NORTON FARM,

BIRMINGHAM ROAD, BROMSGROVE

ADVICE

INTRODUCTION

1. In this matter I am asked to advise Gallagher Estates ("GE") whether the claim made by Worcestershire County Council ("WCC") through its Network Control Manager in relation to application 12/0709 in respect of land owned by GE at Norton Farm, Bromsgrove ("the Site") is CIL compliant.

2. Application 12/0709 is a proposal described in the consultation response from WCC made under Article 10 of the Town and Country Planning (General Development Procedure) Order 1995 as follows

   "Outline application with means of access for development comprising demolition of existing buildings and the construction of up to 316 dwellings; new accesses for vehicles, pedestrians and cyclists; provision of associated vehicular and cycle parking; creation of public open space and landscaped areas; sustainable drainage measures (including surface water attenuation areas); and all associated, enabling and ancillary works."

3. I have seen two Article 10 consultation responses from WCC relating to the same application: the first is dated 8 May 2013 and the second is dated 21 May 2013. The wording in each response is identical save that in the first the sum identified is £ 1,035,967.60 and in the second the sum identified is £ 951,564.48. I am yet to see an explanation as to why

(i) there are two consultation responses,

(ii) there is a difference of £ 84,403.12 between the first and the second.

4. The text in the first response reads as follows:

"The Network Control Manager, on behalf of the County Council, under Article 10 of the Town and Country Planning (General Development Procedure) Order, 1995:-

Recommends that the permission be refused for the following reasons:-

In order to deliver the growth proposed within the current local plan and draft core strategy 2, it will be necessary to maintain a transport network that is capable of minimising adverse impacts upon the economy and environment. Worcestershire County Councils objectives stated within the Local Transport Plan seek to deal with issues of accessibility, traffic congestion, journey times, journey time reliability and transport related costs imposed upon businesses and other network users. If these issues are not addressed, then they could adversely impact on the performance of the economy and the local environment, in terms of air quality, health and the ability to improve the quality of life.

The developer has not indicated that he is willing to contribute £ 1,035,967.60 towards mitigating against the impact his development on the local transport network which is considered harmful to safeguarding the economy and local environment of Bromsgrove and is therefore contrary to policies set out in the Worcestershire Local Transport Plan and saved Policy T1 and T2 of the County Structure Plan.

The impact of this development is considered to be to have a residual impact on the highway network and without mitigation the cumulative impact with the other development assumptions in the emerging core strategy will be severe, this is confirmed in the modelling work undertaken in the preparation of the transport assessment."

BACKGROUND

5. I have been provided with material relating to the application for development at the Site. The Site lies on the northern edge of Bromsgrove adjacent to the A38 to the south of its junction with the M42 at Junction 1.

6. The application was submitted in August 2012. Part of the supporting documentation included a Transport Assessment ("TA") prepared by Halcrow.

7. WCC responded to the TA by email of 23 October 2012 from Stephen Hawley. This identified a package of measures being sought by WCC. Having identified a package of measures, WCC requested a supplemental note to address the items raised and the email closed with this (ominous) observation:

   "Finally Worcestershire County Council has undertaken a piece of work on behalf of Bromsgrove District Council to consider the uplift of the development

traffic for all cores strategy sites and develop a infrastructure list to impact can be fairly distributed. The BDM tried to deal with this to a degree but this has stepped on and there is policy to support this when it came onboard. Notwithstanding the works you are proposing and the S106 requirements above you may have to contribute to the overall towns infrastructure proportionate to your development impact. As this is likely to be a material consideration at the time of determination I need to advise you of this and will update you shortly when the impact of your development has been considered against this emerging policy."

