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28 March 2014

Dear Mr Burton

**LAND AT LOWFIELD ROAD, BOLTON-UPON-DEARNE
PLANNING APPLICATION BY GLEESON HOMES AND REGENERATION (APP. REF: 2013/0960)**

Introduction

We have been instructed by Mr Steven Gamble of Gleeson Homes and Regeneration to advise and act regarding the submission of an Appeal to the Secretary of State on the basis that your email to him dated 6 March 2014 indicates that you are considering that the application be recommended for refusal (based on the concerns raised by the Council's Pollution Control Service in relation to the provisions of Core Strategy Policy CSP40 relating to Pollution Control and Prevention).

Whilst Mr Gamble has raised the matter of an Appeal directly in relation to the comments received from your Pollution Control Service, we would like to take this opportunity to pull a number of factors together in the hope that the points made may persuade you to reconsider the position set out in your email of 6 March.

In addition, we also understand that Mr Gamble has mentioned the submission of amended plans. These relate to the relocation of the proposed play area. Electronic copies of the plan are attached (Drawing Ref. 373/2E).

These matters are addressed in turn below.

Preamble

As you are aware, the NPPF re-states the established principle of planning law that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. The NPPF is itself such a material consideration, and operates a presumption in favour of sustainable development. For decision taking this means approving development proposals that accord with the development plan without delay; and where the development plan is absent, silent or relevant policies are out of date, granting planning permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole, or specific policies in the framework (for example, those policies relating to sites protected under the Birds and Habitats Directives and/or

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designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion) indicate development should be restricted.

We understand that so far as development plan policy is concerned, the Council's sole concern relates to the provisions of Core Strategy Policy CSP40 by virtue of the proximity of the site to the Bolton-upon-Dearne Waste Water Treatment Works (WwTWs) to the south. Other elements of development plan (and national planning policy) are set out in the Planning Statement and suite of additional supporting documents submitted with the planning application.

Policy CSP40 and Related Matters

Policy CSP40 refers to pollution control and protection and is a widely formulated policy embracing all aspects of pollution including smell. It replaces UDP Policy E52 which although specifically focused on sewage treatment works, has not been saved.

Policy CSP40 notes that:

"Development will be expected to demonstrate that it is not likely to result, directly or indirectly, in an increase in air, surface water and groundwater, noise, smell, dust, vibration, light or other pollution which would unacceptably affect or cause a nuisance to the natural and built environment or to people."

"We will not allow development of new housing or other environmentally sensitive development where existing air pollution, noise, smell, dust, vibration, light or other pollution levels are unacceptable and there is no reasonable prospect that these can be mitigated against."

"Developers will be expected to minimise the effects of any possible pollution and provide mitigation measures where appropriate."

The associated written justification at para. 9.287 of the Core Strategy indicates that the precautionary principle is an important consideration in the planning process, and notes that where there is a *significant* risk of damage to the environment, planning and pollution controls will take into account the need to *prevent or limit*, harm over where there is no scientific knowledge. It follows that given the imperatives now set out in the NPPF, any 'negative' application of the policy must be based on the need to prevent or limit development where there is reasonable prospect that the risks are significant. In this context, the 'Planning System General Principles' documents (2005) which has not been cancelled by the NPPF notes that the test to be imposed in assessing proposals for development is whether it would *unacceptably* affect amenities and the existing use of land or buildings which ought to be protected in the public interest. Accordingly for any impact to be significant it must ultimately be judged as rendering the development unacceptable, which brings into play an assessment of other material considerations.

Looking in that context at the NPPF, para. 109 requires the planning system to prevent both new and existing development from contributing to or being put at unacceptable risk from or being adversely affected by unacceptable levels of pollution; and para. 123 notes that planning policies and decisions should mitigate and reduce to a minimum other adverse impacts. In this latter context, however, para. 122 makes it clear that LPAs should assume that pollution control regimes will operate effectively.

This matter is addressed in the 'Odour Constraint Assessment – Bolton on Dearne Wastewater Treatment Works' Report prepared by SLR and submitted in support of the application. From this it is quite clear that this is a case where there is not only a body of scientific knowledge; but there is also a range of 'industry-specific' policy; and notwithstanding the absence of European or UK specific regulatory standards, there is precedent in terms of appeal decisions and case law (details of which are cited in the SLR report).

That precedent and case law should not be overlooked. Other than the proposed play space area located to the south of the built development, the proposed development at Lowfield Road lies outside the 5 ou/m³ 'contour' (there is, however, existing residential development within it).

