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TOWN AND COUNTRY PLANNING ACT 1990 (“TCPA 1990”)
PLANNING AND COMPULSORY PURCHASE ACT 2004 (“PCPA 2004”)

IN THE MATTER OF:

an appeal pursuant to section 78 TCPA 1990 by

KIER HOMES LTD

against a refusal of planning permission by

UTTLESFORD DISTRICT COUNCIL

in respect of

LAND NORTH AND SOUTH OF THAXTED ROAD, SAFFRON WALDEN

ADVICE

Introduction

1. I am instructed to advise Uttlesford District Council (“the Council”) on its prospects of success in relation to an appeal against its decision to refuse planning permission for a 300-unit residential-led development proposed by Kier Homes Ltd (“Kier”) on 20.20 ha of agricultural (Grade 2, so BMV) land that lies either side of Thaxted Road, Saffron Walden (“the Kier Site”). I will refer to the proposal as “the Kier Scheme”. In addition to residential, the Kier Scheme proposes an extension to a skate park, provision of recreation land and an option for a new primary school. The latter element was an amendment to the original scheme.
2. The Kier Site is almost entirely beyond, albeit immediately adjacent to (south-east of), the development limits of Saffron Walden, as set by the current development plan, the Uttlesford Local Plan 2005 (“the Local Plan 2005”).¹ It straddles the Thaxted Road to the north and the south as that road proceeds south-east from Saffron Walden. A sizeable area of what is presently employment land lies adjacent to the south-eastern boundary of the part of the Kier Site to the north of the Thaxted Road.

¹ <http://www.planvu.co.uk/udc/>

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3. The Kier Site forms part of a 59ha land allocation, known as “Saffron Walden 1”, in the local plan the Council submitted for examination in public on 04.07.2014 (“the Submission Local Plan”). Saffron Walden 1 has Radwinter Road as its northern boundary and encompasses the entirety of the Kier Site within its southern portion. It is allocated for some 800 residential units and 4ha of employment land.
4. The notice of refusal is dated 02.05.2014 (“the Refusal”). It followed an extraordinary meeting of the Council’s Planning Committee on 30.04.2014. The resolution to refuse, which split the committee 6/4, was contrary to officer advice. I have a copy of the officer report, comprising an initial report prepared for a Planning Committee meeting of 11.12.2013, at which consideration of the Kier Scheme was deferred pending further information regarding highways and education, and an addendum prepared for the meeting on 30.04.2014 (together “the Officer Kier Report”).
5. At the same meeting, immediately after the resolution to refuse the Kier Scheme, the Planning Committee resolved 8/2, in accordance with officer advice, that the Council would grant permission for another residential-led proposal on the northern part of Saffron Walden 1, on application by Manor Oak Homes (“the Manor Oak Site”). The Manor Oak Site comprises 13.9 ha of Grade 2 BMV agricultural land immediately to the east of the development limit. I will refer to that scheme, which in fact was for two alternatives, one including a site for a school, as “the Manor Oak Scheme”. Planning permission has yet to be granted pending agreement of a suitable planning obligation pursuant to s.106 TCPA 1990. Again, I have the officer report into the Manor Oak Scheme (“the Officer Manor Oak Report”).
6. Kier promptly launched an appeal against the Refusal pursuant s.78 TCPA 1990. I have its Statement of Case within my papers.
7. The Refusal gives the following four reasons:
 - (1) The proposal is considered to be an unsustainable form of development in this location as it lies outside the development limits of Saffron Walden within the Countryside, contrary to policies S1 and S7 of the Uttlesford Local Plan 2005.

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- (2) The proposal would result in the loss of Grade 2 agricultural land which forms a traditional open space on the approach to Saffron Walden, contrary to policies S7, ENV3 and ENV5 of the Uttlesford Local Plan 2005.
 - (3) The proposal by reason of its size and scale would give rise to unacceptable levels of air quality within Saffron Walden which can have a harmful impact on human health, contrary to policy ENV13 of the Uttlesford Local Plan 2005.
 - (4) The development hereby permitted would increase the pressure on the local infrastructure within the district, not covering the issues as listed within the schedule of Heads of Terms of the Addendum report presented to the 30th April Planning Committee (page 7 & 8). In the absence of any legal agreement to address this, the application fails to fully mitigate the impacts of the development contrary to Policy GEN6 of the Uttlesford Local Plan 2005.
8. I will refer to the four reasons by their proprietary number, so “Reason 1”, “Reason 2”, and so on.
 9. I am instructed to consider the reasons for refusal and to advise whether the Council can defend them, having particular regard to the fact that the Submitted Local Plan allocates the Kier Site for residential development as part of Saffron Walden 1.
 10. I set out my analysis below. I close with a very short-form conclusion.
 11. I make clear at the outset that although my inquiries have ranged beyond the documents that my instructions specifically linked to, I have of necessity relied heavily on the Officer Reports for various matters. As such, I have proceeded on the basis that the factual material and summaries of representations/consultation responses in the Officer Reports are reliable. Most importantly, I have proceeded on the basis that the present and anticipated position in relation to the district’s five-year housing supply set out within the two Officer Reports was reliable at the time it was made, likewise their assessment of the non/availability of other land that is not BMV agricultural land.
 12. I have proceeded in this way because I have seen no cogent reason or material to suggest I should do otherwise, and the timeframe within which this advice is sought

