

**TOWN AND COUNTRY PLANNING ACT 1990**

**IN THE MATTER OF:**

**LAND AT HEATH ROAD, EAST BERGHOLT**

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**NOTE OF ADVICE**

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**Introduction**

1. I am instructed by Holmes & Hills LLP, on behalf of Hills Residential Ltd, to advise in relation to an application for outline planning permission, reference B/16/01902, for:  
  
‘Mixed-used development including up to 75 dwellings, a pre-school and a neighbourhood hub, comprising a swimming pool, office space and a local shop, public open space, and associated infrastructure and landscaping as amended by drawings received on 11<sup>th</sup> November 2016 (omission of school land)’
2. The proposal is on land outside but adjacent to the built-up area of the village of East Bergholt, a ‘Core Village’ for the purposes of the Babergh Local Plan, Part 1 (the Core Strategy, adopted February 2014) which, with the East Bergholt Neighbourhood Plan (made September 2016) (“the NP”), forms the statutory development plan. The local planning authority is Babergh District Council (“the LPA”).
3. I am grateful for my clear and comprehensive instructions, which include all relevant papers provided electronically (and in answer to my instructing solicitors’ query, I am more than happy to receive papers electronically). Those papers include the original Planning Statement provided by Phase 2 Planning & Development Ltd on behalf of Hills Residential Ltd in support of the application.
4. I am asked to consider an April 2017 ‘Planning Statement Update’, again prepared by Phase 2 Planning & Development Ltd on behalf of Hills Residential Ltd, and advise on a short point. That is whether or not the Planning Statement Update reflects a correct construction of development plan housing policy as regards development

outside the built-up area of East Bergholt village contained in Local Plan (Core Strategy Part 1) Policies CS2 and CS11, in accordance with the judgment of Mitting J in *R (East Bergholt Parish Council) v Babergh District Council* [2016] EWHC 3400 (Admin) (“the Judgment”), and in accordance with NP Policies EB1 and EB2. The Planning Statement Update follows a written request from the LPA for updating of the application material in light of the Judgment, and the authors have (sensibly) taken the opportunity to include commentary on key policies in the recent NP.

5. My instructing solicitors are very familiar with the statutory development plan and the Judgment. I will not trawl over either unnecessarily, but confine myself to comments regarding the Judgment.
6. In my view, the important bullet points from the Judgment are those I set out below, along with my commentary *in italics* on whether and if so how the Planning Statement Update tackles the relevant points:

(1) Policies CS2 and CS11 are to be construed as representing a combined test for development in the countryside, such that development can take place outside the built-up area boundaries in the 2006 Local Plan or those to be shown in the (still emerging) Site Allocations document, if they fulfil the requirements of Policy CS11 and the LPA are satisfied, pursuant to Policy CS2, that (a) the circumstances are exceptional and (b) there is a proven justifiable need (Judgment, paragraph 18). The Judge was clear regarding the need to satisfy ‘both’ of those requirements of Policy CS2 (Judgment, paragraph 18, also paragraph 30). *The Planning Statement Update gets this absolutely right (see paragraph 5.3).*

(2) By “locally identified need” in Policy CS11(iv) is meant a need referable to the particular Core Village and its (functional) cluster (Judgment, paragraph 21). That interpretation is in line with the Supplementary Planning Document (adopted 8 August 2014) which provides guidance on Policy CS11 (“the SPD”), including in relation to the sequential test at Policy CS11(iii) (judgment, paragraph 22). The “locally identified need” may ‘perhaps’ also include ‘areas immediately adjoining (the cluster)’ (Judgment, paragraph 23). *Again, I note that the Planning Statement Update gets this absolutely right (see paragraphs 4.1 and 4.2). I also note*

*that paragraph 4.3 of the Planning Statement Update explains a modification of that functional cluster that removes Brantham, in line with the NP and the views of the Council. Subsequent paragraphs of the Planning Statement Update set out and analyse the relevant evidence base, by reference to market housing need, affordable housing need and housing mix. All of this reflects a correct approach to Policies CS2 and CS11.*

- (3) Although it is not referred to in the Judgment, I consider Mitting J's conclusion regarding the meaning of "locally identified need" is consistent with the (earlier) decision of the Court of Appeal (upholding the decision of Mrs Justice Lang) in *Old Hunstanton Parish Council v SSCLG* [2016] EWCA Civ 996, where the issue was, again, the relevant area for assessing local need.
- (4) The Judge noted that establishing the necessary local housing need 'could properly lead to the conclusion that there were exceptional circumstances' (Judgment, paragraph 40). *I note the Planning Statement Update advances 'twofold' exceptional circumstances, on the basis that each is sufficient: (i) contribution to the policy requirement for at least 86 dwellings within East Bergholt and (ii) the particular nature of the proposals (see paragraphs 5.5-5.13). Again, this is all in accordance with a correct construction of Policies CS2 and CS11.*
- (5) As regards the sequential test at Policy CS11(iii), that proceeds, as explained in the SPD, on the basis of, firstly, 'other available, suitable and deliverable sites within the built-up area of the village', secondly 'sites which adjoin the built-up area of the village' and, thirdly, sites that do not adjoin the built-up area of the village if there is a special justification 'e.g. it is meeting a local need which cannot be met elsewhere or is easily accessible from the parent village'. The sequential test does not require 'sites within the same category of suitability to be considered sequentially' (Judgment, paragraph 24). The SPD also contains this statement, as a final bullet to paragraph 11 dealing with the sequential approach: 'Preference will also be given to brownfield sites where these are well located and meet sustainability criteria'. I note Mitting J did not express a concluded

view on the meaning of these words.<sup>1</sup> *The Planning Statement Update correctly addresses the sequential test at paragraph 7.1(iii). I can see no reason to fault its conclusion, which is favourable to the application.*

7. As regards NP Policies EB1 and EB2, and in particular EB2, the Planning Statement Update considers these at its Section 8. I cannot fault its approach to those policies.
8. I have carefully considered the Planning Statement Update. In my view it reflects a correct understanding of Local Plan (Core Strategy Part 1) Policies CS2 and CS11, as explained by the Judgment, and NP Policies EB1 and EB2.
9. I would also add that as regards those policies, the proposals appear to me to be in accordance with the development plan.
10. I have not considered the proposals against other policies within the development plan, or against other material considerations such as national policy. I also recognise that a number of the relevant policy tests involve an exercise of judgment on the part of the LPA.
11. Those instructing should please feel free to contact me in Chambers in order to discuss anything arising from the above.

James Burton

39 Essex Chambers, WC2A 1DD

21 April 2017

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<sup>1</sup> I note that the LPA in its request states that brownfield land sits along with 'sites within the boundary' in the sequence and that this was 'clarified by the judgment'. I do not think the Judgment goes so far, as Mitting J did not rule on the point, but only reflected the common ground that 'possibly' brownfield sites might form the 'first category', and the Judgment does not even make clear what is meant there by 'first category' (it could be a reference back to sites within the built-area, as the LPA says, or, alternatively, that brownfield sites would form the 'first category' of 'sites that do not adjoin the built-up area of the village' (Judgment, paragraph 22). As noted, the actual ruling on the sequential test was only that it does not require 'sites within the same category of suitability to be considered sequentially' (Judgment, paragraph 24).

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Attention: Mr David Whipps