WORCESTERSHIRE COUNTY COUNCIL

TOWN AND COUNTRY PLANNING ACT 1990

SECTION 78 APPEAL

Appeal by NRS Aggregates Ltd against the refusal of planning permission by Worcestershire County Council of "Proposed sand and gravel quarry with progressive restoration using site derived and imported inert material to agricultural parkland, public access and nature enhancement" on land at Lea Castle Farm, Wolverley Road, Broadwaters, Kidderminster, Worcestershire.

Planning Inspectorate Reference: APP/E1855/W/22/3310099

County Council Reference: 19/000053/CM

CLOSING SUBMISSIONS ON BEHALF OF

WORCESTERSHIRE COUNTY COUNCIL

Abbreviations

CW Mr Christopher Whitehouse

LT Mr Liam Toland

NF Mr Neil Furber

SCh Mr Satnam Choongh

GB Green Belt

VSC Very Special Circumstances

1. Worcestershire County Council ("the Council") was quite right to refuse this application on the grounds of inappropriate impact on openness in the Green Belt ("GB")

GB policies attract very significant weight. Development which is "inappropriate" must be refused. "Inappropriate" means harmful to the openness of the GB – because that

is what a GB is. Open, permanently. Any development that causes harm to the GB is "inappropriate", whether it is built development/buildings within NPPF paragraph 149 or otherwise appropriate development that fails to meet the provisos within para 150.

2. LT agreed (XX) that the Council's reason for refusal 2 was capable of encompassing both types of harm, and his only complaint was that the Council could have made it clearer. The Appellant has sought to address both parts of the case – whether para 149 or para 150, by advancing very special circumstances, in case the Inquiry finds that the proposal is "inappropriate" in any sense.

3. The built development/buildings on site are empirical – the evidence clearly sets out what they are and what they are to be used for. The definition of "building" is set out in classic caselaw [Skerritts of Nottingham[1]]. Paragraphs 13, 25 and the judgment of Pill LJ from para 33 onwards set out the established tests for "buildings", which include permanence, removeability, and so forth. These are the tests against which the portacabins will have to be judged, and it is hard to see how they would not meet the legal test for "buildings".

4. It is for the Inquiry, therefore, to decide whether the built development on the plant site meets that definition, and falls to be considered under para 149 or para 150. The Appellant relies upon the Europa Oil case[2]. The issue in that case was that the inspector decided that the proposal before him was not mineral extraction at all in the GB, and so could not be appropriate. It is interesting to note that the Court ruled that a site can be a combination of mineral extraction / engineering operations and built development. It is then a matter of fact and degree as to whether the site overall falls under one limb or the other, (ie: 149 or 150) when it comes to judging the impact on GB:

"55. It would have been open to the inspector to conclude that the totality of the operational development was an engineering operation, if not a mining operation. I am not prepared to hold, however, that it was not open to the inspector to conclude as a matter of fact and degree, of which he was the judge, that the combination of undoubted engineering works in site preparation, access and security with the tanks,

[1]ID 40 Secretary of State for the Environment, Transport and the Regions and another v Skerritts of Nottingham Ltd [2000] All ER (D) 245 Court of Appeal

[2] CD 12.07 Europa Oil and Gas Ltd. v Secretary of State for Communities and Local Government [2013] EWHC 2643 (Admin)

pits, 35 metre high drill rig and Portakabins, was sufficient to make development more than an engineering operation and make it either a building, mining or other operation. Mr Banner gave no reason for saying that the inspector had erred. In my judgment, he did not make an error in his conclusion that it was not an engineering operation."

5. It is a matter for the Inspector to judge what, overall, the site comprises, and which paragraph of the NPPF, therefore, the site comes under. This does not change the fact that part of the site comprises buildings.

6. LT agreed that there is a sliding scale as to what would be proportionate, in terms of built development, to this minerals site - and that certain plant and machinery clearly would be proportionately related to this mineral extraction, and, at the other end of the extreme, locating the NRS national headquarters at the site would not. CW on behalf of the Council has clearly indicated that the training/meeting room, shower facilities, offices, canteen/kitchen and other facilities housed in three portacabins, double storey, on this site go beyond the plant and machinery that is envisaged within para 150.