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means I cannot fully explore the available evidence base to unpick those matters myself in any event (though I have, for example, found and considered not only the SHLAA of January 2014 which the Officer Reports refer to, but also the “Housing Trajectory and Statement of 5-Year Land Supply April 2014”, dated June 2014, which postdates the Officer Reports). In the case of the Kier Scheme the reasons for the Refusal do not advance alternative facts, I have seen nothing to suggest the summary of representations/consultation responses is inaccurate, and I cannot proceed on the basis of objectors’ disagreements with the Officer Kier Report where those have not found their way into the Refusal. In the case of the Manor Oak Scheme, the Planning Committee voted in accordance with officer advice.

13. I also proceed on the basis that if the Council had particular material it wished to draw to my attention in order to support the reasons for Refusal (over and above the material identified by my instructions) it would have done so. The fact that it has not I take to mean that its differences with officer advice are more of interpretation than anything else.
14. This approach inevitably colours my advice, and the Council should regard it as subject to caveat accordingly. If, for example, the Council disagrees with the housing land supply assessment within the Officer Reports, or their judgment as to whether sufficient non-BVM land is available, that may affect my advice.

Analysis

Legal framework

15. Kier’s appeal against the refusal is pursuant to s.78 TCPA 1990, and will be determined by the Secretary of State through his appointed Inspector unless called in for his own direct determination.
16. The starting point for the decision-taker on appeal is s.38(6) PCPA 2004 which, along with s.70 TCPA 1990, confirms the primacy of the statutory development plan in decision-making. Section 38(6) provides that the determination must be made “in accordance with the plan unless material considerations indicate otherwise”.

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17. The legal meaning of development plan policy (and indeed of other planning policy, including national policy) is a matter for the courts; *Tesco Stores v Dundee City Council* [2012] UKSC 13.

Policy framework

18. The development plan is, as noted, the Local Plan 2005. The “material considerations” outside the development plan for the purposes of s.38(6) include, inter alia, national policy. Chief among which is the National Planning Policy Framework, published March 2012 (“the NPPF”), followed by the National Planning Practice Guidance, published March 2014 (“the NPPG”). They also include emerging development plan policy, such as the Submission Local Plan, though the weight it attracts will be relatively limited at this stage; prior to examination and with relevant objections outstanding.
19. The Inspector will focus on the development policies cited within the reasons in the Refusal, in light of other material considerations, including the NPPF and the NPPG. I have viewed the relevant policies within the Local Plan 2005 online using the Council’s website.² I will discuss their detail when considering the individual reasons for refusal below. Both the NPPF and the NPPG contain material of relevance to the approach to be taken to the Local Plan 2005, which plainly predates them by a number of years.
20. The NPPF replaced the previous national Planning Policy Statements and Guidance Notes. At the heart of the NPPF is a presumption in favour of “sustainable development” (defined at §7 as having three “dimensions”: economic, social and environmental), which should be seen as a “golden thread” running through plan-making and decision-taking; NPPF§14.
21. As regards conformity with the NPPF as a whole, and the weight to be given to development plans prepared prior to the NPPF and to local plans still heading towards adoption, NPPF§214-216 within Annex 1: Implementation are on point:

² <http://www.planvu.co.uk/udc/written/cpt2.htm#s1>

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214. For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with this Framework.

215. In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).

216. From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:

- the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
- the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
- the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given).

22. Those paragraphs lead back to NPPF§14, final bullet, which concerns decision-taking and prescribes:

where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
- specific policies in this Framework indicate development should be restricted.

23. The development plan is plainly not absent, as the Local Plan 2005 is in existence.³ Whether it is “silent” or relevant policies are “out-of-date” I consider below.

³ *Bloor Homes v Secretary of State* [2014] EWHC 754 (Admin), Lindblom J, paragraphs 42-63.

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24. The NPPG deals with questions of prematurity. The Council has not raised prematurity in its reasons for the Refusal hence I do not address it here (albeit I note it appears some third parties have raised prematurity).
25. The Council had Ann Skippers Planning conduct a “compatibility assessment” of the Local Plan 2005 against the NPPF in July 2012, and adopted the result in September 2012 (“the Skippers Assessment”). I refer to the Skippers Assessment below.

The reasons for the Refusal

26. It is appropriate to divide the reasons into three; Reasons 1 and 2, Reason 3 and Reason 4. I deal with them in turn.

