IN THE MATTER OF : -

s.78 TOWN AND COUNTRY PLANNING ACT 1990

APPEAL BY VINEYARD FARMS LIMITED

LAND SOUTH OF BUSH ROAD, NEAR CUXTON, MEDWAY, KENT

LPA Ref MC/21/2328

PINS Ref APP/A2280/W/3307648

ADVICE ON NPPF PARAGRAPHS 147-149 (GREEN BELT)

SUMMARY OF ADVICE

1. I consider that the Inspector is obliged, as a matter of law, explicitly to consider the application of the NPPF Chapter 13 Green Belt policies[1] (beginning with the question of whether the development falls into the agricultural buildings exception in NPPF 149(a)), as a material issue in his determination of the appeal. I do not consider that there are any reasonable grounds for an award of costs against an interested party (whether Rule 6 or not) who requests the Inspector to consider this issue and/or includes it in their representations at the public inquiry.

INTRODUCTION AND BACKGROUND

2. I am instructed under the Direct Access scheme by Mr Brian McDonald, a resident of Cuxton in Kent, who objects to the proposal for a "*new winery building including café/restaurant and visitor centre, with energy centre, car park, access road and landscaping*" ("**the development**") on land to the south-west of Cuxton, and south of the village of Upper Bush within Bush Valley ("**the appeal site**").

3. The appeal site is located within the Kent Area of Outstanding Natural Beauty ("**AONB**") and the Metropolitan Green Belt. I am specifically asked to advise on the application of

[1] Paragraphs 147-149 in particular

NPPF Green Belt policies in the determination of this appeal, which are not cited in the Council's reason for refusal, nor identified by the Inspector as a main inquiry issue.

4. Planning permission was refused by Medway Council ("**the Council**"), contrary to officer advice, for the following reason :

   '*The scale and nature of the proposed development would result in a significant increase in additional activity within the Bush Valley, which would constitute a severe adverse impact and a direct loss of the currently undeveloped tranquillity and wildness of the AONB. It would also lead to the erosion of the rural character and uniqueness of the community of the Upper Bush Conservation Area and the wider Parish of Cuxton, contrary to Policies BNE12, BNE14, and BNE32 of the Medway Local Plan 2003 and paragraphs 177, 197 and 201 of the National Planning Policy Framework 2021*

5. The reason for refusal encompasses harm to the AONB, and to the character of the area, including harm to a designated heritage asset (the conservation area) by way of development in its setting.

6. The appeal will be heard at a public inquiry, which I understand begins on 19 March 2023. The deadline for submission of proofs of evidence is 21 February 2023. Cuxton Parish Council and Cuxton Against the Winery are the joint Rule 6 party. There are other objectors, including Mr McDonald, who are not formally part of the Rule 6 party.

7. I have seen the Inspector's summary note of the main issues (which does not include harm to the Green Belt), and a letter from the Rule 6 party to the Inspectorate dated 26th January 2023 which states as follows :

"As advised at the case management conference on 19 January 2023, we have approached Medway Council via the Planning Department, Council Members, and their legal Counsel in relation to their apparent position of 'no disagreement' with the appellant on the Green Belt. We have not received a reply on this important issue, one that has been a feature of the debate and many representations from the public since application stage.

We are confused by this, given a minute in the official record of Medway Council's Planning Committee meeting of 9 March 2022 (at which the planning application was refused), which states clearly that, following legal advice, the Council concluded that the proposed Kentish Wine Vault development constitutes inappropriate development in the Green Belt.

In the light of Medway Council's silence, although we believe that the Green Belt is a significant issue that should be on the appeal agenda and debated by all, we have no option but to remove it from our Statement of Case, simply because we have no funds for legal advice and cannot afford to be placed in a situation where we could incur costs, as suggested by the appellant's Counsel."

Green Belt – the Council's position

8. It is recorded on the penultimate page of the planning officer's report to the Medway Council planning committee on 9th March 2022 (**"DOR"**) that, following the first presentation of the planning application to committee on 8 December 2021, the Council sought further legal advice on whether the development would constitute "inappropriate development" in the Green Belt.

9. The contents of that legal advice is summarised as follows :

"It was considered balanced, however due to the provision of the visitor centre and café/restaurant which would measure more than 1000m2, it was considered that the proposed development would constitute inappropriate development in the Green Belt".

10. The Council's reason for refusal does not reflect this advice.

11. I am instructed that during the pre-inquiry Case Management Conference on 19 January 2023, counsel for the appellant stated that the Council agrees the development is not inappropriate development within the Green Belt. There was, as I understand it, mention of an application for costs by the appellant if the Green Belt objection is pursued. This appears to have been directed at the interested parties.