7. CW clearly analyses that – by reference to the Act.

- 4.15 What comprises 'mineral extraction' for the purposes of applying this policy is not defined in the NPPF. However, section 55 of the 1990 Act defines mining operations to include the removal of material of any description from a mineral-working deposit. With regard to the imposition of conditions for mineral working schedule 5 of the 1990 Act refers to the winning and working of minerals. Therefore, it is reasonable to conclude that 'mineral extraction' should include plant and infrastructure necessary to facilitate the winning and working of minerals. To that extent, it is considered that the plant and machinery included within proposal is limited to that necessary to facilitate mineral extraction.

8. SCh put to CW: "Openness is the absence of built development. There is no built development on this site. So the site inevitably preserves openness." [XX CW].

That is certainly not correct. The PPG makes it very plain that there is a range of factors that can impact upon openness, including traffic and activity. There is no question that the bunds are capable of impacting on openness, but they are not built

development. If SCh were correct, then there would be no need for the proviso in para 150. The mere fact that the appropriate uses under para 150 had no built development associated with them would, on his argument, be enough to preserve openness, and therefore any further assessment of their impact on openness would be unnecessary.

9. It is entirely possible for a mineral site like this to have an excessive impact on the GB, notwithstanding the fact that minerals must be worked where they are found, and that they require a certain amount of infrastructure to do so. Samuel Smith[3] and Europa Oil do not endorse the extraction of all minerals in the GB as appropriate, no matter what it takes to extract them. This mineral extraction proposal could be less intensive; it could have fewer bunds; less built development, different phasing, and so on. It is not fixed in stone that it must be as it is presented, and its acceptability must be directed related to the parcel of GB land in which it sits, and the potential harm that it does in that position. The reason it needs the bunds that are proposed, in the numbers and positions in which they are proposed is to mitigate against other harms and impacts, such as noise, dust and visual impacts. The reason the proposal is phased as it is is to avoid delay and get the site restored as quickly as possible to remediate harms. CW clearly identified that there are less sensitive sites within the strategic corridor and the GB.

10. CW analyses very clearly how this site impacts on the openness of this parcel of GB.This site impacts on openness - visual and spatial. The Appellant's analysis of impact on openness has been inadequate, and particularly in relation to spatial impact. This is one of those cases where there is a clear identifiable difference between the visual and spatial elements of impact on openness. By way of example, NF claimed that the built development on the plant site had no impact on openness because it was sited at a "lower level" and was therefore less visible. This takes no consideration of the spatial impact on openness that such development would have at that lower level.

11. The primary answer of the Appellant to the impact of the proposal on openness is that the proposal is temporary, and will be restored back to Green Belt. This is not,

[3] CD12.06 - Judgment, R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) (Respondents) v North Yorkshire County Council (Appellant) [2020] UKSC 3

in fact any analysis or answer to the impact itself, but is only an answer as to whether that impact should be judged to be inappropriate, due to its shortened duration.

12. If temporary duration were the primary consideration for impacts of mineral sites on GB openness, then it would be assessed by focussing primarily on an acceptable time frame for reasonable extraction of the amount of mineral that is there, because it can only be worked where it is found. That is not how mineral extraction in the GB is approached. It is a multi-layered approach, based on the need for the minerals, (relating to the Planning Authority's landbank); the harm that the proposal will cause; the duration and remediability of the proposal, and other relevant factors. Duration does not trump all other considerations; it is just one factor out of several and it is entirely possible that a mineral extraction proposal, even of short duration, could still be refused permission. Europa Oil makes it plain that temporary development can still be inappropriate development:

13. Temporary duration

"56. There was no issue with what the inspector said in the last sentence of paragraph 15 to the effect that temporary development in the Green Belt could still be inappropriate. It is plain that temporary development can be inappropriate. Equally, it will not always be inappropriate. That is what the inspector in substance says. If he had said that the temporary nature of a development was irrelevant to its inappropriateness he would have been in error, as I shall come to."

14. Europa Oil also has something to say about the size of the buildings, which is something else that the Appellant prays in aid, in calling the built development "modest":

"66. Secondly, as Green Belt policies NPPF 89 and 90 demonstrate, considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose. The same building, as I have said, or two materially similar buildings; one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness. The Green Belt may not be harmed necessarily by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness,

and the other it is not harmed by because of its effect on openness. These concepts are to be applied, in the light of the nature of a particular type of development."

