

THRINGS

SOLICITORS

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12 August 2016

Your Reference:
Our Reference: RT/lcl/L3837-1

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Dear Mr Banks

Our Client: Clive Lower of 27 Salmons Leap, Calne, Wiltshire
Examination of Bath & North East Somerset Placemaking Plan

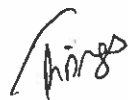
Hearing sessions on Tuesday 13 September 2016

We refer to the above and enclose legal submissions in triplicate on behalf of our client. We would be grateful if this document is placed before the Inspector for consideration at the Hearing.

Please do not hesitate to contact the writer, Rosalyn Trotman, on the above number should you have any queries.

In the meantime, we would be grateful of acknowledgment of receipt.

Yours faithfully



Thrings LLP

Encs.

LEGAL SUBMISSIONS ON BEHALF OF REPRESENTOR NO: 7002

REPRESENTOR NAME: Mr Clive Lower represented by Nina Pindham of No5 Chambers on instruction of Rosalyn Trotman of Thrings Solicitors

CONCERNING:

“Matter 5 - Building strong and vibrant communities

Issue 1: Whether the relevant proposed policies in the Placemaking Plan are positively prepared, justified, effective and consistent with national policy in the context of the adopted CS.

Q4. Is the approach to the designation of Local Green Spaces (Policy LCR6A) sound and is there justification for those that are designated?”

RE: SITE REFERENCE LGR18

Introduction And Background

1. These legal submissions concern land adjacent to Bramble Cottage, Farmborough, Bath, BA2 0AN (“the site”). The landowners are Mr Clive Lower and Mr Peter Lower. The site has been designated by policy LCR6A (site reference LGR18) as Local Green Space (“LGS”) in the draft Placemaking Plan (“the Plan”) by Bath and North East Somerset Council (“the Council”).
2. In summary, our response to Matter 5, Issue 1, Question 4 is that the site does not meet the criteria for designation and thus its proposed designation is neither sound nor justified.
3. To avoid repetition, we do not repeat points made in our earlier representation (found in the Schedule of Public Consultation Comments, pages 379-381), and therefore these submissions should be read alongside that representation.
4. The history of the site’s designation as a LGS in the Plan is opaque (there is no published decision of the Council which states that the site should be designated). It is therefore difficult to fully examine the Council’s justification for the designation of the site. The site was initially proposed as a LGS by Farmborough Parish Council (“FPC”). FPC’s report regarding the designation of the site states that “*from a historical perspective the land has, apart from occasional use in days gone by as a cottage garden, been free from any activity.*”

5. The Council's note disclosed in a Freedom of Information request regarding the site's designation as a LGS states:

"The site is demonstrably special to [FPC] as the site holds local significance in terms of its historic significance and its importance to the setting of the church and to the character of Farmborough....preserves the rural character of this locality, although no clear uniformity is visible within the street scene...Boundaries comprise local stone walls and grassed or planted banks which extend along the lane engendering an enclosed and intimate semi-rural character which adds to the unique character of this part of the village. As an open grassed area the site contrasts with and complements with [sic] the appearance of its surroundings, and it makes a significant contribution to the character of the lane."

6. Notably, the site was the subject of earlier planning applications seeking planning permission to develop residential dwellings on it (references 10/01663/FUL and 14/03431/FUL). The former application was refused at appeal and the latter application was withdrawn on 22 September 2014.
7. As a final relevant background matter to the legal context of designation of the site as a LGS, and as alluded to in our earlier representation, the site is adjacent to the local FPC ward member's property. This ward member has objected to the previous applications to develop the site and at the time of the FPC nomination of the site was trespassing on the site by using it for storage of a trailer without the permission of Mr Lower. The site has also been subject to other instances of trespass in that someone entered the land without Mr Lower's permission and mowed the grass closely prior to Council's site visit on 1 December 2015 when photographs were taken. The site is accessed via a gate which is locked.

General Principles

8. The power to designate land as a LGS derives from the NPPF, specifically paragraphs 76 and 77. The courts have not yet considered these provisions, so the starting point is the text of the NPPF itself. This is subject to the principle established by *Tesco v Dundee City Council* 2012 UKSC 13 that the courts may inquire into whether policies have been read objectively in their proper context by decision-makers.
9. Despite the informality of the designation process, the effect of a site's designation as a LGS is significant. Essentially, the same restrictions upon development in the Green Belt apply (see paragraph 78 of the NPPF and paragraph 020 of the PPG, section 37: all references to the PPG hereinafter refer to paragraphs within section 37). Thus, even if the proposed development of a LGS is necessary and sustainable, it may only be permitted when very special circumstances apply. What constitutes very special circumstances is not defined in the NPPF, but it can be assumed from the informality of the designation process and the absence of details such as those set out in paragraph 89 of the NPPF that this is to be a matter entirely

for the discretion of the local planning authority. Designation of an area as a LGS therefore imputes great uncertainty as to how (and whether) development will be permitted to proceed.