12. I have seen the contents of a subsequent email from the Parish Council to the Inspectorate, pointing to the legal advice mentioned in the DOR which on the face of it contradicts what was said by counsel for the appellant about the Council's agreement on the "inappropriate development" issue. Clarification was also sought about the risk of costs if the Parish Council pursues an objection based on Green Belt harm. I am told that the case officer responded as follows :

Further to yesterday's CMC and the exchange of representations between parties this morning, the Inspector would like to remind each of you that he does have discretion as to whether main issues should be introduced which are not reflected in the reasons for refusal as long as they relate to a part of the evidence submitted to date. Whilst he has asked the R6 party to indicate whether or not they intend to pursue the Green Belt issue by next Thursday, the final decision on identification of the main issues rests with the Inspector. He will take a final decision on this by close of play on 27 January 2023.

13. The letter from the Rule 6 party to the Inspectorate stating that it will withdraw its Green Belt case for fear of a costs award, is dated 26 January. At the time of writing I am not aware of any response or further communication from the Inspectorate on this issue.

The Council's case on appeal

14. It should be appreciated that the Council is not obliged to follow legal advice, either in the formulation of reasons for refusal (which are a matter of planning judgement), or in the presentation of its case on appeal. Indeed, adding new reasons for refusal at appeal is a potential ground for an award of costs against a local planning authority[2].

15. Having said that, there is no clear explanation in the public domain, as far as I am aware, as to why the Council chose not to include Green Belt harm in its reasons for refusal. The body of the DOR, under the heading 'Green Belt and Wine Making as An Agricultural Use' does not explicitly conclude that the development would fall within the agricultural buildings exception and is therefore not "inappropriate development " in the Green Belt.

16. That conclusion could be inferred from the following sentence : *"whilst there would be a landscape and highways impact in connection with the café/restaurant and visitors centre, it is not considered that this results in a development which is not focused on the agricultural process of wine-making".* However, there is no indication why the legal advice which is summarised on the penultimate page of the DOR and which appears to have been received after the officer's assessment, was rejected.

17. I also note that the Councils' Appeal Statement of Case ("ASOC") states at paragraphs 1.8 and 1.9 :

> 1.8 As it was considered that the proposed development would constitute inappropriate development in the Green Belt in accordance with The Town and Country Planning (Consultation) (England) Direction 2021 the local planning authority is required to consult the Secretary of State were the Planning Committee minded to grant planning permission,
>
> 1.9 Members of the Committee resolved to refuse the application on the grounds that the proposed development would have a severe adverse impact upon the AONB in particular on the wildness and tranquillity of the area and would impact on the character and uniqueness of the community in Cuxton with the Head of Planning being granted delegated powers to approve the final wording of the refusal.

18. It is not obvious from the above paragraphs *who* considered that the proposed development constituted inappropriate development in the Green Belt : it does not appear to have been the officer writing the DOR, nor the Committee. This sentence may simply reflect the legal advice that the Council was given prior to the Committee's decision to refuse planning permission, but (for reasons unknown) rejected.

[2] Paragraph: 047 Reference ID: 16-047-20140306

19. In any event, the position now seems to be that the Council will not pursue an objection to the development on Green Belt grounds at the inquiry. I infer that this is because it was not included in the reason for refusal. That is not an unusual or surprising position for the Council to take, but it is a pragmatic one rather than a reasoned decision on a material issue.

20. The essence of Mr McDonald's request for advice is the question of where that now leaves him and the other objectors (including the Rule 6 party, although they do not instruct me), who take the view that the development is inappropriate in the Green Belt and, as I understand it, want the Inspector to consider this issue as part of his determination of the appeal - but not if they are at risk of a costs award.

ISSUES

21. I will first set out what I consider to be the correct approach for the Inspector to take in this situation (i.e. whether the Green Belt issue should be treated as an inquiry issue notwithstanding the agreement of the Council and the appellant that it should not), then address the principle of an objection on Green Belt grounds, and finally the likelihood of an award of costs if the objectors pursue the Green Belt issue at inquiry and either the appeal is allowed, or dismissed but Green Belt harm is not identified by the Inspector as a reason for refusing planning permission. The issues this advice will cover can therefore be summarised as follows :

A. Whether the Inspector should treat the impact of the proposal on the Green Belt as a main issue at the inquiry, independently of any request by the objectors, and notwithstanding the views of the Council and the appellant.