The SLR Report refers to three Appeal Cases and a High Court ruling:

- (a) Appeal ref: APP/F2930/A/92/206240 dated 15 July 1993 (Appeal by Northumbrian Water Limited – land adjacent to Spittal Burn, Newbiggin-by-the-Sea). The Appeal was allowed. Inter-alia, the Inspector concluded that *adoption of a level of 5 ou/m³ for the appeal site is both reasonable and cautious*;
- (b) Appeal ref: APP/P0240/A/09/2110667 dated 9 March 2010 (Appeal by J S Bloor (Northampton) Limited – land at Stoke Road, Leighton Linsdale). The Inspector recommended that the Appeal be refused on a number of grounds (including Green Belt policies), but in so far as the application of the 5 ou/m³ 'contour' is concerned, she recalled the Appellant's evidence that a standard of 5 ou/m³ as a 98th percentile would be a concentration above which odour might be a potential nuisance, and concluded that *that approach seems reasonable and has been accepted at a previous appeal*;
- (c) Appeal Ref: APP/E3525/A/11/214235 dated 24 August 2011 (Appeal by Haverill Snooker Club – land at Chalkstone Way, Haverill, Suffolk). The appeal was dismissed, but in doing so the Inspector concluded *that the proposal would not be prejudicial to the living conditions of future resident occupiers*, and that the reason for the dismissal of the appeal was as a consequence of the implications of the absence of a completed legal agreement relating to affordable housing and community infrastructure. Leading to the Inspector's conclusion on living conditions was the fact that the proposed development was located some 7m from the boundary of a WwTW where modelling predicted *between 3 and 5 ou/m³*. The principal factor driving the Inspector's analysis was *whether the development would result in such a significant loss of amenity as to have the potential to result in significant unacceptable harm to the living conditions of future residents*. Clearly he did not consider this to be the case;
- (d) High Court Ruling ref: [2011] EWHC 3253 (TCC) dated 8 December 2011 (Hanifer Dobson and Others/Thames Water Utilities Limited/OFWAT). Inter-alia the Judge concluded that *as the odour concentration rises to 5 ou/m³this is the area where nuisance....would start*.

Against this background, SLR originally advised that the results of the Odour Assessment remain defensible, in the assessment of potential odour from the Bolton on Dearne WwTW ensuring that those locations of outside of the predicted 5 ou/m³ 'contour' are sufficient to ensure the amenity of residents of the Gleeson development would not be witness to any significant detrimental impact.

In addition, SLR have more recently drawn our attention to two further matters:

- (a) Appeal Ref: APP/E3525/A/11/2162837 dated 25 May 2012 (Appeal by Abbey New Homes – land between Upthorpe Road and Hepworth Road, Stanton). The decision is helpful since it includes an independent assessment by the Inspector of all of the cases referred to above. The appeal was allowed, and in concluding that the normal operation of the STW would cause no unacceptable risk of a significant loss of amenity, or materially diminish future residents' reasonable expectations of high amenity standards, the Inspector indicated that an *appropriate threshold in this case is 3-5 ou/m³, the level of the DEFRA guidance's "faint odour"*;
- (b) the Water UK consultation response to the draft EA H4 Guidance Note (Odour Management) Consultation states, in regard to assessment criterion that a realistic target is 5 ou/m³ at the nearest 'receptor'.

The various decisions referred to above clearly address all but the last of the matters I have set out regarding the interpretation and application of Core Strategy Policy CSP40 (ie mitigation – see below), in that read collectively they demonstrate that:

- (a) application of the 5 ou/m³ 'contour' principle **addresses** the precautionary principle (Northumbrian Water);
- (b) the 5 ou/m³ 'contour' is a reasonable threshold in terms of both nuisance and amenity (Northumbrian Water/Leighton Linsdale);
- (c) the 5 ou/m³ threshold is an acceptable one to apply with the clear inference that development within it would not unacceptably affect amenities which ought to be protected in the public interest (all decisions) and the Water UK consultation response.

Notwithstanding these conclusions, SLR have provided further information to the Applicant which is attached to this letter, and which further supports their conclusions as set out above.

On this basis, we consider that there is a compelling argument to suggest that the proposed new dwellings would not be contrary to Core Strategy Policy CSP40 in that occupants will not experience an unacceptable level of pollution by way of smell. Mitigation is addressed below, but subject to that it can also be concluded that there is no significant risk of damage to the environment such that the precautionary principle is met in this case. It follows that the relevant policy requirements set out in the NPPF would also be met.

Mitigation

As we note above, the only component of the proposed development located within the 5 ou/m³ 'contour' is the children's play area situated to the south of the new access road defining the limit of built development in the western part of the site.

Bearing in mind SLR's findings and the conclusions arising from the appeals, case law and Water UK consultation response referred to above, the Applicant proposes to relocate the play area on the area of open space proposed immediately to the south of Lowfield Meadows.

This is shown on the amended plans attached with this letter, via which they are formally submitted.

