

## SUPPLEMENTARY REPORT

### PLANNING COMMITTEE (4<sup>th</sup> March 2019)

#### OBSERVATIONS/REPRESENTATIONS RECEIVED SINCE COMPLETION OF REPORT

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**17/01191/OUFMEI – HYBRID PLANNING APPLICATION COMPRISING FULL PLANNING APPLICATION FOR THE CONSTRUCTION OF A SUSTAINABLE MIXED USE URBAN EXTENSION COMPRISING OF 475 DWELLINGS, NEW VEHICULAR ACCESS POINTS ONTO CLAYPIT LANE AND BIRMINGHAM ROAD, THE REMODELLING AND FORMATION OF A ROUNDABOUT AT THE JUNCTION OF FOSSEWAY LANE AND CLAYPIT LANE, COMPREHENSIVE GREEN INFRASTRUCTURE INCLUDING UP TO 16.55 HA OF COUNTRY PARK, FOOTPATHS, CYCLEWAYS, MULTIFUNCTIONAL OPEN SPACE INCLUDING CHILDREN'S PLAY AREAS, COMMUNITY ORCHARD, OPEN SPACE FOR INFORMAL SPORT AND SUSTAINABLE URBAN DRAINAGE SYSTEMS, FOUL AND SURFACE WATER DRAINAGE INFRASTRUCTURE INCLUDING BALANCING PONDS, AND OTHER ANCILLARY INFRASTRUCTURE AND GROUND REMODELLING. WITH OUTLINE APPLICATIONS FOR THE SERVICED PROVISION OF 1.09 HA OF LAND FOR A PRIMARY SCHOOL AND 1.9 HA FOR STRATEGIC SPORTS PROVISION WITH ALL MATTERS RESERVED EXCEPT ACCESS DEANSLADE PARK, LAND SOUTH OF FALKLAND ROAD, LICHFIELD, STAFFORDSHIRE DEANSLADE PARK CONSORTIUM**

#### Additional Consultation Responses

**Inland Waterways Association** – Decisions on planning applications should be made in accordance with the Development Plan. The primary policy document is the Local Plan Strategy (LPS) which commits to safeguarding the route for a restored Lichfield Canal. This is implemented by the Local Plan Allocations Policy IP2 Lichfield Canal which is now close to adoption and must be accorded significant weight.

The LPS Policy Lichfield 6 allocated the Deans Slade Strategic Development Area (SDA) and the Concept Statement says that details of the infrastructure requirements are set out in detail in the Infrastructure Delivery Plan (IDP) and developers will be expected to enter into a legal agreement to ensure its provision.

Core Policy 4 (CP4) also requires new development to provide the necessary infrastructure, and at the appropriate stage.

The IDP identifies the infrastructure required for Deans Slade SDA as provision of a new road bridge over the lowered canal channel and any further necessary canal channel works. Funding is to be by Developer/S106 and delivery by the developer working with LHCRT.

The first Opinion from Keystone Law (Appendix 1) at paragraph 5 states that a guiding principle is that where the wording of a policy refers to the necessity to comply with other sections of the Local Plan or other planning documents (e.g. the IDP) the relevant wording of those documents becomes part of the policy wording. This is uncontroversial. To construe otherwise would render the policy wording meaningless.

This key part of the Opinion has not been directly challenged by the applicant's legal advice, which has simply chosen to ignore it as an inconvenient truth. The Council has stated that any legal agreement has to comply with the NPPF, but in its final report has not sought to suggest that this particular planning obligation does not comply. Clearly it considered it did comply when written, as did the Inspector that approved the LPS. A very similar

requirement for the South of Lichfield (South of Shortbutts Lane or St Johns) SDA was accepted and forms part of the S106 agreement accompanying the Outline consent for that site.

The applicant and the Council have sought to use some differences in the positioning of the canal route across these sites to cast doubt on the validity of the Deans Slade infrastructure obligation, but these differences were known about when the sites were allocated and were taken into account by minor differences in the wording. The IDP was reviewed as recently as March 2018 and no changes were considered necessary.