Reasons 1 and 2

27. I take these together, because in my view they ultimately stand or fall as one.
28. As regards the Local Plan 2005 policy on which they are based, Policy S1 adds little if anything to Policy S7 for the purposes of the present appeal. Policy S7, which is the single most important policy so far as the Kier Scheme and the merits are concerned, provides as follows:

Policy S7 – The Countryside

The countryside to which this policy applies is defined as all those parts of the Plan area beyond the Green Belt that are not within the settlement or other site boundaries. In the countryside, which will be protected for its own sake, planning permission will only be given for development that needs to take place there, or is appropriate to a rural area. This will include infilling in accordance with paragraph 6.13 of the Housing Chapter of the Plan. There will be strict control on new building. Development will only be permitted if its appearance protects or enhances the particular character of the part of the countryside within which it is set or there are special reasons why the development in the form proposed needs to be there.

29. The Skippers Assessment concludes that Policy S7 is “partly consistent” with the NPPF, as whilst the latter makes the protection and enhancement of the natural

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environment an important part of the environmental dimension of sustainable development, it takes a positive approach to appropriate development, rather than a protective one. I agree with that assessment and expect an Inspector on appeal to reach a similar view. More importantly, I expect an Inspector on appeal to find that S7 is a “relevant policy” for the purposes of housing supply and is out-of-date, as described by the NPPF. I set out my reasoning.

30. Section 6 of the NPPF deals with housing under the heading “Delivering a wide choice of high quality homes”. It explains that the aim is to “boost significantly the supply of housing” and insists on a five-year supply of deliverable housing sites, along with a suitable contingency buffer (§47):

47. To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
- identify and update annually a supply of specific deliverable¹¹ sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
- identify a supply of specific, developable¹² sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;

...

¹¹ To be considered deliverable, sites 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 and in particular that development of the site is viable. Sites with planning

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permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.

12 To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.

31. As the Court of Appeal (Sir David Keene) observed in *Hunston Properties v Secretary of State* [2013] EWCA Civ 1610; [2014] JPL 599 at para.6:

6. There is no doubt, that in proceeding their local plans, local planning authorities are required to ensure that the “full objectively assessed needs” for housing are to be met, “as far as is consistent with the policies set out in this Framework”.

32. Those other policies in the NPPF included its policies regarding green belt, which was an issue in *Hunston* (but not here). The Court of Appeal agreed with the first instance judge that the Inspector in *Hunston* had been wrong to seek to constrain the objectively assessed housing need by reference to a revoked Regional Strategy; constraint was a matter for the plan-making process.

33. Ouseley J considered *Hunston* in *South Northamptonshire v Secretary of State* [2014] EWHC 573 (Admin) and said this:

30. In my judgment the crucial point to take from the *Hunston* case is how to interpret paragraph 47 (i) of the NPPF, relating the requirement for a full objective assessment of housing needs in the housing market area to the subsequent qualification that that be done so far as is consistent with the policies in the Framework, before the Local Plan is produced, reconciling or balancing the two aims.

31. Before that happens through the Local Plan, the full objectively assessed housing needs of the area are not subject to the constraints of policy. Those constraints fall for consideration later on in the development control decision-making process, as the Court of Appeal pointed out; for example in a Green Belt case, the question will be whether a shortfall of housing land supply against those

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fully assessed needs constitutes very special circumstances so as to permit inappropriate development in the Green Belt. The question is not whether the Green Belt constrains the assessment, but whether the Green Belt constrains meeting the needs assessed. Once the Local Plan is adopted, it is the constrained needs in the Plan which are to be met.

32. A revoked RSS is not a basis for the application of a constraint policy to the assessment of housing needs, because it has been revoked and cannot be part of the Development Plan. The same would be true of an out of date Local Plan which did not set out the current full objectively assessed needs. Until the full, objectively assessed needs are qualified by the policies of an up to date Local Plan, they are the needs which go into the balance against any NPPF policies. It is at that stage that constraints or otherwise may apply. It may be problematic in its application, but that is how paragraph 47 works.

34. The NPPG says this of relevance regarding housing supply:

The National Planning Policy Framework sets out that local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements. Therefore local planning authorities should have an identified five-year housing supply at all points during the plan period. Housing requirement figures in up-to-date adopted Local Plans should be used as the starting point for calculating the five year supply. Considerable weight should be given to the housing requirement figures in adopted Local Plans, which have successfully passed through the examination process, unless significant new evidence comes to light. It should be borne in mind that evidence which dates back several years, such as that drawn from revoked regional strategies, may not adequately reflect current needs.

Where evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying sufficient weight, information provided in the latest full assessment of housing needs should be considered. But the weight given to these assessments should take account of the fact they have not been tested or moderated against relevant constraints...

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35. The NPPG also contains telling comment as to how to address historic undersupply (which bears on the debate as to whether the Liverpool or the Sedgefield method is appropriate – and favours the Sedgefield method):

Local planning authorities should aim to deal with any undersupply within the first 5 years of the plan period where possible. Where this cannot be met in the first 5 years, local planning authorities will need to work with neighbouring authorities under the ‘Duty to Cooperate’.

36. At §49 the NPPF explains the approach to be taken if the five-year supply cannot be demonstrated:

Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.