10. Perhaps because the designation of an area as a LGS has such drastic effects following such an informal process, the designation of an area as a LGS is subservient to the requirement that a development plan must meet the identified needs of the area for homes, jobs and other essential infrastructure (paragraph 76 of the NPPF). This is reemphasised in paragraph 007 of the PPG (reference ID: 37-007-20140306), which states:

“Designating any Local Green Space will need to be consistent with local planning for sustainable development in the area. In particular, plans must identify sufficient land in suitable locations to meet identified development needs and the Local Green Space designation should not be used in a way that undermines this aim of plan making.” (emphasis added)

11. By *Tesco v Dundee*, policy must be taken to mean what it says, and national policy, supported by national guidance, says that the decision-maker must first ensure the development plan document meets the identified needs of the area and it is only once this task is completed that the issue of whether the land satisfies the criteria for designation as a LGS falls to be considered. This is unlike the balancing exercise undertaken when determining whether meeting the full OAN is constrained by other designations such as Green Belt, AONB and those attributed to European protected sites, for example.

Criteria For Designation

12. It is not appropriate to designate a site as a LGS unless all of the criteria set out in paragraph 77 of the NPPF are satisfied (see paragraph 013 of the PPG). A designation must be supported by clear evidence that the land is demonstrably special to the local community. The PPG provides examples consisting of small, locally distinct, and demonstrably special areas which can be easily identified on the ground (and not by reference to boundaries on a map):

“Whether to designate land is a matter for local discretion. For example, green areas could include land where sports pavilions, boating lakes or structures such as war memorials are located, allotments, or urban spaces that provide a tranquil oasis.” (paragraph 013, reference ID: 37-013-20140306)

13. It is to be noted that paragraph 013 refers to areas to which the public has access. Further on, paragraph 017 of the PPG refers to green areas to which the public does not have access but which can nonetheless be designated as LGS because of their wildlife interest, historic significance and/or beauty.

Application of Criteria to the Site

14. There is no evidence that the site is demonstrably special, or of any demonstrable importance to the local community. Whilst the site is in reasonably close proximity to the community it serves, it is not beautiful, it has no historic significance, it is not accessible by the public, and it has no recreational value and it is not tranquil. Nor is the site notable for the richness of its wildlife. The site presents as a disused grass plot (as opposed to a garden area).
15. As to the Council's assertion that the site is of historic significance, FPC's report is inconsistent with the Council's statement, as it recognises that the site has, apart from its former use some years ago as an occasional cottage garden, been "*free from any activity.*"
16. The Council's note also states that the site is important to the setting of the church and the character of Farmborough. These reasons are concerned with the site's undeveloped nature and do not identify anything special which is worth protecting. In other words, these reasons have nothing to do with the inherent qualities of the site itself. They are quite simply issues outwith the consideration of whether to designate a site as a LGS. The designation of land as a LGS is concerned with the land's inherent qualities, rather than the extrinsic consequences of keeping the site undeveloped. The latter issues are to be dealt with by way of the development control regime and cannot be used to justify designation of a site as a LGS.
17. The designation of the site therefore cannot be said to satisfy the relevant requirements under paragraph 77 of the NPPF, as it holds no particular local significance because of its beauty, historic significance, recreational value, tranquility, or richness of wildlife, and there is no other reason justifying its designation.

Council approach to designation

18. As stated above, there does not appear to have been any published decision on the proposed LGS designation of the site. Thrings Solicitors has raised a number of questions with the Council since December 2015 regarding its adopted decision making process for this LGS site designation through the Council's Planning and Legal Departments and through the Freedom of Information and Review process. To date the following information regarding the Council's approach to this particular LGS designation has come to light:
 - a. The Council wrote to Mr Lower on 25 September 2015 inviting submissions on FPC's nomination of the land as a LGS by 30 October 2015;
 - b. Thrings Solicitors submitted representations to the Council dated 29 October 2015 which was acknowledged by the Council the same day explaining why the site does not meet the LGS criteria and providing evidence of the same;