The applicant and the Council have also sought to argue that because the bridge location is just outside the SDA boundary the obligation should not apply. But again, this location was known when the allocation was made, and LPS Policy IP1 states that the Council will require developments to provide necessary infrastructure on and off site in line with the IDP.

#### The Planning Committee Report

The Claypit Lane Canal Bridge and Channel Works section of the Report (pages 63-71) quotes the actual text of the relevant sections of policies CP4, IP1, CP13, Lichfield 6 and the IDP at paragraphs 6.11- 6.16, as summarised above. It concludes that:

“The IDP requirements therefore are clear that a new road bridge is to be delivered, with the developer as lead, or through a S106 contribution, along with any further necessary canal channel works.” (6.18).

The subsequent discussion about St Johns and the employment site (6.19-6.20) serves only to emphasise the validity of the IDP infrastructure requirements as part of LPS policy.

However, para. 6.21 is wholly erroneous. The canal was not in situ when the policy requirement was adopted, so that has not changed and is irrelevant. It has never been suggested that the bridge is required by the developer; it is required by the canal restoration project and is to be provided by the developer at the appropriate stage. The statement that the Deans Slade Concept Diagram shows the route of the canal only partly within the SDA is misleading as the more precise OS based plan on the preceding page of the LPS (Map H.1 page 183) shows that the SDA boundary includes the whole of the land corridor reserved for the canal alongside Falkland Road.

#### Legal Opinions and Changes to the Council’s Position

All of the above matters were comprehensively addressed by LHCRT’s legal opinion (Appendix 1) which concluded that a decision that does not require provision of the road bridge and integration with the canal route would be unsound and susceptible to legal challenge.

However, the January version of the committee report introduced entirely new arguments about Community Infrastructure Levy (CIL), which were convincingly dismissed by the Trust’s second opinion (Appendix 2). This concluded that the requirement for the road bridge and other works is explicit, clear and unambiguous, and that these should be funded by S106 not CIL. But the Council persists in pursuing this line of argument in the latest version of the report, now partly relying on a letter from Eversheds Sutherland (Appendix 3) which was only made available to IWA and LHCRT over 3 weeks after its receipt, on publication of the revised committee report. The arguments about CIL have already been fully addressed by the Trust’s legal opinion but we set out below why those arguments are both mistaken and irrelevant.

## Community Infrastructure Levy

The CIL Regulation 123 List says that “Infrastructure works relating to the restoration of the Lichfield Canal will potentially benefit from CIL funds.” The canal is 7 miles long and encompasses numerous items of infrastructure but there is no analysis of what these works are or how much they may cost, so this is just a generalised statement. It then mentions an exception which is “works required in relation to any on-site provision by the developers connected to the three SDAs in the vicinity of the canal: South of Lichfield, Deans Slade Farm, Cricket Lane.” However, it does not say anything about off-site works.

LPS Policy IP1 provides for developments to provide necessary infrastructure both on and off site in line with the IDP, and the IDP includes off-site provision of the canal bridge by the Deans Slade development through S106 agreement. Given that infrastructure cannot (at present) be funded by both S106 and CIL (‘double dipping’) then that particular piece of infrastructure (the bridge) is clearly also an exception to the general rule that infrastructure works relating to the canal will potentially benefit from CIL funds. So, contrary to the assertion in 6.23, it is not a reasonable interpretation that all off-site works will be supported by CIL funds.

Where there is any potential for doubt about which method of funding applies to a particular item of infrastructure, it is clear that an IDP requirement for S106 funding which is directly referenced by and therefore effectively part of an LPS policy must take precedence over the CIL document which is not a policy document and which is not referenced anywhere within the LPS, since CIL was adopted after the LPS.