37. I have already noted above the effect that a finding a “relevant policy” is not up-to-date has in relation to paragraph 14 of the NPPF.

38. My understanding is that whether the Council is presently able to demonstrate a five-year supply of deliverable housing land at any given time is a moot point. To quote from the Officer Kier Report and the June 2014 statement regarding 5-year supply:

Officer Kier Report:

5 year Land Supply

4.11 Since this application has been presented at Planning Committee the Council has met their 5 year housing land supply however it is anticipated that, as this is a rolling target, there will be a shortfall in provision again in 2014/15. This is dependent on the amount of housing commenced or built in 2013/14, which will not be confirmed until June. Whilst lack of a 5 year supply was one of the arguments for the development the application site forms part of the larger Saffron Walden Policy Area 1 within the Pre Submission Draft Local Plan and this scheme would count towards this housing supply. The principle of the application is still considered to be

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acceptable as it is a sustainable form of development as outline within Section 10.1 to 10.15 of the main committee report, please refer to Appendix A, in accordance with the core principles of the NPPF.

June 2014 statement:

13. The trajectory shows how the completion rate in the reporting year of 2013/14 is lower than in previous year and falls short of the Council's target of 523 dwellings per annum. This undersupply is planned to be met within the following 5 years.

14. It is predicted that completion rates for the next two years will remain relatively low reflecting the fact that the sites identified in the Adopted Local Plan have been completed, and there will be a delay before there are completions on new sites granted permission while detailed planning applications are negotiated and determined.

39. The picture painted by the combination of the Officer Kier Report and the June 2014 statement is one of up-down provision, in which the Council would meet its housing target in some years and fall short in others. That in and of itself would mean most Inspectors would be receptive to arguments from developers that the “relevant policies” in the Local Plan 2005 are out of date and that NPPF§14 is engaged. But when the assessments are considered it is immediately obvious that the Council is relying on proposals that conflict with Policy S7 in order to arrive at its list of “deliverable” sites. To give the most obvious example, the June 2014 assessment relies upon the Manor Oak Site for delivery of homes within the 5-year period. The Manor Oak Site is entirely outside the development limits, so conflicts with Policy S7. I also note that at p.10 the June 2004 assessment projects delivery of 50 homes from the Manor Oak Site as early as 2016/2017. In the case of a development that enjoys a resolution to grant but has yet to receive a planning permission, the suggestion that homes would be ready for occupation within less than three years strikes me as optimistic and I suspect will give an Inspector further cause for concern.

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None of this can come as any surprise, given the Council has decided to allocate the Saffron Walden 1 site outside the development limits set by the Local Plan 2005.

40. I consider that an Inspector will find S7 a relevant policy, as a matter of planning judgment and in line with the reasoning of Ouseley J in *South Northamptonshire* at paragraph 38 onwards. I further consider that the Inspector will proceed to treat it as out-of-date for the purposes of para.14, as it is an obstacle to the Council demonstrating a deliverable 5-year land supply. That finding will be assisted by the fact it the policy wording is obviously inconsistent with the positive approach taken by the NPPF, as recognised by the Skippers Assessment, and by the age of the policy in light of NPPF: Annex 1.
41. In those circumstances, so far as the NPPF is concerned (remembering of course that the NPPF does not displace the s.38(6) statutory test) I would expect an Inspector to assess the Kier Scheme, and the Kier Site, by reference to the general considerations of sustainability explained at NPPF§6-15, and ask whether adverse impacts will “significantly and demonstrably” outweigh the benefits. The Officer Kier Report at paragraphs 10.11-10.15 concludes that the Kier Site meets the three strands of sustainable development. I expect an Inspector to agree, as:
- (1) Given the reasons for the Refusal, it is difficult to see that there might be sustainability objections to the Kier Site per se on any basis other than extension of the settlement (the assessment of sustainability will include, of course, the relationship with the existing settlement, hence some of Policy S7 would enter into the process at that point), encroachment into/loss of countryside, landscape impact and loss of BVM.
 - (2) However, the Kier Site is immediately adjacent to the development limit, which is in its favour, and development beyond the development limit is plainly needed to meet the 5-year housing target. At paragraph 52, the NPPF notes that sometimes the supply of new homes may best be achieved through larger schemes, such as extensions to existing settlements carried out in accordance with the principles of Garden Cities. NPPF§55 states that housing

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in rural areas should be located where it can enhance or maintain the vitality of rural communities.

(3) As regards the loss of BMV land, the Officer Kier Report explains that there is no lower value land that might be used instead (paragraph 10.15). On that basis, there is no conflict with Policy ENV5, nor with NPPF§12 (the two are, in my view, consistent-I note that Skippers Assessment agrees).⁴

(4) As regards landscape impact, the report proceeds to note the lack of objection from the Council's landscape officer (see paragraph 10.46).