- c. The Council informed Thrings Solicitors that a decision would be made by the Council's Cabinet on 2 December 2015 ("the First Decision");
- d. The Council subsequently informed Thrings Solicitors on 1 December 2015 that the site was included in the draft Plan for Cabinet approval and the representations submitted made would not be put before Cabinet for consideration. The Cabinet decision of 2 December 2015 appears to be the first decision with any formal constitutional authority;
- e. The Council's Legal Department gave the following reasons for representations not being made available: representations were not received in time and Cabinet were considering the Plan as a whole rather than individual LGS allocations. In relation to the first point, this is inaccurate as representations were submitted in accordance with the Council's own timescales over 4 weeks prior to the Cabinet decision. In relation to the second point, it is unclear how Cabinet could make a sound and justified conclusion on a LGS proposal without all information on an individual LGS allocation being made available;
- f. Subsequent information through correspondence and FOI requests with the Council revealed that the site was included as LGS in the draft Plan by a non-decision making body called the LDF steering group made up of a cross party group of elected members whose names have not been disclosed (possibly including the aforementioned Ward Member). The LDF steering group met on 31st July 2015, 30th September 2015 (both of these dates being before representations were received) and 11th November 2015. The Council confirmed that the LDF steering group discussed individual LGS and that powerpoint slides were made available to members of the steering group relating to some sites, but not in relation to this site. The only document which the Council says relates to the site is a summary of the results of the assessment of all nominated spaces in Farmborough which we have enclosed. Within this document each LGA proposal states where additional information has or has not been received, except for Mr Lower's site which only states that FPC nominated it for its beauty and community value without any reference to Thrings representations of 29 October 2015;
- g. It remains unclear who, if anyone, specifically considered the representations made on 29 October 2015 and concluded that the site should be included as LGS in the Plan before Cabinet formally making the First Decision— and what, if any, delegated authority such a decision maker had (seemingly none). It appears that even the LDF steering group (who as stated have no decision making power) did not fully consider or consider at all the representations made – and it is unclear whether the Ward Member played any part in that decision;

- h. The Council also advised that Ward Members can request LGS designation reconsideration, however clearly this is not an available option given the personal interest the Ward Member has in this matter;
 - i. The Council's Legal Department by letter dated 14 January 2016 explained that Richard Daone, Team Manager in Planning Policy for the Council, had re-considered the representations made on 29 October 2015 and concluded that this was an appropriate LGS designation ("the Second Decision"). It remains unclear what date the Second Decision was made by the Council as to date no formal decision making documents have been released, but we can assume it was some time between 1 December 2015 and the Council letter of 14 January 2016. Confirmation of delegated authority was requested, the Council initially referring to the Constitution for which we can see no provision to grant such decision making powers. The Council's most recent position is to purport to rely upon a Cabinet minute which grants delegated authority to the Divisional Director for Development, in consultation with the Cabinet Member for Homes & Planning, to make minor changes to the Plan to *correct errors and inconsistencies* to the Plan prior to publication. There are two issues with this position: 1. Richard Daone does not hold the title to any of the aforementioned positions and 2. This delegation of power does not extend to re-determination of LGS allocations.
19. Thrings Solicitors representations were re-submitted as part of the public consultation process.
20. Both the First Decision and the Second Decision are flawed by apparent procedural impropriety.

Conclusion

21. In summary, the site does not satisfy the relevant tests under the NPPF (reading the policy objectively and in its proper context, as one must). It follows that the approach to the designation of Local Green Spaces (Policy LCR6A) is not sound and there is no justification for the designation of site reference LGR18 as LGS.

Annex A – Council document on LGS allocations in Farmborough

Local Green Space: Farmborough Allotments

Landowner: Farmborough Parish Council

Nominated By: Farmborough Parish Council

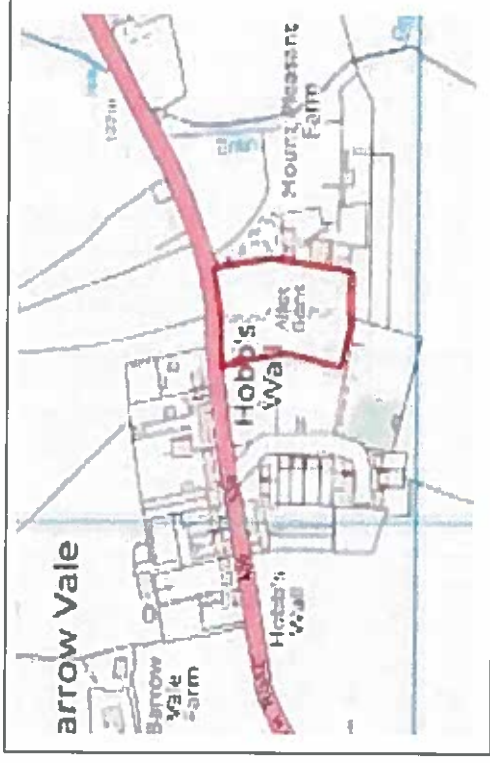
Description of green space: Well-maintained allotments