The revised play area has been designated to minimise any potential impacts on neighbouring properties via a number of measures. In summary the design principles and connectivity of the proposed facility are as follows:

- (a) the location of the proposed play area is relatively close to properties on Lowfield Meadows. These properties do benefit from a reasonable level of separation as a result of the road, existing front gardens, and the strip between the road and the proposed play area. However, it is possible that the residents might be concerned if a facility was constructed in this location that became a focus for youth congregation in the evenings, which can happen with 'standard' equipped play areas in some instances. To avoid this potential problem, it is proposed that the play area is specifically targeted at the toddler age of child as the resulting equipment is not attractive for older children to use. This will also complement the existing play equipment between Hawthorne Drive and Furlong Road to the west of the railway line which is designed for older children;
- (b) there is an existing informal footpath from Lowfield Meadows that runs to the east of the bund with planting. This route will be used to access the play area from the south. A gate to the play area will be provided where the informal footpath meets Lowfield Meadows to facilitate access from Lowfield Meadows to the north. There is a natural break in the hedgerow to the west of the play area. A new footpath link will be created to link the estate road to the play area so that it is easily accessible from the wider residential development to the west;
- (c) a specification has been prepared that demonstrates how this footpath link can be created without adversely affecting the hedgerow trees. It will not involve any excavation over the root ball of the trees, and will be constructed of porous material. The minor pruning works that would be advantageous to facilitate this access are also set out in this specification, and these will not impact upon the long-term health or viability of the trees.

We consider that this amendment represents an appropriate balance between maintaining the amenity of existing residents; providing an appropriate play area in a location which is more accessible to, and better connected with the existing settlement pattern while remaining accessible to the proposed new development; and offering a key element of mitigation regarding the proximity of the WwTW to the land to the south of the proposed built development.

Other Material Considerations

There are a number of other material considerations which should be taken into account in this case:

- (a) the allocations in the UDP of the site in part as an employment policy area (Policy DE4) and in part as a site for industrial expansion (Policy DE5) – both not saved – are, with regard to the provisions of Saved Policies ED7 and ED11, historic; and it is clear from the pre-application engagement process as summarised in the Planning Statement that the principle of residential development on the site is accepted. The proposed development will, therefore, bring into use beneficial use land formerly allocated for development of a type which has proven unviable; and in doing so will result in the re-development of PDL in accordance with national planning objectives (NPPF para. 17);
- (b) as indicated in the Planning Statement the site occupies a sustainable location with regard to connectivity with and accessibility to services. Its development will help to support local services in accordance with the requirements of NPPF paras. 30 and 58;

- (c) the Planning Statement refers to an appeal decision in January 2012 which indicated that at that time the Council was unable to demonstrate a 5-year supply of deliverable housing land, and as such proposals for housing should be considered favourably. The decision pre-dates the publication of the NPPF which notes at para. 49 that in considering applications for housing development 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 LPA cannot demonstrate a five-year supply of deliverable housing sites. The Council's current housing land position (October 2013) shows that against a 5-year requirement of 5,705 dwellings, the available and deliverable supply is just 3,303 dwellings, equating to only 2.89 years. The provisions of NPPF para. 49 thus apply, and allied to those of para. 14 (referred to in the **Preamble** above) invoke the presumption in this case that permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the framework or where specific policies indicate that development should be restricted. Since there is no suggestion that the proposed development is inconsistent with any NPPF policy (save perhaps that for pollution – which is addressed above) and the suite of 'footnote 9' policies do not apply, this presumption does apply;
- (d) in support of that view, the beneficial use of PDL weighs in favour as do the following additional factors:
- (i) housing is a more appropriate 'neighbouring use' to existing development than the former employment allocations;
 - (ii) the Planning Statement notes that Bolton-upon-Deane is identified as an area of low housing demand where the Council will support a range of housing market regeneration programmes. The development of the site as proposed will assist in meeting the aims of this objective, especially in view of the Gleeson housing model which seeks to focus solely on building low cost homes for people in low incomes in areas of industrial decline and social and economic deprivation. The Company builds a range of affordable homes for sale to people who would otherwise be unable to afford a new home, thereby helping them onto the property ladder. Gleeson funds all of its own projects, allowing regeneration to take place without reliance on Government investment.
 - (iii) the proposed development will assist in the achievement of the three dimensions to sustainable development set out at NPPF para. 7 (the economic and social roles in particular refer to ensuring sufficient land is available in the right places and at the right time to support growth, and to providing the supply of housing required to meet the needs of present and future generations); and in this context it should be noted that para. 17 confirms that the delivery of housing contributes to proactively driving and supporting sustainable economic development.

Conclusion

We consider, therefore, that the proposed development would result in a number of benefits which would not be significantly and demonstrably outweighed by the *potential* impact of pollution arising from the WwTWs. To the extent that this may have been an issue, the proposed re-siting of the play area to a location outside the 5 ou/m³ 'contour' comprises an appropriate mitigation of the *potential* for an unacceptable level of impact.

Accordingly, the proposed development would not unacceptably affect amenities and the use of land that ought to be protected in the public interest, and the presumption in favour of sustainable development set out in the NPPF should apply.

Planning permission should, therefore, be granted.

We appreciate, however, that this letter includes some matters not previously raised, and would be happy to meet to discuss this matter further. If you consider this would assist your consideration of the application, please contact either Peter Wood or Sarah Worthington at our Leeds office.

Yours faithfully



cc PETER WOOD

cc	S Gamble Esq:	Gleeson Homes and Regeneration
	G Blacklock Esq:	SLR
	Ms S Worthington:	Peacock & Smith
	Ms L Fern:	Peacock & Smith