42. In short, the appeal Inspector is likely to find that the Kier Site is sustainable by reference to the NPPF, as the Council has itself recognised by including it within the Submission Local Plan. Note that I reach this conclusion primarily for reasons outside the fact of Saffron Walden 1 within the Submission Local Plan, which as noted is subject to objection and yet to start examination so carries out limited weight, but bolstered by it. Having found that the key development plan policy, S7, is out-of-date for the purposes of the NPPF, the Inspector will surely then attach less weight to it when weighing the appeal against the s.38(6) test.

43. As regards the other policies cited in support of Reason 2, I can see nothing in the materials I have to support the Council's reliance on ENV3, which I interpret at aimed at something other than the seemingly generic edge-of-development-boundary agricultural fields that comprise the Kier Site. I have regard to the supporting text to the policy as shedding light on the policy wording:

Open Spaces and Trees

5.5. There are open spaces of high environmental quality in many of the towns and villages. Such spaces may include village greens, commons or narrow

⁴ Policy ENV5 - Protection of Agricultural Land:

Development of the best and most versatile agricultural land will only be permitted where opportunities have been assessed for accommodating development on previously developed sites or within existing development limits. Where development of agricultural land is required, developers should seek to use areas of poorer quality except where other sustainability considerations suggest otherwise.

NPPF§112::

112. Local planning authorities should take into account the economic and other benefits of the best and most versatile agricultural land. Where significant development of agricultural land is demonstrated to be necessary, local planning authorities should seek to use areas of poorer quality land in preference to that of a higher quality.

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tongues of agricultural land or woodland or large mature gardens. Sometimes, the land may have been left in a state of untidiness but, nevertheless, the existence of the space may be important to the character of the locality. Retention of the space would also enable its full environmental potential to be realised through an enhancement project. Normally it has been possible to protect such areas by ensuring that they lie beyond defined development limits. The need to protect similar areas within settlements is equally important and the most significant of these have been shown on individual inset maps. Other smaller spaces of importance will also be protected where development would be inappropriate, but it is not practicable to identify all of these.

5.6. Where the principle of development is acceptable it should avoid taking away features that are prominent elements and enhance the local environment, such as for example, healthy mature trees. However, as a specific example, it may not be possible to accommodate a residential development on a tight space without removing a clump of sycamore saplings or similar. This may be considered acceptable. Sometimes public facilities may be proposed on open space. Again, if a successful design can be achieved, a limited loss of open space may be permitted.

Policy ENV3- Open Spaces and Trees

The loss of traditional open spaces, other visually important spaces, groups of trees and fine individual tree specimens through development proposals will not be permitted unless the need for the development outweighs their amenity value.

44. Based on what I have seen, I expect an Inspector to find the Kier Site sustainable, bolstered in that conclusion by its inclusion within the Submission Local Plan, and to attach limited weight to Policy S7 in light of concerns over the Council's ability to demonstrate a deliverable 5-year supply if S7 is applied. This is not a foregone conclusion, not least because the 5-year housing supply position might improve markedly between now and an inquiry, and equally the Submission Local Plan might

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see Saffron Walden 1 modified out of that document. However, on balance and on present evidence, I expect Reasons 1 and 2 to fail.

Reason 3

45. As regards Reason 3, its wording makes clear that it is aimed at the effects of the Kier Scheme on air quality within Saffron Walden *as a whole* (not simply within the Kier Site), which it states the Kier Scheme will render “unacceptable”.
46. The reason finds no material support in the assessment of the Council’s environmental health officer, Ms O’Boyle, who noted that the Kier Scheme would have a “small adverse impact on air quality” within Saffron Walden⁵ but according to the Officer Kier Report raised no objection.⁶
47. Equally importantly, in my view Policy ENV13 does not provide support for Reason 3. That policy is, in my view, aimed at the impact on *users* of development, so the residents of the Kier Site itself, and illustrates its meaning by reference to such as zones either side of the M11 and the new A120 (the Kier Site is well beyond the “poor air quality zone” marked up to 100m from the centre of the M11)⁷. ENV13 and its supporting text provide that:

Air Quality

5.25. The Council’s air quality management strategy has identified that, based on traffic forecasts, poor air quality is anticipated alongside the M11 and the new A120. Since both run through the open countryside where there is strict control on new buildings it is unlikely there will be many proposed developments close to either road. The widths of the zones are based on Government standards for the traffic levels predicted. The extent of the zones is based on Local Air Quality

⁵ ...the development without the primary school would result in small increases (1-2.8%) in annual mean nitrogen dioxide levels at receptors in Thaxted Road, Peaslands Road, Borough Lane, Debden Road, High Street, George Street and East Street, within the Air Quality Management Area. The model predicts that at High Street and East Street these increases would be on top of existing nitrogen dioxide levels approaching or exceeding the Air Quality Limit Value of 40 ug/m³. According to the widely used EPUK criteria, these increases are regarded as representing a small adverse impact on air quality.

...The inclusion of the primary school slightly reduces the impact, as fewer car journeys would be made to other schools in the town. However the overall conclusion of a small adverse impact on air quality remains the same.

⁶ See para.4.5 of the Addendum.