B. Whether refusal of planning permission on Green Belt grounds is reasonably open to the Inspector.

C. Whether the objectors(s) who request the Inspector to address the Green Belt impact as part of the inquiry are at risk of an award of costs.

A. The correct approach to the Green Belt issue

22. Pursuant to s.38(6) of the Planning and Compulsory Purchase Act 2004 and s.70(2) of the Town and Country Planning Act 1990, the Inspector is required to determine the appeal *"in accordance with the [development] plan, unless material considerations indicate otherwise".* The relevant development plan policies are those in the Medway Local Plan 2023, as set out in the DOR, and include BNE30 on the Green Belt . The National Planning Policy Framework 2021 ("NPPF") is a material consideration in the determination of the appeal.

23. As set out in the planning statement at paras 5.65 – 5.70, and in the DOR, Chapter 13 of the NPPF deals with "proposals affecting the Green Belt". The relevant paragraphs are:

"147. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

148. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

149. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:

a) buildings for agriculture and forestry;"

24. Local Plan Policy BNE30 is broadly consistent with the NPPF (I agree with the appellant's assessment at paras 5.65 – 5.70 of the planning statement). Emerging Local Plan Policy NE6 simply refers directly to national planning policy for the Green Belt, i.e. the NPPF.

25. The location of the appeal site within the Green Belt and paragraphs 147-149 of the NPPF raise the following questions as a matter of law:

    i) Does the development fall within the para 149(a) exception, i.e. does it consist of "buildings for agriculture" ?

    ii) If it does not fall within the para 149(a) exception, and so is inappropriate development by definition, do "very special circumstances" exist which justify a grant of planning permission ?

iii) If it does fall within the para 149(a) exception, what (if any) harm is caused to the Green Belt, and how does the "substantial weight" accorded to this harm by para 148 of the NPPF affect the planning balance ?

26. Question (i) is primarily a question of fact rather than planning judgement[3]. The Council and the appellant are now in agreement that the answer to question (i) is 'yes': in other words, the development falls within the agricultural buildings exception and it is not, therefore, inappropriate development in the Green Belt which should be refused except in "very special circumstances". This agreement is clearly set out in the Appellant's ASOC at paragraph 4.43.

27. However, there is no explanation (other than that in the DOR, which does not appear to take account of the later legal advice) as to why the Council considers that the development falls within the exception. It is not dealt with in the Council's ASOC. It is dealt with only briefly in the Appellant's ASOC at paragraph 4.43 : "*The winery building and access road is an agricultural building and the café/restaurant and visitor centre are ancillary to it. The Application Proposal is therefore not inappropriate development in the Green Belt*".

28. The section of the DOR dealing with the exception issue refers to the judgment of the Court of Appeal in Millington v SSE [2000] J.P.L. 297, on which the appellant relies in support of the proposition that "*crushing, processing and bottling wine made from the grapes grown on site is an agricultural use. The winery building and access road is an agricultural building and the café/restaurant and visitor centre are ancillary to it. The Application Proposal is therefore not inappropriate development in the Green Belt*" (planning statement para 5.71).

29. The DOR essentially agrees with the appellant's interpretation of Millington. It goes on to refer to two grants of planning permission, the Rathfinny Wine Estate in the South Downs National Park, and the AC Goatham & Son fruit processing and storage facility in Medway. The Rathfinny Wine Estate includes substantial accommodation and restaurant facilities for visitors, which were ultimately[4] accepted by the local planning authority as being ancillary to the main agricultural use of the winery buildings. The AC Goatham & Son building appears to have been purely agricultural, with no ancillary visitor or tourism facilities. I note that the Rule 6 party's statement of case set outs in section 2.5 the points on which the instant development can be distinguished from these earlier permissions.

[3] *Hook v SSHCLG* [2020] EWCA Civ 486, Lindblom, Peter Jackson and Asplin LJJ at [7(3)]
[4] The Rathfinny Estate's website recounts discussions with the planning authorities on this issue : https://rathfinnyestate.com/about/news/since-when-was-a-winery-not-an-agricultural-building/

30. It is uncontroversial, following Milington, that wine making is an agricultural activity and a building used for that purpose is, in most cases, an agricultural building. However that does not resolve the relevant controversial issue in this appeal, which is whether the other elements of the development, i.e. the café, visitor centre, visitor parking etc, are ancillary to the agricultural buildings. That is ultimately a question of law, and one which Inspectors are routinely required to address.

