment should be made at the point of adoption of the Local Plan to avoid double-counting past delivery in the period 2018-2020, which had already elapsed at the point at which the inspector’s report was issued and the Plan adopted.
20. It is therefore apparent that, contrary to Mr Bolton’s statement in paragraph 5.3 of his report, the Inspector’s report required the inclusion of a windfall allowance in year 1 and 2 of the 5 year period (i.e. in 2020/1 and 2021/2), rather than prohibiting it.

Sites Under 25 dwellings

21. Related to the above issue, at paragraph 5.2, Mr Bolton states that there is ‘*no evidence of contribution of sites less than 25 dwellings to windfall*’. This is provided in Appendix C to my Proof, which provides the dataset underlying Figure 2, taken from the AMR.
22. At paragraph 5.8 of his report, Mr Bolton states that *“There is no justification for sites of 25 dwellings to almost double their rate of delivery in the next five years which is what is proposed by adding commitments of less than 25 dwellings to a windfall allowance of 70 dpa for the next five years.”*
23. It is not clear from his Proof as to why Mr Bolton has alighted upon a figure of 25 dwellings as being of significance. As explained above, the use of an arbitrary cut-off for windfall was a point addressed within the Local Plan examination hearings and which the Inspector required the Council to address in its updated evidence.

Section 6) The Housing Supply

24. From comparison of the trajectories set out in Table 5 of Mr Bolton’s Proof and in Table 2 (and paragraph 17) of mine, it is clear that we take a different approach to inclusion of sites within the five-year housing land supply. Setting aside site-specific factors, there are a number of reasons for this as set out below.

Categorisation of Sites

25. I do not recognise the mechanistic way in which all sites are classified as 'either' 'Category A or 'Category B'. As far as I am aware there is no mention of 'categories' within national policy and guidance. It is true that there are two parts to the Glossary definition of 'Deliverable', but, especially in the case of large, multi-phase sites, different phases of the same site may have different characteristics and be more or less deliverable, depending on the stage of each parcel in its journey through the planning process. That is particularly relevant in the case of the strategic site at Cheshunt Lakeside.
26. At paragraph 6.4, Mr Bolton's Proof states that *"It is my reading of the Framework that to be considered deliverable then a site has to meet the criteria at the base date. This is the simple straightforward reading of this definition. It is also in line with the decision of the Woolpit Inspector (CD2.3)."* Similarly, Mr Bolton takes issue with the Council's use of up-to-date evidence further down his Proof at paragraphs 6.11 and 6.12
26. I have looked at the NPPF and the PPG but unlike Mr Bolton I can find no reference to a requirement that only sites in parts (a) and (b) of the definition of "deliverable" in the NPPF Glossary at the base date can form the basis of the 5 year housing land supply calculation. I have appended at Appendix A a report that the Secretary of State has accepted in High Court proceedings that the definition of "deliverable" does not set out a closed list.

Evidence in the AMR

27. In paragraph 6.5 of his proof, elaborating on a point within paragraph 2.4 about 'recently released evidence', Mr Bolton implies that site-by-site and line-by-line evidence to justify each site within the five-year housing land supply should be set out within the AMR. In my experience that would make the AMR unwieldy (give that housing land supply is just one among many matters reported in that document), and I am aware of no suggestion in either national policy or guidance that such an approach is either required or expected as good practice.

Definition of 'Deliverable' in 2012 vs 2019

28. In paragraph 6.6 of his proof, Mr Bolton cites the definition of 'deliverable' in footnote 11 to the 2012 version of the NPPF against the definition within the Glossary to the current version of the NPPF. Both documents refer to a 'realistic prospect' of delivery. My reading of the main difference is that there is an emphasis on the need for evidence in the current version. The Council has provided site-by-site evidence to this Inquiry.
29. Table 13 (and Paragraph 6.13) within Mr Bolton's proof is largely a correct reflection of my Proof, with the exception that the Former Hoddesdon Police Station (30 dwellings) is now in the hands of a developer and a planning agent has been appointed to progress the scheme.

Phasing of delivery at Tudor Nurseries

30. At paragraph 6.9 of his Proof, Mr Bolton cites evidence from a report by NLP in respect of average rates of delivery at similar sized sites (inquiry document CD2.14). The document states on page 6 alongside the evidence on which Mr Bolton draws *“it is important to remember that these are average figures which come from a selection of large sites. There are significant variations within this average, with some sites progressing very slowly or quickly compared to the other examples. This is unsurprising as planning circumstances will vary between places and over time.”*
31. The NLP report does not provide delivery rates for sites below 500 dwellings, but it does provide numerous examples of rapid delivery at sites in the range 500 to 1,000 dwellings within Appendix 2. The table below compares this information from NLP with the phasing schedule provided by Redrow Homes for Tudor Nurseries.