8. The Highways Agency ("HA") has responsibility for M42 J1 within the vicinity of the site. HA provided its own Article 10 consultation response in relation to the application by letter of 27 September 2012. This letter concluded that it offered no objection to the grant of planning permission subject to the imposition of a condition which required the creation, agreement and delivery of a Framework Travel Plan. The relevant extract of the letter reads as follows:

"However, the Highways Agency is satisfied that the likely risk to the SRN arising from the scale of development in this instance is such that it would not be appropriate to require any further capacity assessment work to be undertaken at this stage. However, in order to ensure that the development's impacts are minimised and that, following implementation, there will be provisions for monitoring and management of development traffic, it is considered that a detailed Residential Travel Plan should be prepared and agreed, prior to occupation.

This Residential Travel Plan should build on the existing Framework Travel Plan (which has been submitted with the current proposals) to provide a greater level of assurance regarding the developer's commitment to achieving modal shift targets, and also to define more clearly the mechanisms which will be put *in place to ensure appropriate targets are met, including provisions for monitoring and for the implementation of remedial measures in the event that targets are not met.*

On this basis, we attach our formal response to this application which confirms no objection, subject to the imposition of a pre-occupation condition which will require a detailed Residential Travel Plan to be agreed with the local authority, in consultation with the Highways Agency, prior to occupation of this development."

9. It is of some considerable practical importance that the HA did not regard any physical works as necessary at M42 J1 as a result of the development traffic generated by this development.

10. Halcrow provided the additional Technical Note ("TN") requested by WCC to supplement the TA on 7 February 2013. It identified the following S106 contributions which the applicant was prepared to pay.

"A number of S106 contributions were outlined in WCC's original response email, the contributions sought are as follows:

- *4 gold standard bus shelters split between the Birmingham Road and Stourbridge Road stops - £40,000;*

- *Improvement to existing Toucan crossing at southern end of Birmingham Road - £25,000;*

- *Contribution towards MOVA at the Birmingham Road/The Strand/Stourbridge Road/Market Street junction - £26,000;*

- *Improvements to public right of way linking site with Stourbridge Road (unspecified amount); and*

- *Improvements to cycle links between the site and local routes on Upland Grove and Barnsley Hall (unspecified amount).*

These S106 contributions are acceptable to the applicant, and will be set out within the S106 Heads of Terms."

11. The next communication from WCC was its own TN of 22 February 2013. This referred to the wider package of measures referred to in the email of 23 October 2012. This TN referred to the Bromsgrove Transport Infrastructure Delivery Plan ("BTIDP"). It also described the total cost of all measures identified in the BTIDP to bring about necessary infrastructure improvements in the area as £27,675,000. It calculated the applicant's share of this as £ 1,035,967.60 - the same sum referred to in the first Article 10 response dated 8th May 2013.

12. Barton Willmore ("BW") wrote to WCC on 1 March 2012 on behalf of GE in respect of this new element of claim. A variety of points were made in respect of the claim and in particular WCC were challenged to justify the claim having regard to Regulation 122 (2) of the Community Infrastructure Levy Regulations 2010 ("CIL").

13. WCC replied to the BW letter by further TN of 13 March 2013. The reply did not specifically address BW's request to justify the claim by reference to the three elements of Regulation 122 (2). The TN denied that the "sum claimed represented double counting" in these terms

"The contribution methodology has been established to avoid 'double counting' of contributions towards the site specific and the wider transport infrastructure

needed to support the planned growth. The costs of the site specific schemes are excluded from the cost of the wider strategic measures needed to support the emerging Bromsgrove District Plan and the adopted Bromsgrove Local Plan. Contributions towards the identified schemes to mitigate the cumulative impact does not negate the requirement for site specific measures required to meet Worcestershire County Council adopted LTP3 Development Control policy.

In summary, the contribution is based upon the size and scale of development and is directly related to trips generated from the development."

Although this assertion was made, no calculations were provided to demonstrate how the sum claimed was arrived at or how the identified and costed "site specific" schemes had been credited against the BTIDP global sum.