31. The DOR appears to address this question when it says that 92% of the total floor space of the building would serve the agricultural element of the proposal, and *"while there would be landscape and highways impact in connection with the café/restaurant and visitors centre, it is not considered that this results in a development which is not focused on the agricultural process of wine making".* Although not explicitly stated, this can reasonably be read as a conclusion that the café/restaurant and visitor centre would be ancillary to the agricultural use of the winery buildings, and so are encompassed by the para 149(a) exception.

32. It appears, however, that counsel instructed to advise the Council on this question (prior to the determination of the planning application) took a different view based on the size of the visitor centre and café/restaurant. Their conclusion appears to have been that the whole of the proposal would therefore constitute inappropriate development.

33. In the absence of a clear explanation, in the public domain, as to why the Council considers that that the development falls within the agricultural buildings exception, the issue is one which in my view must be determined by the Inspector. If it is not, one of the "principal important controversial issues"[5] in the appeal will not have been resolved openly and with adequate reasons provided for the conclusion.

34. That would in my view leave the appeal determination vulnerable to a legal challenge, principally because the "very special circumstances" test which applies to inappropriate development in the Green Belt is more stringent[6] than the "exceptional circumstances" test which applies to major development in the AONB by virtue of NPPF paragraph 177, and which the Inspector will consider in any event. The outcome of the appeal could very well be different if the Green Belt test is applied. Therefore, paragraphs 147 – 149 of the NPPF are not considerations which can lawfully be excluded from the Inspector's determination by agreement between the Council and the appellant.

[5] South Bucks DC v Porter (No 2) 2004 1 WLR 1953 at [36]
[6] Compton Parish Council v Guildford Borough Council [2019] EWHC 3242 (Admin) at [70]

35. As the case officer's email to the Parish Council has said, the Inspector has discretion to include consideration of main issues which are not reflected in the reasons for refusal. I would go further than that on these particular facts: in my view the Inspector is obliged as a matter of law[7] to consider first whether the agricultural buildings exemption applies, and then the determine the issues which follow from his answer to that. Indeed the Appellant's ASOC envisages this possibility at paragraph 4.45:

"Without prejudice to this [i.e. that the development is not inappropriate in the Green Belt], if the Application Proposal was considered inappropriate development there are "very special circumstances" which justify development which, as explained above, include the significant need for the proposal, the significant economic benefit, the benefit to the tourism market and that it is an exemplar of good landscape led design and of sustainability Answering that question should not necessitate any further evidence on top of that which will be submitted by the appellant and the Council to address the other main issues in the inquiry".

36. As the Appellant accepts, dealing with the Green Belt issues should not require any evidence over and above what the Appellant and the Council would submit anyway, in respect of the other main issues in the inquiry. It will necessitate relatively short additional sections in the appellant's and the Council's proofs of evidence, and some limited additional time in opening and closing statements. There may be some additional inquiry time if the Rule 6 party chooses to cross examine on this issue.

37. If the Inspector concludes that the agricultural buildings exception does not apply, he will have to go on to consider question (ii), that is, whether "very special circumstances" exist which justify a grant of planning permission. This is a question of planning judgement. The appellant has already outlined, at paragraph 4.45 of the ASOC, the circumstances it relies on. Again, no further evidence on top of that which will be submitted anyway in relation to the main inquiry evidence, should be required.

38. Question (iii), that is: if the agricultural buildings exemption does apply, what harm (if any) is caused to the Green Belt and how does the "substantial weight" accorded to "any harm" by NPPF para 148 affect the planning balance, is one which in my view should also be determined by the Inspector. Self-evidently, this question falls to be determined despite the Council and the appellant's agreement on the agricultural buildings exception. Per Lindblom LJ in R (Lee Valley Regional Park Authority) v Epping Forest District Council [2016] EWCA Civ 404 at [26]:

[7] By virtue of s.38(6) PCPA 2004 and s.70(2) TCPA 1990.

"That is not to say, of course, that proposals for the erection of agricultural buildings in the Green Belt will escape other policies in the NPPF, and in the development plan, including policies directed to the visual effects of development and the protection of the countryside or the character of the landscape. Policies of this kind will bear not only on proposals for development that is inappropriate in the Green Belt but also on proposals for development that is appropriate.
[..]

And development that is not inappropriate, because it is within one of the exceptional categories in paragraphs 89 and 90[8] and thus not potentially harmful to the Green Belt "by reason of inappropriateness", may still be unacceptable for other planning reasons."

39. In conclusion on this issue, if the Inspector does not consider the NPPF Green Belt provisions, and policy BNE30 of the development plan insofar as this is consistent with the NPPF, as part of his determination, he will have erred by failing to have regard to a material consideration to which he is required, by law, to have regard. It is not unusual for Inspectors to consider Green Belt harm even if it is not cited in the reasons for refusal[9].

