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Your Ref: Planning Application CB/16/01389/FULL
Attn: Debbie Willcox

Our Ref: BEF1-001/RB

4 September 2017

Dear Sirs

Proposed Wind Turbine at Checkley Wood Farm

1. Thank you for your notification of 31.8.17 that this matter will be further considered by the Planning Committee on 13.9.17.

2. Bedford Estates have asked us to consider the materials including the officer report (OR). We and our clients were surprised in all the circumstances to see the OR recommending grant of permission here where the weight of considerations seems so heavily against it. Those particularly include the strong concerns raised in relation to landscape and the historic environment including by Historic England and your own officers.

3. Having reviewed the matter the OR does – as is often the case where one's reaction is "this cannot be right" – contain at least two issues which appear to be in legal error. For the avoidance of doubt this is not trespassing on the question of "planning judgement" which is not our place to do. That is for the Committee members to make their own minds up about once they have carefully considered all the materials including representations made on the day. On the other hand they must do that on the correct legal basis.

4. We trust you would agree that it is better that the Committee is properly informed of these now than following office recommendations which are – with respect – wrong in law, and then the decision end up being challenged.

5. The OR is lengthy and other papers here are voluminous so we will try to keep the points short. You are very familiar with the issues and we trust that an outline will suffice.

<u>Environmental impact assessment</u>

6. The reasons for the council's approach to EIA being unlawful were originally set out in detail in our letter of 3.8.16. The net result of that was that the Council carried out a fresh screening opinion dated 18.11.16. This corrected an error in

an earlier purported screening opinion dated 25.3.15. We have reviewed the later screening opinion and the OR.

7. In our letter of 3.8.16 we raised three areas of concern: significance (including the question of mitigation measures), the EIA voluntarily provided for the Double Arches application, cumulative impact, and proximity to sensitive areas. The OR addresses these points at §§16.4-13.

8. As for the issue of "significance", we are truly surprised that the Council in the OR purports to hide behind the suggestion that EIA and planning significance are different things. Particularly given the low threshold applicable to EIA (see the discussion and authority *R. (Bateman) v. South Cambs DC* [2011] EWCA Civ 157 which we referred you to in our letter of 3.8.16, to the effect that the threshold is met where there is "any serious possibility" of significant effects) this is obviously wrong. The screening opinion accepts in terms that there "may be significant effects on a small number of heritage assets" and the probability of this is "high".

9. Perhaps this is discounted by the notion that "the impact is not complex and reasonably predictable". But that is not the test. We refer to the currently applicable rules (2017 EIA Regulations) where the relevant consideration is "the possibility of effectively reducing the impact". That does not appear to have been considered at all. But anyway the report itself acknowledges significance notwithstanding.

10. As for the EIA of the Double Arches application, as we pointed out in our letter of 3.8.16 the Council considered then that the matter was of environmental significance, and the refusal was recommended in strong terms on the basis of effects on landscape and the historic environment. It just does not "add up" now to say in the OR that this is really a single turbine application, consistent with others where EIA has not been required.

11. From this also follows the point that in relation to cumulative impact, we can say little more than that the Council's approach here is a blatant attempt at unlawful "salami slicing" and refer to the points made in our letter of 3.8.16.

Green Belt

12. The Council (rightly) recognises that the development is "inappropriate development" from a Green Belt (GB) perspective and therefore "very special circumstances" (VSC) must be found to justify development. In summary the OR concludes that the substantial harm that would be caused to the GB is "clearly and demonstrably" outweighed by (principally) the electricity generating benefits of the scheme.

13. There are two important legal errors in the analysis.

14. First, we deal with the matter as put. Although in the end the existence of VSC is a matter of judgement, the difficulty with the OR's approach is that there is nothing to suggest anything special about electricity generation from this proposal. It is of course fully accepted that renewable electricity is a good thing and our clients (and indeed we) strongly support that. But in order to constitute VSC the situation has to be not just "special" but "very special". There is nothing of either of those identified here at all. It is just "one more turbine" contributing

as part of a national effort to improve renewable generation. That is simply not good enough.

15. VSC must be interpreted to mean what it says. We are aware that the NPPF contemplates at §91 that VSC may include the wider environmental benefits from renewable energy. We accept that in considering VSC it is right to put that in the balance, as the OR does. But what it does not do is explain why in this instance it "clearly and demonstrably outweighs" the identified harm. The OR identifies the extent of electricity generation and that it is "significant" (see §3.12). However that still does not make it "special" let alone "very special".

16. And in this context the OR appears, see again §3.12) to muddle the NPPF support for small scale electricity generation at §98 NPPF with GB factors. But that is wrong, §98 is in a different section dealing with planning and environmental challenges generally. Of course we do not say that VSC cannot exist in relation to even a small scale renewable energy project, just that there is no indication that VSC can properly be said to exist here. The OR jumps to its conclusion without explaining why.

17. In this context we particularly note the observations of your Renewables Officer at OR pp.33-36. There is no suggestion there of the special circumstances of this application. Indeed it is neutral at best given the other considerations mentioned. It is thus extraordinary for the OR to conclude as it does in relation to GB and VSC. As a matter of law we are satisfied overall that the OR is misdirected in this regard.

18. The second error is one that goes directly against established jurisprudence, namely the need to balance "any other harm" as well as inappropriateness of development in the GB when considering whether VSC exist or not. This issue was discussed in *Reigate and Banstead BC and Others v Redhill Aerodrome Limited* [2014] EWCA Civ 1386 and it appears that the OR here is manifestly deficient in the balancing it purports to carry out. The "other harm" identified in the report simply does not form part of the VSC balance. That is a serious error of approach.

19. We trust these observations are of assistance.

Yours faithfully

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Richard Buxton Environmental and Public Law

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