Doncaster Council

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Date: 10th August 2021

By email: [redacted]

Dear [redacted]

Doncaster Local Plan Inspector's Report 30th June 2021

Employment Allocations

Flood Map Challenge – Bradholme Farm, Thorne

We refer to your letter dated 19th July 2021 in which you raise a number a points concerning the Doncaster Local Plan Inspector's approach to the assessment of relative flood risk. We note the indication that your client may bring legal proceedings.

The Council does not accept the criticisms outlined in your letter or that any legal errors have been committed by the Inspector or the Council in assessing the soundness of the Doncaster Local Plan ("DLP").

By way of an introductory observation you will be aware that no legal challenge can be brought against the DLP until after its adoption[1]. The penultimate paragraph of your letter refers to 'any decision to progress …. the plan', which suggests that a legal challenge may be brought in advance of adoption of the DLP. This is not legally possible given the preclusive provisions in s.113(2) Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). If your client does make an application under s.113 of the 2004 Act then the Council will respond fully and appropriately at that stage. Our firm view is that detailed engagement with the points in your letter before a report to Full Council has been published, before Members have had the opportunity to consider that report and the Inspector's Report and in advance of adoption of the DLP would be premature and arguably counter-productive.

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In that context, the Council's response to your client's points are set out below:

1. Your client's site was not a proposed allocation in the DLP for reasons that were covered extensively during the Examination in Public ("EiP"). Detailed consideration of omission sites rarely occurs during an EiP but your client was afforded the opportunity to produce evidence and make representations (written and oral) in relation to the relative merits of Bradholme Farm in comparison to the Council's preferred allocation and other reasonable alternatives. It cannot be suggested that your client was deprived of the chance to make the points it now repeats in your letter. To the contrary, Spawforths (acting on behalf of your client) robustly and repeatedly put the case that the DLP's assessment of relative flood risk was deficient. All participants, the Inspector especially, were aware of and considered your client's position;

2. Bradholme Farm was only ever a reasonable alternative, not a proposed allocation. The Inspector's task was to assess the soundness of the DLP including the Council's preferred allocation at Thorne North, not the soundness of omission sites. Your challenge to the DLP is, in essence, an attack on the Sustainability Appraisal underpinning the DLP. The scope for challenging a SA is limited and is quintessentially a matter for the Inspector in determining whether there is legal compliance: see *IM Properties Development Ltd v Lichfield DC* [2015] EWHC 2077 (Admin), *R (Spurrier) v. Secretary of State for Transport* [2019] J.P.L. 1163 and s.20(5) of the 2004 Act;

3. Your wide ranging assertion that the Inspector did not have the same evidence in relation to each of the competing sites and therefore fell into legal error is misguided. The Inspector's task was to consider whether the evidence was adequate and proportionate[2]. In that context, the sufficiency of the evidence was a matter for the Inspector to assess, exercising his planning judgement. The Inspector was satisfied that the evidence was both adequate and proportionate. Any legal challenge which seeks to attack the Inspector's planning judgement is bound to fail;

4. Your letter repeats the point made on numerous occasions during the EiP that the DLP would be deficient without being informed by a Level 2 Strategic Flood Risk Assessment ("SFRA"). Bearing in mind that the circumstances in which a Level 2 SFRA might be required arise from guidance documents rather than any statutory requirement, the Inspector dealt with this point in

[1] See s.113(3B) and (11)(c) Planning and Compulsory Purchase Act 2004.
[2] NPPF 2019, §31 and 35(b).

his report[3]. §35(d) NPPF requires there to be consistency with national policy, not slavish adherence to it. Whether there is consistency or not is a matter of planning judgement for the Inspector. §156 NPPF requires strategic policies to be informed by a "strategic flood risk assessment". There is no specific requirement in the NPPF that the SFRA should be Level 1 or Level 2. Importantly, §156 NPPF invites plan-making authorities to take account of advice from the EA. Thus, where the EA considers that the flood risk information supporting the DLP is sufficient then that view must carry considerable weight. A Level 1 SFRA must be detailed enough to allow application of the sequential test to the location of development and to identify whether development can be allocated outside of high and medium flood risk areas (based on all sources of flooding) without application of the exception test. The Inspector's assessment took these matters into account reveals no legal error;

5. Bearing in mind the weight that the Inspector is entitled to give to the view of the statutory consultee on flood matters, the EA's position in relation to the Plan examined by the Inspector was and remains clear:

   "*there has been regular on-going consultation and engagement with the Environment Agency. This has resulted in their involvement throughout the evolution of the Local Plan as their comments and suggestions have been considered and incorporated in to the policies and the Flood Risk Topic Paper. This joint working has ensured <u>that the Local Plan complies with national guidance regarding flooding</u> and has guided where development can take place but also has regard to the regeneration needs of the borough.*" (emphasis added)[4]

   There is no suggestion that the EA's position has altered in light of the Flood Map Challenge and your letter provides no evidence of a change in stance from that expressed in the SoCG;

6. Your letter refers to a 'successful' Flood Map Challenge and to the EA's letter dated 24th June 2021. The EA's letter does not update the Flood Zone categorisation for Bradholme Farm so matters remain as they were during the EiP. The only potential change in circumstances relates to Areas Benefiting from Defences ("ABD"). However, your letter places far too much weight on the EA's response, which in fact says the following:

[3] See Inspector's Report §88 – 89.
[4] See SoCG between Doncaster Council and the EA, §72.

a. A national review of the ABD dataset in currently underway and may be published in early 2022;
b. Your client's letter of 25th May 2021 suggests that the Bradholme Farm "appears to meet the criteria for inclusive in the ABD GiS layer" (emphasis added). This is not a categorical confirmation that a different approach to the flood risk of your client's site should be adopted; and in any event
c. The ABD dataset, including in relation to your client's site, will have to await the outcome of the national review.

There has been no material change in the evidence base relevant to the DLP, merely an indication of a *possibility* that the status of your client's site may change at some point in the future. It is unarguable that the evidence before the EiP was insufficient;

7. Even if (which we do not accept) the result of the Flood Map Challenge could have resulted in a more favourable score for Bradholme Farm in the Sustainability Appraisal, it simply does not follow that your client's site would have been allocated or that the Council's and the Inspector's assessment of reasonable alternatives would have resulted in a different outcome. Your client suggests that a site with flood defences scores more highly than one that is at the edge of the flood plain. The SA does not state that a site adjacent to flood defences is automatically more sustainable than one that is on a floodplain but at its edge. The overall 'score' depends upon the application of judgement, which *included* (but was not determined by) whether a site is likely to be subject to main river flooding (SA 11A(i)) or surface water flooding (SA 11A(ii)). Your arguments again seek to challenge the planning judgements of the Council and the Inspector, which the Court will not overturn in the absence of irrationality;

8. The theme running through your letter is that the DLP should not be adopted, at least in relation to strategic employment sites, unless and until technical evidence in relation to flood risk has been perfected. With respect, that approach is misguided and fails to recognise the very serious consequences of delaying the adoption of a local plan. The critical question is whether the Inspector had sufficient evidence on which to reach a planning judgement as to the soundness of the DLP. The answer to that question is undoubtably in the affirmative;

9. At the examination stage, the decision what should happen to the plan is that of the inspector, who is in control of the examination process: see *Samuel Smith Old Brewery (Tadcaster) v Selby DC* [2015] EWCA Civ 1107, [29]. Within this context, the Inspector considered whether to admit

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further evidence after the close of the EiP. It was an entirely lawful and rational response to decline to re-open the flood risk question in light of, *inter alia*, (i) the fact that the Inspector was responsible for determining the proper procedure in the Examination and thereafter; (ii) the likely encouragement that allowing late evidence would provide to other disappointed representors to produce additional evidence; and (iii) the public interest in providing a final view on the soundness of the DLP;

10. Wholly without prejudice to the foregoing, given that the Inspector has concluded that the DLP is sound with the Main Modifications, the Council only has two options: either withdraw the Plan or adopt the DLP with the Main Modifications and any minor modifications that do not materially affect the policies set out in it: see s.23(3) of the 2004 Act. The Council does not propose to throw away the considerable time and effort that it has spent on producing a sound development plan document. Your client's suggested way forward ignores these wider and serious consequences and seems to suggest that further evidence gathering and examination of the DLP can somehow take place outside this statutory framework. That is not possible.

If, following the adoption of the DLP, your client makes an application under s.113 of the 2004 Act on some or all of the grounds set out in your letter of 19th July 2021, the Council's very strong view is that it will be dismissed. Naturally we will draw the contents of this letter to the Court's attention.

We invite your client to reflect on the merits of proceeding with a legal challenge and to confirm that it will not bring any such challenge.

Yours sincerely,

[redacted]

Stacy Cutler
for Assistant Director of
Legal and Democratic Services