15. The Planning Practice Guidance (PPG) paragraph 64-001-20190722 sets out the correct approach:

"…assessing the impact of a proposal on the openness of the Green Belt, where it is relevant to do so, requires a judgment based on the circumstances of the case. By way of example, the courts have identified a number of matters which may need to be taken into account in making this assessment. These include, but are not limited to:

• openness is capable of having both spatial and visual aspects – in other words, the visual impact of the proposal may be relevant, as could its volume

• the duration of the development, and its remediability – taking into account any provisions to return land to its original state or to an equivalent (or improved) state of openness

• the degree of activity likely to be generated, such as traffic generation"

16. LT conceded that he had not analysed the effect on openness of traffic generation, vehicle movements and general activity, even though it is a PPG requitement. The effects are exacerbated because this is not a static site, and the bunds in particular are not static features, and will not be assimilated into the countryside. The erection, maintenance and dismantling of the bunds has an impact on openness, over and above their ongoing presence in the landform, for shorter or longer periods.

"CW 4.44 Notwithstanding final restoration; the description of works above identifies that there will be major development of the site over 11 years. The bunds, internal haul roads, plant areas and associated activity are all significant developments that affect openness. There would also be very significant lorry activity within a current provision of countryside land, together with an intensified access junction and associated highway movements. The Appellant accepts that " the visual quality of the landscape is not relevant to openness".

17. CW identified that the bunds which are likely to have the greatest impact, around the plant site, are the ones that will be there the longest, for the duration of the development.

18. Landscape mitigation might be entirely acceptable for preserving landscape character, by creating screening; angles to hide development from view; using topography to hide development, and placing it in less interesting parts of sites, and so forth, which might all be very successful mitigation for visual impact of development. Such measures would have no effect on mitigating impact on GB openness, however. Bunds are a good example of this principle. Core Document CD3.08 provides details of the individual soil storage bunds associated with the proposed development; noting the use of No.20 bunds during operations, ranging from 6m to 3m in height, (bund 6 at 0.3m in height). They may comprise very effective mitigation in screening development from views by the public, and indeed, that is part of the reason why these bunds have been proposed in the locations in which they would be sited, but they also have a major effect, spatial (by partitioning) and visual, on openness.

19. The Appellant has not appropriately considered the impact of the bunds on openness in isolation, nor cumulatively with the adjacent development. CW and NF have both extensively presented the key views and their arguments on the visual impacts of the development on openness. The Inquiry will be invited to judge between those two radically different representations of the visual impact on openness. The inquiry is invited to conclude that CW has undertaken the most thorough and compelling analysis.

20. The cumulative impact of the proposal with the adjoining and proposed development in the area is something that the Appellant has not addressed appropriately either. NF stated that this was all adequately taken into account in the LVIA, and that he did not differentiate between the landscape and visual effects considered by the LVIA, and the issues of visual and spatial openness, which are not considered in an LVIA. NF's appraisal of openness from his paragraph 2.49 onwards is not sufficient, and adding the words " and no discernible effect on openness" at the end of every paragraph until para 2.57 does not constitute effective analysis. Similarly, NF's conclusion on cumulative impacts relies too heavily on the ES/LVIA:

21. NF 2.58 –“ It is the conclusions of the ES that “the resulting level of cumulative impact on landscape character and visual amenity would be neutral”

There was no separate conclusion in the ES/ LVIA on GB openness. NF is just extrapolating the conclusions of the LVIA on character and visual impacts into a conclusion on openness, which is inappropriate. They are different things.

The Appellant has not considered either the heightened purposes that this site performs once the cumulative Lea Castle development goes in. The remaining GB is required all the more.