Existing Planning Designations: Allotment, Green Belt, outside HDB

Assessment

Recommendation: Do not designate as a local green space

Farmborough



	In reasonably close proximity to the community it serves	Yes – the space is adjacent to housing
	Demonstrably special to a local community and holds a particular significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of wildlife	Nominated by the Parish Council for its recreational value to the local community however the site is within the Green Belt and no additional information has been submitted on why it needs the additional protection.
	Local in character and not an extensive tract of land	Yes – clearly defined space
	Exemptions	None

Local Green Space: Farmborough Recreational Field

Farmborough

Landowner: Unknown

Nominated By: Farmborough Parish Council

Description of green space: Green space with a pavilion and opportunities for playing cricket and football.

Existing Planning Designations: Outside HDB, Green Belt

Assessment

Recommendation: Do not designate as a local green space



In reasonably close proximity to the community it serves	Yes – the space is adjacent to housing
Demonstrably special to a local community and holds a particular significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquility or richness of wildlife	Nominated by the Parish Council for its recreational value to the local community however the site is within the Green Belt and no additional information has been submitted on why it needs the additional protection.
Local in character and not an extensive tract of land	Yes – clearly defined space
Exemptions	None

Local Green Space: Farmborough Primary school field

Farmborough

Landowner: Unknown

Nominated By: Farmborough Parish Council

Description of green space: Green space surrounded by trees and hedgerows with glimpses across to the open countryside.

Existing Planning Designations: Site is subject to playing permission, school playing field

Assessment

Recommendation: Do not designate as a local green space



	In reasonably close proximity to the community it serves	Yes – the space is adjacent to housing
	Demonstrably special to a local community and holds a particular significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquility or richness of wildlife	No- It is not appropriate to designate spaces that are allocated or proposed for development. The site is part of a larger planning application and therefore the boundary of any potential Local Green Space cannot be determined at present. Further school and college playing fields and grounds are not normally be suitable for designation. This is because national guidance states that the space designated as 'local green space' must be capable of enduring beyond the plan period. In order to address future needs for school places there may, on some school sites, be a need to reconfigure the arrangement of school buildings and playing fields. The NPPF states that local planning authorities should give great weight to the need to create, expand or alter schools. Therefore, given this priority educational sites (grounds and playing fields) are not suitable for designation.
	Local in character and not an extensive tract of land	Yes – clearly defined space
	Exemptions	None

Local Green Space: Molliers Glebe Land

Landowner: Bath and Wells Diocese

Nominated By: Farmborough Parish Council

Description of green space: Large green space with trees and children's play structure.

Existing Planning Designations: Outside HDB, Green Belt

Assessment

Recommendation: Do not designate as a local green space

Farmborough



	In reasonably close proximity to the community it serves	Yes – the space is adjacent to housing
	Demonstrably special to a local community and holds a particular significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquility or richness of wildlife	Nominated by the Parish Council for its recreational value to the local community however the site is within the Green Belt and no additional information has been submitted on why it needs the additional protection.
	Local in character and not an extensive tract of land	Yes – clearly defined space
	Exemptions	None

Local Green Space: Land adjacent to Bramble Cottage

Farmborough

Landowner: Mr Peter Lower

Nominated By: Farmborough Parish Council

Description of green space: Small green space which is contained behind a stone wall.

Existing Planning Designations: within the HDB

Assessment

Recommendation: Designate as a local green space



		Yes – the space is adjacent to housing
In reasonably close proximity to the community it serves		Yes - nominated by the Parish Council for its beauty and community value to the local community.
Demonstrably special to a local community and holds a particular significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of wildlife		
Local in character and not an extensive tract of land		Yes – clearly defined space
Exemptions		None

Local Green Space: The Poplars

Landowner: Bath & Southwest Developments Limited

Nominated By: Farmborough Parish Council

Description of green space: Sloping green space surrounded by housing, part of a larger planning application.

Existing Planning Designations: Site is subject to playing permission,

Assessment

Recommendation: Do not designate as a local green space

Farmborough



	In reasonably close proximity to the community it serves	Yes – the space is adjacent to housing
	Demonstrably special to a local community and holds a particular significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquility or richness of wildlife	No- It is not appropriate to designate spaces that are allocated or proposed for development. The site is part of a larger planning application and therefore the boundary of any potential Local Green Space cannot be determined at present.
	Local in character and not an extensive tract of land	Yes – clearly defined space
	Exemptions	None