⁷ <http://www.planvu.co.uk/udc/>

NOT FOR PUBLICATION (paragraphs 3 and 5 of Schedule 12A of the Local Government Act 1972). All of the exemptions are subject to a qualification in that they can only be used if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Management Technical Guidance Note 3 in respect of Nitrogen Dioxide using the Design Manual for Roads and Bridges Screening Model.

Policy ENV13 – Exposure to Poor Air Quality

Development that would involve users being exposed on an extended long-term basis to poor air quality outdoors near ground level will not be permitted. A zone 100 metres on either side of the central reservation of the M11 and a zone 35 metres either side of the centre of the new A120 have been identified on the proposals map as particular areas to which this policy applies.

48. As I understand it, air quality is a major concern of the local residents group that objected vociferously to both the Kier Scheme and the Manor Oak Scheme; “We Are Residents”. I note the wording of Reason 3 closely matches the wording used in the WeAreResidents air quality report, which suggests it is based on work they commissioned from Ove Arup. WeAreResidents argue that any development that might add to emissions within an Air Quality Action Zone where the limits are already breached must be unacceptable by reference to the NPPF and to be refused.

49. As regards air quality, NPPF§124 states that:

124. Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan.

50. Whatever the prompt for Reason 3, I expect an Inspector to reject it as a reason for refusal. Not only is it not supported by the development plan policy relied upon or the Council’s own internal expert advice, but Reason 3 would, on its face, apply to stymie all major development in and around Saffron Walden that depended on the internal combustion engine. An Inspector will not find the planning balance in favour of the delivery of housing on a sustainable site outweighed by a “small adverse impact on air quality”, particularly when conditions could be imposed to require such as measures

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for the provision of electric car charging points. The NPPF does not alter my assessment. I see no credible suggestion that the Kier Scheme runs counter to any local Air Quality Action Plan. Whilst I expect an Inspector to acknowledge that the Kier Scheme will not reduce pollution levels, equally I do not expect an Inspector to refuse permission based on the “small adverse impact” it will have.

Reason 4

51. Reason 4 is essentially a complaint that unless and until Kier provide a suitable s.106 planning obligation there will be an insuperable infrastructure objection. It cites Policy GEN6, which is as follows:

Policy GEN6 –Infrastructure Provision to Support Development

Development will not be permitted unless it makes provision at the appropriate time for community facilities, school capacity, public services, transport provision, drainage and other infrastructure that are made necessary by the proposed development. In localities where the cumulative impact of developments necessitates such provision, developers may be required to contribute to the costs of such provision by the relevant statutory authority.

52. It see no reason to doubt Kier’s averment in its Statement of Case that it has “always been prepared to enter into a legal agreement to provide the contributions requested” and that it was agreed with Council officers that the necessary agreement would be concluded subsequent to a resolution to grant. That is standard practice amongst LPAs as a whole, and is exactly what has happened with the Manor Oak Scheme. Barring some inexplicable failure on Kier’s part, the Inspector will no doubt have a suitable s.106 planning obligation, whether by agreement or unilateral undertaking, to consider prior to any decision. Hence I expect Reason 4 to fail.

Summary

53. Drawing the threads together, on balance I expect Kier’s appeal to succeed.

Relevance of Council’s resolution to grant permission for Manor Oak Scheme

NOT FOR PUBLICATION (paragraphs 3 and 5 of Schedule 12A of the Local Government Act 1972). All of the exemptions are subject to a qualification in that they can only be used if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

54. It will not be the Inspector's role to consider the lawfulness of the Council's decision-making for what are, at face value, two sites that give rise to very similar issues and for a Judge in the Administrative Court would cause a very real concern regarding consistency (both sites are outside the development limit; both involve the loss of BMV land; both involve sizeable residential-led schemes; both will to some extent be dependent on the internal combustion engine). However, the Inspector will not ignore the Council's approach to the Manor Oak Site, and it may well be that he will attach less weight to the Council's evidence in support of the Refusal here as a result.

Conclusion

55. I repeat the caveats I give within the Introduction regarding my reliance on the Officer Reports for many matters.

56. I consider that matters will turn on sustainability and the state of the Council's progress towards its five-year housing supply. On balance, I expect Kier's appeal to succeed. Reasons 3 and 4 are insubstantial and, provided Kier is organised regarding a planning obligation for the purposes of Reason 4, no Inspector will refuse permission on those grounds alone. Reasons 1 and 2 are linked, in that if the Kier Site/Kier Scheme is considered sustainable and ultimately the conflict with (out-of-date) Policy S7 outweighed, then there would appear to be no alternative to BMV agricultural land, hence no conflict with ENV5 (and in my view ENV3 does not apply).

57. Whilst it is not a foregone conclusion that the Council will fail to defend Reason 1, and the Submission Local Plan has yet to undergo examination and is the subject of representations regarding housing allocation in general and Saffron Walden 1 in particular, I put its prospects of mounting such a successful defence at some 30-40%. All else flows from there.