22. The Appellant relies heavily upon the restoration of the site to demonstrate that the site is not inappropriate; that the effect on openness will be temporary and reversible, and that, if required, there are VSC. There are various reasons why the restoration proposals for this particular site does not substantiate those points. In PPG Para 001 ID: 64-001-20190722, “remediability” is defined as “taking into account any provisions to return land to its original state or to an equivalent (or improved) state of openness. There is no question that the land will not be returned to an original state. The question revolves around whether the restoration can be described as an “equivalent” or “improved” state of openness. SCh misunderstood the distinction to be made between restoration delivering “improvements”, and the restoration “improving openness”. It is very hard to maintain an argument that this site will be more open after it has been developed and restored than it is now, before it has been touched. Indeed, CW gives the more compelling analysis, that the restoration to the lower levels will reduce the openness of the site. In this regard, the restoration of the landform, especially levels, and the biodiversity benefits of restoration are two different considerations.

23. NF accepts in terms that the land will not be restored to what it was:

NF 2.39 “Land levels will generally be between 2 – 7 metres below existing levels with restored land gradients being between 1 in 8, and 1 in 30 – reflecting existing gradients.”

The key reason for this, as LT explained, is the availability of inert waste to constitute the fill, and the length of time it would take to restore the site to something closer to the existing land form.

24. CW does not agree that the restoration of the landform is a positive thing in itself, let alone a VSC , and he is the Council's expert witness.

CW 4.65 "….Furthermore, the land is not returned to its original form on completion of works, thus reversing impacts; the restoration substantially changes the original landform, offering a reduced visual contribution to wider ranging views in the long term due to a generally lower landform being created in restoration.

CW 4.66 "It is concluded therefore that the proposal would offer harm across the lifespan of development to the openness of the Green Belt, with such harm not being offset by the temporary nature of the works, due to a heightened requirement of the land towards Green Belt purposes across that period, nor by a reversal through restoration, as the restoration does not return the land to its natural landform. The lack of returning of the land to its natural landform; in combination with the extent of proposed bunds across the lifespan of development; the extent of works for Phases 4 and 5, which as such require in mitigation a substantial bund to be sited to its east; to the visual detriment of the Green Belt, in combination with other development from far ranging views, affect openness to the extent that it "tips the balance" to make it inappropriate development."

25. Restoration to high quality parkland is claimed by the Appellant as a benefit, in and of itself, to the point of being VSC. It is not – it is neutral. This is already high quality parkland. At best, the Appellant puts the site back to something similar to what it was. The biodiversity gains are a separate issue.

26. The proposal also impacts on two of the purposes of the GB. This offers "further harm" in the GB harm matrix.

27. A – unrestricted sprawl

Contrary to the Appellant's case, the site does not have to be connected to large built up development in order to be able to perform its contribution to checking unrestricted sprawl. Neither does it have to "constitute" sprawl in itself – and this is the mistake that the Appellant has made.

28. "Sprawl" is the converse of open and undeveloped. NPPF Paragraph 137 indicates that: "The fundamental aim of Green Belt policy is to prevent urban sprawl

by keeping land permanently open." GB sites restrict sprawl by staying open themselves. Therefore, anything that fails to keep GB land permanently open fails to restrict sprawl.

29. If this site were a busy quarry with urban features, it would be much easier to justify the development of land surrounding it than it would be if this land remained an open and pristine green field. Other development could take advantage of the period of time that the land was a quarry, and then when the land was restored to its greenfield status, it would be with the new development in situ, and that will have failed to restrict sprawl.

30. The Samuel Smith case does not say that a mineral site by definition ***does*** prevent sprawl, it says that a mineral site ***may*** be no less effective than an open field. This is going to be a very contextual assessment.

31. As it happens, however, this site is, and will be "connected" to large built up areas, including the Lea Castle village. LT's contention that "connected" can only be understood in the sense of being immediately physically contiguous is not an appropriate interpretation at all. LT implied that the site would not be "connected" to built development if it were separated by even a field, or a road. "Connected" is an ordinary English word, and should be interpreted as such in this context, and interpreted relative to the function that that particular GB site is performing in restricting sprawl. This site, as previously noted, performs a heightened function, the more the land around it is developed.

32. The Wyre Forest GB Review concluded that this site contributes to restricting urban sprawl. LT's only answer to this was that the GB review must be wrong, which is entirely unpersuasive.

C – Encroachment

33. CW 4.22 - …. 'encroachment' … is generally defined as a gradual advancement of urbanising influences through physical development or land use change".