14. WCC provided a further TN dated 5 April 2013 which again sought to explain how the BTIDP claim was calculated. In the background section the TN states

"Worcestershire County Council (WCC) have been commissioned by Bromsgrove District Council (as the Local Planning Authority) to identify the transport related infrastructure and services needed to support the delivery of the emerging Bromsgrove District Plan (BDP)."

The assertion that WCC is acting on behalf of BDC in terms of identifying transport infrastructure is noteworthy given the position that BDC has adopted in relation to WCC's claim as will be seen below.

15. Table 1 of the TN of 5 April 2012 identified a series of infrastructure measures in and around Bromsgrove, most of which would have no relevance to the proposed development. The total cost of all the schemes comes to £ 27,650,000

(as opposed to £ 27,675,000 identified in the TN of 22 February 2013 – the slight difference may represent an arithmetical error).

16. There has been further exchange of emails between BW / Halcrow / WCC which can be summarised in this way : WCC maintains that

(i) its claim is CIL compliant;

(ii) there is no "double counting"

(iii) it has a legal opinion (which it is not prepared to share).

WCC's final word on the subject is an email from Stephen Hawley responding to a request for a meeting to explore middle ground

"We clearly have a fundamental difference of opinion here and I do not consider a meeting will resolve this. WCC has made their representation to the planning authority based and this is a position that we are happy to defend should this get as far as a planning inspector. Therefore we are declining the opportunity to meet on the grounds that we have made our position clear and we are not prepared to considered a reduced offer against or an alternative specific purpose."

17. The background is completed by seeing the position adopted by BDC in relation to WCC's claim. BDC produced a Committee Report recommending grant of planning permission in respect of the site for the Committee Meeting of 13 May 2012. It advised as follows in relation to WCC's claim:

"Members should note that there is an objection from Worcestershire Highways in respect of the requirement for contributions towards District wide

infrastructure development and improvement. This forms part of the emerging Bromsgrove Transport Infrastructure Delivery Plan BTIDP which is currently at an early stage of development. The plan will seek to deliver a phased investment in transport and other infrastructure.

However, the additional financial contribution sought by WH (which is additional to the site specific highway mitigation measures already agreed) is not considered to be justifiable. No evidence has been provided to demonstrate what the money would be used for, how the amount has specifically been calculated, or why this particular development should contribute this money over and above the other contributions to schemes that are required as a result of the proposed development. This information appears not to be available to the agents or to the public, and therefore it would be unreasonable to seek these contributions from the applicant. The applicant has agreed to enter into a S106 Agreement in respect of the other site specific highway financial requests made in relation to this application. However, they consider the IDP request unjustified and unreasonable and are therefore not willing to make this payment. As there is no justification to seek the payment, it would also be considered unreasonable to seek to refuse the application in the absence of it. In the event that the IDP is adopted at a later date, then it will carry significantly more weight in the decision making process consistent with paragraph 204 of the NPPF which sets out detailed tests for planning obligations. They need to be necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in kind and scale to the development."

<u>THE DEVELOPMENT PLAN</u>

18. Section 38 (6) of the 2004 Act requires that

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

The consultation response from WCC refers to policy DS11 of Bromsgrove District Local Olan to justify the claim.

Policy DS11 provides

"... where appropriate, agreement with developers will be sought to meet their reasonable costs to the community through planning obligations to provide for: (a) on or off-site facilities directly arising from the development such as additional educational, community, recreational or other infrastructure which may reasonably be required as a result of the scheme; or (b) compensatory works to mitigate for the loss of any environmental or community resources resulting from the development; or (c) the implementation of a local plan policy (e.g. affordable housing)."

19. The consultation response also refers to various policies in the emerging Bromsgrove Local Plan including CP24 which seeks to secure developer contributions towards different types of infrastructure provision that are necessary to make a scheme acceptable in planning terms, the nature and scale of which will be related to the type of development and its potential impact on the area. For the purposes of this Opinion it is essential to note that the method which the emerging Local Plan intends to use to collect such contributions will be the CIL. It is equally important to note that no practical progress to date has been made with regard to introducing a Charging Schedule within Bromsgrove District. The detailed procedures necessary to identify (and have approved) a

Charging Schedule are set out in the Planning Act 2008. These procedures have not yet made any meaningful progress.