Compatibility of the CIL List with the IDP was ensured and endorsed by the CIL Charging Schedule Examination, which also endorsed the IDP as a thorough, up to date and clear analysis (6.28) so there is no basis for the claim of discrepancies between the two documents (6.26). The IDP has since been again updated and as said at 6.27 it was considered that the IDP and CIL schedule were in conformity. The claimed discrepancy is therefore entirely imaginary, based on something that the CIL List does not say. If there is any minor textual deficiency it is simply the incompleteness of the CIL statement in not mentioning off-site S106 obligations, but as it does not purport to detail every individual infrastructure item the absence of such a reference cannot be taken as an intention to contradict and undermine the policy provisions of the LPS and IDP.

### Eversheds Sutherland Letter of 29th January 2019

This letter does not even mention the Development Plan, LPS or IDP but is entirely based on a misrepresentation of the text and relevance of the CIL provision. In no way, therefore, can it be said to present a complete or balanced opinion.

The claim that the CIL List is unambiguous and that on-site works are the sole exception to the application of CIL funds is simply wrong. The CIL text makes no such claim. It identifies an exception but that does not preclude other exceptions. The IDP identifies the other exception as specific off-site canal works to be S106 funded.

As the rest of this opinion is based on this fundamental misinterpretation, it is effectively worthless, or to use its phrase; entirely without merit. Their argument might have had some value if the Local Plan did not exist and the only relevant document was the CIL List. However, that is subsidiary to the policies of the Development Plan which makes specific provision for the canal works by Developer/S106 funding.

Other misrepresentations in this letter include:

- Reference to “an item of infrastructure that appears on its Regulation 123 List” – the list does not identify any specific items of infrastructure related to the canal.

- The Regulation 123 List cannot “take precedence” over the Development Plan and the specifically referenced provisions in the IDP which are part of that Plan.
- The Trust does not “acknowledge that the applicant’s proposals do not prejudice delivery of the bridge or the Canal restoration”, quite the contrary, and that is not what para. 3 of the Further Opinion says. Para. 3 is referring only to the roundabout.
- The claim that the bridge “would not satisfy the test for a valid S106 Obligation” is wrong as it was endorsed by examination of the LPS with its proposed Main Mods, and the IDP was endorsed as part of the examination of the CIL Charging Schedule.
- The conclusion that as the bridge is off-site it falls within CIL and consequently cannot be included within S106 has been shown to be based on a completely false assumption that absence of reference to development related off-site works constitutes a requirement that they be CIL funded.

One might expect a developer commissioned opinion to selectively present arguments that favour their client, but this letter ignores the Development Plan entirely and misrepresents the CIL List text as implying something that it doesn’t say.

### Planning Balance

Of greater concern is that the planning report accepts this selectively distorted opinion from Eversheds Sutherland and says that both parties agree that the wording of the CIL Regulation 123 List is explicit in requiring off-site work to be funded in part by CIL, and therefore a s106 contribution is not possible (6.44). Whilst the List does provide for CIL funding of other off-site canal works it does not state or in any way imply that this is the sole method of funding off-site works and that the policy provisions of the development plan should therefore be set aside. This is a preposterous interpretation.

It is clear therefore that the CIL arguments are a complete red herring that appear to have been introduced in an effort to sow confusion and cover up the failure of officers over several years to defend and implement adopted policies in the Development Plan.

At 6.45 it is admitted that non-delivery of the bridge and channel works will have adverse effects on the timescale and cost of delivery of the canal. The cost will be higher if delivered later due to: more restricted access for construction; the need to divert services over the bridge; the likely need for extensive canal cutting retaining walls if the development land levels have not been integrated with the canal; and the possible need for a temporary road diversion. Otherwise there will be prolonged disruption to the main road access to the site, with adverse effects on construction work, house sales, or new residents, depending at what later stage the canal works could be funded. In round figures, this could turn a £½m cost to the development into a £1m cost to the Canal Trust, and thus a £½m penalty on a local charity working to provide community benefits, which has every right to expect the Council’s Development Plan policy support for its work to be maintained and properly implemented.