B. Is refusal of planning permission on Green Belt grounds open to the Inspector ?

40. The Inspector's determination is an exercise of planning judgement, which is subject to review on rationality grounds only. I cannot see any reason why it would not be reasonably open to the Inspector to dismiss the appeal on the grounds inappropriateness, or other harm, to the Green Belt

41. It is reasonably open to the Inspector to determine that the agricultural buildings exception does not apply, and "very special circumstances" must be demonstrated. Each case turns on its own facts. The Rule 6 parties, in their statement of case, detailed the points on which the development can be distinguished from the other permissions cited in the DOR (in section 2.5). I cannot see any sensible basis for the submission that the DOR and/or the Council's reason for refusal resolve this question, and it is not open to the Inspector to reach a different conclusion.

42. An assessment of the planning merits is outside my competence and the scope of this advice, but it is obviously open to the Inspector to conclude that "very special circumstances" are not demonstrated. It is also open to the Inspector to conclude that the

[8] Precursor to NPPF 2021 paragraph 149 and150
[9] See e.g. APP/B1225/W/18/3206919 : the Inspector refused permission on Green Belt grounds despite the fact that this was not one of the Council's reasons for refusal.

development does fall within the agricultural buildings exception, but that the development is unacceptable for other planning reasons. The essential point for the purposes of this advice is that the Inspector must consider these questions.

C. Risk of an award of costs against interested parties

43. For the reasons I have explained above, I consider that it is incumbent on the Inspector to determine the impact of this proposal on the Green Belt by applying the relevant tests in the NPPF and the local plan, in addition to the AONB and character/heritage impacts. That is an obligation entirely independent of the objectors' / Rule 6 parties' request for the issue to be considered. It follows that I consider the risk to the objectors / Rule 6 parties ought to be non-existent, regardless of the outcome of the appeal.

44. For the sake of completeness I will address the possible grounds for an award of costs as set out in Planning Practice Guidance ("PPG")[10]. Costs may be awarded where a party (including an objector or Rule 6 party, referred to as "interested parties" in the PPG) has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process. "Unreasonably" is given its ordinary meaning. The applicant for an award of costs will need to "*demonstrate clearly how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense*". Inspectors may initiate an award of costs even if there is no application from one of the parties.

45. The PPG on costs against interested parties[11] states as follows :

When might an award of costs be made against an interested party?

Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules, may be liable to an award of costs if they behave unreasonably. They may also have an award of costs made to them. See the Planning Inspectorate guide on Rule 6 for more detail.

It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an appeal has been withdrawn without good reason or where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct. In cases dealt

[10] Paragraph: 030 Reference ID: 16-030-20140306, onwards
[11] Paragraph: 056 Reference ID: 16-056-20161210

with by written representations, it is not envisaged that awards of costs involving interested parties will arise.

46. The PPG contains no specific examples of unreasonable behaviour by interested parties (in contrast to the lists of examples of substantive and procedural unreasonable behaviour by local planning authorities and appellants[12]). It is, in principle, possible for costs to be awarded against an interested party for a ground analogous to that arising when a planning authority "*prolongs the proceedings by introducing a new reason for refusal*" but I do not think it can sensibly be said to apply here. The fact that the Council has (for reasons unexplained) not relied on Green Belt harm in its reason for refusal does not make it a new issue. As I have already set out, it falls to be considered because of the location of the site, and the application of the NPPF and the local plan.

47. If any interested party (whether Rule 6 or not) persists in their case on the Green Belt issue, it is in my view unlikely in the extreme that any Inspector, acting reasonably, would award costs against them. Consideration of those issues cannot correctly be said to be "unnecessary". I also note the Inspector's summary of the main issues, which does not include the Green Belt, but does state in the final paragraph : *"There will be an opportunity for interested parties to make comments at the start of the Inquiry. They should not feel that these should be restricted to just the main issues above."*

48. In conclusion, and without intending criticism of any particular party, I have to say I am troubled that a situation has been allowed to develop which has resulted in the Rule 6 party withdrawing its submissions on the Green Belt issue for fear of an award of costs, in circumstances where (on the basis of all the information available to me) no reasonable Inspector would order such an award.

49. There is nothing to prevent Mr McDonald from sharing this advice with the other main / interested parties and the Inspectorate should he wish to do so.

8th February 2023

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[12] Paragraph: 052 Reference ID: 16-052-20140306 and Paragraph: 053 Reference ID: 16-053-20140306