58. My instructing solicitor should please feel free to contact me in order to discuss anything arising from the above.

James Burton

Thirty Nine Essex Street, WC2R 3AT

13th August 2014

NOT FOR PUBLICATION (paragraphs 3 and 5 of Schedule 12A of the Local Government Act 1972). All of the exemptions are subject to a qualification in that they can only be used if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

**TOWN AND COUNTRY PLANNING ACT
1990 (“TCPA 1990”)**
**PLANNING AND COMPULSORY PURCHASE
ACT 2004 (“PCPA 2004”)**

IN THE MATTER OF:

an appeal pursuant to section 78 TCPA 1990 by

KIER HOMES LTD

against a refusal of planning permission by

UTTLESFORD DISTRICT COUNCIL

in respect of

**LAND NORTH AND SOUTH OF THAXTED
ROAD, SAFFRON WALDEN**

ADVICE

James Burton
Thirty Nine Essex Street, WC2R 3AT

Michael J Perry LLB (Hons), Solicitor
Uttlesford District Council
Council Offices
London Road
Saffron Walden
Essex
CB11 4ER

Assistant Chief Executive – Legal

IN THE MATTER OF:

Land at Land South & North of Thaxted Road, Saffron Walden; Kier Homes Limited; Planning Permission.

ADVICE

1. I am asked to advise on the position following the refusal of planning permission by the Uttlesford District Council Planning Committee dated 2 May 2014 in respect of an outline planning application for up to 300 dwellings and associated infrastructure at Thaxted Road, Saffron Walden. The only matter not reserved was access.
2. The refusal was on 4 stated reasons, which I set out below.
3. The refusal was against officer recommendation. The original Report recommending conditional approval was by Maria Shoesmith. There was an addendum report produced later (the Reports do not appear to be dated) and the application refused on 2 May 2014.
4. The reasons for refusal state:
 1. *The proposal is considered to be an unsustainable form of development in this location as it lies outside the development limits of Saffron Walden within the Countryside, contrary to policies S1 and S7 of the Uttlesford Local Plan 2005.*
 2. *The proposal would result in the loss of Grade 2 agricultural land which forms a traditional open space on the approach to Saffron Walden, contrary to policies S7, ENV3 and ENV5 of the Uttlesford Local Plan 2005.*
 3. *The proposal by reason of its size and scale would give rise to unacceptable levels of air quality within Saffron Walden which can have a harmful impact on human health, contrary to policy ENV13 of the Uttlesford Local Plan 2005.*
 4. *The development hereby permitted would increase the pressure on the local infrastructure within the district, not covering the issues as listed within the schedule of Heads of Terms of the Addendum report presented to the 30th April Planning Committee (page 7 & 8). In the absence of any legal agreement to address this, the application fails to fully mitigate the impacts of the development contrary to Policy GEN6 of the Uttlesford Local Plan 2005.*

5. In the new local plan, which is still in draft state, the site concerned falls within a larger area allocated for housing development, under policy Saffron Walden Policy 1. That policy allocates the land to the east of Saffron Walden (which includes, but is not limited to, the Kier site) for 800 homes, subject to certain conditions about provision for various types of homes and elements of infrastructure.
6. The local plan is due to be submitted on 4 July 2014. It has been approved, including Saffron Walden Policy 1, by the full Council.
7. The refusal of planning permission has not yet been appealed but that is anticipated.

Analysis

8. There is obvious tension between an allocation for the provision of homes in a version of a local plan which is about to be formally submitted for approval, and a refusal of planning permission for homes on land within that allocated area.
9. There is always scope for refusal of a particular application in such circumstances where, for example, the design, or nature of the specific proposal gives rise to planning objections. However, where the objection is one of principle (i.e. should there be homes on this land?) it is much harder to reconcile the position.
10. A crucial element of this application is that it is for outline planning permission. As such it can be said to be in effect 'testing' the principle of development on the land.
11. In this case the reasons for refusal are four in number, and I address each in turn.
 - (a) Outside development limits
12. The first element, the site falling outwith development limits in a rural area, seems to me to be very hard to reconcile with the forthcoming allocation of the same land for housing development. That allocation seeks to say that building homes on that land (and the wider land) is appropriate and acceptable. I cannot see how it could *simultaneously* be said that to do so would result in an unacceptable intrusion into the countryside, or breach of settlement boundaries.
13. In any event, I should add that the settlement boundaries contained in the *existing* local plan are precisely the kind of policies that serve to restrict development, particularly of housing, and even without the allocation in the forthcoming local plan, might already be said to be outdated and overridden by the NPPF.

14. Unless there are specific reasons for objecting to *this* intrusion into the countryside which can be reconciled with the allocation in Saffron Walden Policy 1 in the new local plan I consider it will be extremely difficult to defend this element of the reason for refusal at appeal (not to mention undermining the Council's position at any Examination in Public in respect of its allocations within the emerging local plan).