### Further Misrepresentations and Errors

At 6.38 the report misrepresents the LHCRT legal opinion as saying that the IDP should carry equal weight to the LPS. But the legal opinion made no such claim for the IDP as a whole, merely that the specific sections of the IDP that are referenced in the LPS Policy Lichfield 6 as detailing the infrastructure requirements of the 3 South of Lichfield SDAs are legally part of that policy. The Council’s position that because the IDP is not itself a Local Plan its contents cannot have the same status is therefore wrong since these specific provisions within the IDP do have the same status. If that were not so then there would have been no basis for the Council requiring the St Johns site to include a canal bridge and channel works and there would be no basis for any other development site to be required to provide essential infrastructure identified in the IDP, with serious local implications for protection of the community interest in future developments. Therefore, the claim that the failure to

provide a bridge is not contrary to development plan policies and there is no requirement to do so is entirely mistaken.

At 6.46 it is conceded that the LPS required the SDAs to deliver off-site infrastructure, that the IDP clearly identifies the canal bridge and channel works will be delivered by the developer, and that the intended route was through S106 agreement. But it then seeks to avoid that requirement by claiming a CIL provision which is demonstrably incorrect. It also refers to the site boundaries which are not relevant. Its final excuse is the 'reasonableness' of the requirement in planning terms. However, this was considered when the LPS was being examined in 2014, and specific wording requiring these provisions was agreed as Main Modifications to be included within policy Lichfield 6. At Deans Slade Farm LPMM30 was to insert "including the provision of a new road bridge over the lowered canal channel and any further necessary canal channel works". The Inspector was aware of this and commented in his report that "the sites at Cricket Lane and Deanslade Farm also offer benefits such as ... provision of a section of canal" (para. 93), so he clearly considered that this was reasonable.

However, due to serious errors by the planning department these modifications were omitted from the adopted LPS. When we complained, IWA was assured that inclusion of the same wording in the IDP would achieve the same objective, but the planners now seek to renege on that intention. No evidence has been presented to support the contention that a requirement that was considered reasonable in 2014 is no longer so.

#### Conclusion

The final conclusion of the committee report (page 81) that the proposal as it stands is in conformity with the Development Plan is simply incorrect, and the recommendation to approve the applications without delivery of the key canal infrastructure is not balanced or appropriate.

Irrespective of whether the applicant thinks they should not have to bear the cost of the essential canal works, or whether they have been encouraged in that belief by planning professionals that should know better, it is a fact that the Lichfield Development Plan requires that provision and no amount of spurious arguments about what the CIL document does or does not say will change that.

#### The Decision

It is the responsibility of councillors on the planning committee to decide on this application. Normally that would follow the recommendation of the planning officers. But in this case it is apparent that the officer's report is fundamentally unsound in its assessment of the status of requirements of the IDP and of the relevance of CIL. Therefore, its conclusions are not balanced and are liable to legal challenge.

Members are requested to use their planning expertise and experience to ensure that this application is only approved if and when the S106 agreement is extended to cover funding for the design and construction of the necessary canal road bridge at Claypit Lane and any necessary canal channel works by the developer working with Lichfield & Hatherton Canals Restoration Trust, as required by the Development Plan policies (01.03.19).

#### **Additional/Amended Observations**

The comments of the Inland Waterways Association are noted. The points raised, reflect and expand upon the Association's previous comments and concerns regarding this proposed development and the officer's recommendation. These have been discussed and considered through the officer's main report, although there is an acknowledged difference

of opinion between the Association's and officer's view, regarding the delivery of the Claypit Lane canal bridge.