20. The fact that BDC has determined that the appropriate method of collection of the developer contributions should be by Charging Schedule is critical to answering the question that I have been posed. The relevant policy in the emerging Plan is yet to be examined for "soundness" at the BDC Local Plan examination. Furthermore the necessary CIL procedures have made no practical progress. WCC's claim is being made as if a Charging Schedule were in place – which it is not.

21. Before any Charging Schedule could be approved it would need to be examined and approved – just as the emerging Local Plan is required to be examined. In this context it is important to see relevant guidance on these procedures below.

<u>LEGAL REQUIREMENTS AND GUIDANCE RELATING TO S106 OBLIGATIONS</u>

22. Regulation 122 (2) of CIL provides as follows

"(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

(a) necessary to make the development acceptable in planning terms;
(b) directly related to the development; and
(c) fairly and reasonably related in scale and kind to the development."

23. The Framework contains similar provision at para 204

"Planning obligations should only be sought where they meet all of the following tests:

- *necessary to make the development acceptable in planning terms;*
- *directly related to the development; and*
- *fairly and reasonably related in scale and kind to the development."*

It follows from these requirements that any S106 requirements which was not

- necessary
- directly related to the development and
- fairly and reasonably related in scale and kind to the development

would conflict with both Regulation 122(2) of CIL and the relevant provisions in the Framework. Any such conflict would represent strong evidence of unreasonable behaviour by an authority making such a request. The financial consequences of unreasonable behaviour are considered below.

24. It is right to note that the Framework encourages provision of infrastructure through the Local Pan process

"*Crucially, Local Plans should:*

- *plan positively for the development and infrastructure required in the area to meet the objectives, principles and policies in the Framework: …" (para 157 NPPF)*

However, the Framework is clear as to the appropriate way to put such necessary infrastructure in place

"175. Where practical, Community Infrastructure Levy charges should be worked up and tested alongside the Local Plan. The Community Infrastructure Levy should support and incentivise new development, particularly by placing control over a meaningful proportion of the funds raised with the neighbourhoods where development takes place."

"177. It is equally important to ensure that there is a reasonable prospect that planned infrastructure is deliverable in a timely fashion. To facilitate this, it is important that local planning authorities understand district-wide development costs at the time Local Plans are drawn up. For this reason, infrastructure and development policies should be planned at the same time, in the Local Plan. Any affordable housing or local standards requirements that may be applied to development should be assessed at the plan-making stage, where possible, and kept under review."

25. This advice has apparently been followed by BDC because Core Policy 24 in its emerging Local plan seeks to require developer contribution to infrastructure provisions by way of a Community Infrastructure Levy. As stated above, this process has not yet been formally progressed and the LP itself awaits its examination for "soundness".

26. The Framework has clear safeguards in place so that claims under S106 or through a CIL regime should not affect viability.

"173. Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable.

Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable."

"176. Where safeguards are necessary to make a particular development acceptable in planning terms (such as environmental mitigation or compensation), the development should not be approved if the measures required cannot be secured through appropriate conditions or agreements. The need for such safeguards should be clearly justified through discussions with the applicant, and the options for keeping such costs to a minimum fully explored, so that development is not inhibited unnecessarily."

It is noteworthy that WCC has not demonstrated any awareness of the potential impact on viability of its charges on the developments in respect of which it intends to make a claim. This conflicts with the guidance in the Framework in this respect. It also serves to demonstrate the fundamental flaw in its approach because if a Charging Schedule had been set for BDC, it would have had to demonstrate that it did not adversely affect the viability of the projects which were subject of charges. This necessary and important part of the CIL process has been completely sidestepped by the WCC approach.