(b) Loss of best and most versatile agricultural land

15. This element gives me concern for two reasons. First, in line with the other elements, I cannot see how it can be sound to say, on the one hand, that this site (and beyond) should be developed for 800 homes, which would inevitably result in the loss of an area of best and most versatile agricultural land, whilst on the other hand saying that up to 300 homes on a part of it would result in the unacceptable loss of best and most versatile agricultural land – unless the specific site itself was of such high quality compared with the rest of the wider site, for example, that it could be specifically justified. I do not understand that to be the case here.

16. In addition, Uttlesford is comprised of Grade 2 and Grade 3 agricultural land only. There is no other grade available. If Uttlesford is to build more houses (which of course, it must) it must use at least grade 3 land to do so, assuming there is insufficient space within urban and developed areas.

17. The Report is not specific about how much of the site is grade 2, but it does say that the district is majority (80%) grade 2, and there is insufficient grade 3 land in the district to meet demand for new housing – the implication being that *any* new housing will be likely to involve the loss of some grade 2 land. As set out in that Report, if housing development in Uttlesford necessarily results in the use of grades 2 and 3 agricultural land, the specific harm (even notwithstanding the allocation) of losing *this* land cannot be significant – unless it can be shown that this site is *especially* valuable. I don't believe there is any such suggestion.

(c) Air quality

18. Very little explanation is given for the refusal on this ground. There was no objection (eventually) from the Environmental Health team of the Council and an Air Quality Assessment appears to have been submitted by the applicant, and no issue apparently taken with its methodology or conclusions.

19. In the addendum report, which appears to have followed a revised AQA, the conclusion reached is that the development will have a small adverse impact but judged to be acceptable.

20. The immediate problem that I see is that what is in effect being said by this reason for refusal is that whilst the Council have no air quality-related objection to 800 houses

being built on this (and the wider) site – i.e. the traffic generated by 800 homes is not such as to produce concerns about the impact on air quality – somehow *these* 300 homes on this part of the wider site would produce such particulate as to give rise to unacceptable impact on air quality.

21. That, it seems to me, is a very difficult argument to make without specific and detailed technical backup: at the very least a report explaining why these 300 houses would give rise to an unacceptable impact notwithstanding that the Council is 'happy' with the impact of putting 800 homes on this and the wider site.
22. I cannot say such that the taking of such a position is impossible, but it necessarily starts from a position of considerable difficulty. Again, this application is in outline: it is not easy to see how a specific case could be made in those circumstances. In addition and on the same occasion, permission was granted for 200/230 homes at the Radwinter Road site with no air quality objection being taken. This, too, would have to be specifically distinguished or explained before any case could properly be made to support this reason for refusal.

(d) Local infrastructure

23. This reason is in effect a complaint that no s.106 contributions have been secured. As it stands it is of course defensible and robust but would be undermined fatally by the provision of a satisfactory s.106 agreement.

Other matters

24. At present, the existing local plan is the development plan for the purposes of s.38(6), which requires applications to be determined in line with the development plan. However, by the time of the appeal it is possible that the new emerging local plan will be part of that development plan, and that would significantly undermine any reliance placed on old local plan policies.
25. More likely, I suspect, is that the emerging local plan would be awaiting its examination in public, and so would not strictly be part of the development plan at that stage; but it would of course be worthy of considerable weight in the Inspector's considerations. Not least in that equation would be the difficulty for the Council in seeking to promote a position in direct contrast to its declared position in the local plan (which it would be seeking to promote to the Inspector in the examination in public).
26. In short, unless a specific case can be made for supporting each element of the decision to refuse which goes beyond issues of principle (which in my view would be difficult given the allocation of the site for housing), I consider it likely to be very difficult to make a coherent case to the Inspector on appeal. I consider such a case would be likely to fail and may result in a costs application against the council.

27. The only case that could conceivably be made (and I hasten to add that there is no indication of such a case even being available on the facts here) would be, for example, one of prematurity – that the 800 houses in the Saffron Walden Policy 1 allocation ought to be developed as a whole, or by one developer, and this speculative application for just 300 would undermine that approach. I have no idea if that is even applicable here. I would be happy to advise further if that was within the thinking of the Council.
28. There is a further problem here, which is that on the same day that the Kier application was refused, another application made by Manor Oak Homes was granted by the same committee. That application was for outline permission for either up to 200 or up to 230 dwellings with associated other use classes and infrastructure. It is for land south of Radwinter Road, which also lies within the area allocated for housing by Saffron Walden Policy 1 in the emerging local plan. I have seen the officer's Report recommending approval. The application involved using land outwith settlement boundaries, and use of best and most versatile agricultural land. It also notes that the impact on air quality would be 'small' and not sufficient to found a refusal. I assume that members adopted that advice in respect of that site.
29. I would be anxious that on any appeal in respect of the Kier site, the difference in approach for that site and the neighbouring Manor Oak site would be highlighted by the appellant, seeking to show inconsistency of approach by the Council. A robust explanation of the differing approaches would be vital.
30. If anything is unclear, or if I can advise further, please do get in touch.

Josef Cannon

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10 June 2013