LT did not dispute this definition. There are certainly "urbanising influences" in this proposal, including the traffic, roads, bunds, plant etc. Potentially, restoration to a

different land form is capable of constituting encroachment as wel, if the effect of the restoration is more urbanising, or impactful on openness than what was originally there.

34. The terms “sprawl” and “encroachment” are highly related. Indeed, there is overlap between many of the 5 purposes of the GB.

NPPF Paragraph 148 states that local planning authorities should apply substantial weight to any harm to the Green Belt. It can be enough of a reason, on its own, to justify refusal of the application. Multiple reasons are not required. Substantial weight is attached to any harm to the Green Belt by reason of inappropriateness. Very special circumstances will not exist unless the potential harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

35. A number of important principles emerge from the case of Wychavon[4]

“It is important that the need to establish VSC is not watered down. Clear and cogent analysis is required”. (para 28)

Very special is not just the converse of commonplace. Special circumstances must be special in the sense of “out of the ordinary”, meaning that they cannot be just a consequence of the preferred working approach of mineral operators, although they do not in themselves have to be rare. There does have to be something not only special about the circumstance, but “very special”. It is possible to combine several elements, so that together they are very special. (para 21).

Landbank

36. The Council does not contend that the Inquiry should conclude that other pending planning applications for mineral sites have already been granted. The relevance of other quarries was set out by CW at his paragraph 4.112. The relevance of pending applications in the pipeline is to give a more accurate sense of how the need for mineral provision is capable of being met. It would be a more weighty consideration that the Council had not got the 7 year landbank, and had no other

[4] CD 12.29 Wychavon DC v Secretary of State for Communities and Local Government and Butler [2008] EWCA Civ 692 42

potential means of meeting the 7 year provision in the short to medium term other than this site, as opposed to the actual situation, which is that there are other potential lines of supply on stream. LT accepted this extent of the relevance of the information, which is why the other permissions are agreed as part of the SOCG.

37. This affected CW's conclusions on the weight to be given to the need for the minerals, which reduces it, and renders it less capable of being a VSC.

Marketplace

38. The Appellant has attempted to demonstrate that the market for their product will be different, and more receptive. CW does not agree – paragraph 4.113 – he concluded that the market will be roughly the same. LT indicated that he had given evidence about the quality of the mineral emanating from this proposed site, but what he has not done is to compare that quality to the material emanating from competing quarries. CW's attribution of moderate beneficial weight to the sustainability of the marketplace is the right assessment.

39. The NPPF sets a 'blanket' landbank for sand and gravel (minimum 7 years). It does not seek to make distinctions between different grades of product, and the different markets that it serves.

Benefits of disposing of inert waste.

40. Similarly, the Appellant seeks to place too much weight on the disposal of inert waste, without properly evidencing the alleged advantage that their site would represent. CW gives this factor negligible weight. There is no agreement in place with any supplier to receive the waste that is needed, and there is no evidence that it would be impossible to agree in principle. There is an active market for inert waste, as CW made clear, and the economics will drive the destination of the waste – not just geographical location, as LT asserted. CW gave this factor negligible weight.

Biodiversity

41. CW attributes moderate beneficial weight to the biodiversity gains. They are undoubtedly present, however, they are not as great as was previously assessed, and

do not carry the weight that the Appellant claims for them. CW (5.3) identifies that the higher risk aspects of the deliverability of the restoration scheme across the long term limit the benefits to moderate in planning balance.

42. CW's assessment of the elements in the planning balance, and the VSC (which are similar in this case), and the weight to be given to them is measured, balanced and reasonable, and is to be preferred to the assessment of the Appellants. CW's conclusions (5.2) are that the claimed VSC do not amount to such, and are not capable of outweighing the harm by way of inappropriateness, and the further harm that this proposal represents.

Conclusion.

43. The Appellant's analysis of the vital elements of this case has been inadequate. The key consideration of this proposal in the GB relates to the GB policies. The Appellant must demonstrate that their site is not inappropriate. If they fail to do that, they must demonstrate that there are VSC that outweigh the harm that the proposal represents to the GB. If they fail to do this, the proposal must be refused. The Appellant has failed on both counts, and the Inquiry is invited to dismiss this appeal.

Sarah Clover

Kings Chambers

7 March 2023