Paragraph 6.38 is amended for clarification to read:

"6.38 The relevant policies of the development plan have been set out above. It is noted that Policy IP1 of the Local Plan Strategy requires that *"The District Council will require all eligible development to provide the appropriate infrastructure on and off-site, in line with other policies of the Local Plan and the Infrastructure Delivery Plan"*. The IDP is not however a Local Plan nor can the contents be properly interpreted as having the same status of a development plan document and rather, as detailed within the Local Plan Strategy, it is *"a plan to implement the necessary social, physical and green infrastructure, required to create sustainable communities in line with the Local Plan"*. Thus, the LHCRT's legal opinion that the IDP should carry equal weight to the Local Plan Strategy is not supported. The IDP is however a published document of the Council and therefore is a material consideration in this planning application. Equally, the Regulation 123 list cannot be considered to have the status of a development plan document and rather, it is also a published document of the Council, being a material consideration in the determination of this application. This distinction is made due the primacy afforded to the development plan by the NPPF and the weight attributable to the documents."

Paragraph 6.46 states that the development is contrary to the IDP, due to the canal bridge not being delivered through a S106 agreement or directly by the developer. As a point of clarification, it should also therefore be noted that the development is contrary to an element of Policy IP1 in this regard.

This has no impact upon the officer's recommendation, to approve this application, but this consideration should therefore also be acknowledged within the last paragraph of the conclusion of the officer's report. Therefore, it is recommended to amend the wording of the last paragraph of the report to read as follows:

"Given the above assessment and the weight attributable to the delivery of residential development through the NPPF, whilst it is acknowledged that the development is contrary to an element of the requirements of Policy IP1 of the Local Plan Strategy, it is considered that there are sufficient material considerations to justify the proposal as submitted. Therefore, the recommendation, subject to the signing of a S106 agreement, is one of approval".

It is to be noted that a revised version of the NPPF was published on the 19 February 2019. The revisions have no bearing upon the conclusions of the report but have resulted in minor changes to the wording of certain paragraphs and their numbering as detailed below:

Paragraph 1.2 of the officer's report refers to paragraph 14 of the NPPF. This is now paragraph 11.

Paragraph 1.3 of the officer's report refers to paragraphs 49 and 50. This is now paragraph 11.

Paragraph 1.4 of the officer's report refers to paragraph 7. This is now paragraph 8. References to 'roles' should be amended to 'objectives'.

Paragraph 1.14 of the officer's report refers to paragraph 89. This is now paragraph 145.

Paragraph 1.15 of the officer's report refers to paragraphs 89 and 90. These are now paragraphs 145 and 146.

Paragraph 1.18 of the officer's report refers to paragraph 88. This is now paragraph 144.

Paragraph 3.1 of the officer's report refers to paragraph 34. This is now paragraph 102.

Paragraph 4.4 of the officer's report refers to paragraph 131. This is now paragraph 184.

Paragraph 4.8 of the officer's report refers to paragraph 134. This is now paragraph 196.

Paragraph 4.8 of the officer's report refers to paragraph 134. This is now paragraph 196.

Paragraph 7.4 of the officer's report refers to paragraph 118. This is now paragraph 175.

Paragraph 8.7 of the officer's report refers to paragraph 109. This is now paragraph 180, whilst the text has been amended slightly to state *"planning policies and decisions should also ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development"*.

Paragraph 9.3 of the officer's report refers to paragraph 112. This is now paragraph 170, which now advises that planning decision should recognise *"the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land"*.

Paragraph 10.1 of the officer's report refers to paragraph 9, 108 and 118. These are now paragraphs 174-177.

Replace the first sentence of Paragraph 10.2 with 'Paragraph 170 of the NPPF requires that planning decisions minimise *"impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures"*.

Paragraph 12.1 of the officer's report refers to paragraph 128. This is now paragraph 199, which states that Local Planning Authorities should *"require developers to record and advance understanding of the significance of any heritage assets to be lost (wholly or in part) in a manner proportionate to their importance and the impact, and to make this evidence (and any archive generated) publicly accessible. However, the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted"*.

LIST OF SPEAKERS

**PLANNING COMMITTEE MEETING**

4 March 2019

**17/01191/OUFMEI**

Christine Bull (Lichfield Canals & Hatherton Restoration Trust)

Objector

Rob Beattie (Taylor Wimpey)

Applicant