Site/size	Year 1	Year2	Year 3	Year 4	Year 5
Dowds Farm	54	189	187	44	102
The Parks	-94	104	88	101	54
Land at Popley Fields	105	172	118	186	126
Channels	31	172	110		
Land at Siston Hill	77	211	96	63	57
Tudor Nurseries		50	70	70	52

32. In light of the evidence provided by NLP, the delivery rates provided within the phasing plan provided by Redrow Homes appear entirely realistic or even somewhat conservative, particularly in light of the rapid construction currently underway on-site.

Conclusion

33. My Proof of Evidence proposed to reduce the five year supply position to 4.9 years. Having reviewed Mr Bolton’s Proof of Evidence, I see no reason to change my conclusions in that regard.
34. Given that Broxbourne’s Local Plan was only recently adopted, it is unsurprising that large sites should not yet have full plans or a fully comprehensive set of reserved matters approval in place. However, as the AMR (document CD3.15) shows (Figure 3) during the most recent monitoring year, the Council granted permission for 2,648 dwellings in 2019/20, including not only outline but also significant numbers of full and reserved matters permissions. Furthermore, there is a large stack of further permissions in the pipeline. This is a dramatic uplift and significant weight must be attached to this.

Appendix A: The NPPF definition of 'deliverable' is not a closed list

18.06.2020

In a development which is likely to have major implications for the way in which local planning authorities go about calculating their five-year supply of housing land, the Secretary of State has consented to judgment in a s.288 appeal against a decision of one of his planning inspectors in which the inspector took the view that the definition of 'deliverable' in the Glossary to the NPPF is a 'closed list' – i.e. that the only types of sites that can be considered are those listed there. The Secretary of State has confirmed that this interpretation is incorrect (and an error of law).

Local planning authorities are obliged by the NPPF to consider their future supply of housing land, and calculate whether they have identified sufficient 'deliverable' sites to meet their needs arising (whether against the housing target in their plan, or the Local Housing Need derived from use of the Standard Method). If they cannot demonstrate sufficient sites to meet 5 years of need arising, then the famous 'tilted balance' in paragraph 11 of the NPPF applies automatically, and planning permission for housing proposals will be harder to refuse.

The Glossary to the NPPF says:

Deliverable: To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:

a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).

b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.

For some time there has been a debate in the planning community about how to interpret that definition: should it be read to mean that only those types of site listed in categories (a) and (b) can be considered (the 'closed list' interpretation); or do categories (a) and (b) simply set out the presumptions as to evidence required for those listed types of site, with other types permissible if the evidence shows that they are deliverable (the 'non-closed list' interpretation)?

That debate ought now to have been put to bed. The Secretary of State has explicitly accepted that the definition is not to be taken as a 'closed list' and site types not listed within the definition – for example, sites with a resolution to grant planning permission subject to the execution of a s.106 agreement, or draft allocations in an emerging plan - are capable of being deliverable if the evidence shows that they are "available now,

offer a suitable location for development now, and are achievable with a realistic prospect that housing will be delivered on the site within five years". That will be a matter for planning judgment on the evidence available.

The Inspector took the view, as a matter of principle, that the definition was to be taken as a 'closed list' and, without going on to consider the site-specific evidence, removed some 700+ units from the Council's claimed supply, on the sole basis that they were on sites types that did not fall into categories (a) or (b) in the Glossary definition. On that basis, he found that the Council could not show a five-year supply of housing land, and allowed the appeal against refusal of planning permission for four houses.

In consenting to judgment quashing that decision on that sole basis, the Secretary of State confirmed, in the Statement of Reasons attached to the Consent Order:

"The proper interpretation of the definition is that any site which can be shown to be 'available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years' will meet the definition; and that the examples given in categories (a) and (b) are not exhaustive of all the categories of site which are capable of meeting that definition. Whether a site does or does not meet the definition is a matter of planning judgment on the evidence available."

What does this mean?

In calculating their five-year housing land supply, local planning authorities may consider sites that do not fall within categories (a) or (b) in the definition of 'deliverable' and may include them if the evidence shows, as a matter of planning judgment, that they are 'deliverable'. Sites in category (a) will not need evidence to show that they are deliverable (but evidence can be led to show that they are not), and sites in category (b) will always require 'clear' evidence showing they are deliverable before they can be included.

In effect, the new approach extends the approach to category (b) sites to any other kind of site not listed: for those sites to be considered deliverable, there will always need to be robust evidence showing that they meet the definition. That evidence should always be 'clear' – anything short of 'clear evidence' is likely to fail to persuade a decision-maker that the site is deliverable and can be included.

Josef Cannon acted for the successful claimant, East Northants Council, instructed by Vanessa Blane of LGSS Law Ltd.

Article available online at:

<https://cornerstonebarristers.com/news/nppf-definition-Isquodeliverablersquo-not-closed-list/>

[accessed 13/07/2021]