27. WCC's Article 10 response claims that the sums requested are justified by reference to policy DS11 of the 2004 Local Plan and saved policies in the draft Local Plan. Para 216 of the Framework provides

"From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:

- *the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);*
- *the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and*
- *the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."*

This means that little weight can be attached to an, as yet, untested draft plan. Similar provisions exist in the still extant document "*The Planning System: General Principles*". Even if it <u>were</u> possible to afford Policy 24 weight, the Policy itself expressly refers to the use of CIL. WCC's demands have ignored the correct CIL procedures which have not yet started. There is, therefore, no approved Charging Schedule in place.

28. LP policy DS11 means that claims can only be made for on or off site facilities where the need for that facility <u>arises directly from the development</u> or other infrastructure becomes necessary which may reasonably be required as a result of the scheme. This approach is broadly consistent with para 204 of the Framework and Regulation 122 of CIL, accordingly it passes the test in para 215 of the Framework.

"In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

29. Failure to act in accordance with well established national policy is an example of where costs will be awarded against a planning authority. Circular 03/09 para B29 provides

"The following are examples which m ay lead to an award of costs against a planning authority

- *ignoring relevant national policy – for example, the advice in PPG8 on Telecommunications concerning health risks arising from a mobile phone base station"*

WCC's email of 17 May (set out above) advises that

"... we are happy to defend (their representation to BDC) should this get as far as a planning inspector."

However, any costs awarded at a planning appeal would be against the planning authority as para D7 of the Circular makes clear.

"A statutory consultee who is asked by the local planning authority to provide a technical or expert witness at the inquiry or hearing will not be regarded as a separate party in its own right liable to an award of costs. In that situation, the planning authority will be treated as the party expected to defend any appropriate costs application made. …"

30. Based on BDC's present (correct) stance that WCC's claim is not justified then an appeal will not be necessary because no requirement will be made of GE in respect of WCC's claim. BDC is obliged to have regard to WCC's consultation response but it is not obliged to follow that advice - as B23 of the Circular makes clear.

"Similarly, planning authorities are expected to give thorough consideration to relevant advice or representations from statutory consultees such as the Environment Agency or English Heritage, or from a county council as highway authority, before determining a planning application. While it is the primary responsibility of planning authorities to either accept or reject that advice, they should clearly understand the basis for doing so and should provide, where necessary, a clear and rational explanation of the position taken. ..."

CONCLUSIONS

31. The claim that WCC is making is without any foundation in the DP whatsoever. The relevant provision at DS11 means that the only claims that should be made are those which are based on the cost of measures directly arising from the development and/or infrastructure made necessary by the scheme. Nowhere does WCC claim that its £27m "shopping list" is attributable to this scheme. Nor does it identify what part of this package is made necessary by the development.

32. The claim is also in fundamental conflict with the requirements of CIL and para 204 of the Framework. WCC's claim mounts to the unilateral imposition of a charging schedule without any of the necessary procedures having been undertaken.

33. What WCC seeks to do is in effect to create its own charging schedule but without complying with the necessary steps of examination, including, inter alia, proof of no adverse effect on viability. It also seeks to avoid the necessary approval of its de facto Charging Schedule by an Independent Examiner as the procedures under the Planning Act 2008 require.

34. If BDC were to follow the advice given by WCC it would put itself at risk of a costs application which would be successful. As things presently stand, BDC has (rightly) concluded that WCC's claim is not justified. It is somewhat ironic that WCC claims (TD 5 April 2013) that is has been commissioned by BDC to identify services needed to support the delivery of the emerging Local Plan and yet BDC is stating very clearly in the Committee Report that WCC's claim is not justified.

35. WCC asserts its has legal opinion (email 1 May 2013). I would be very interested to see who it is from and what it says as the approach WCC is taking in this case is very far from being CIL compliant in my view. The correct approach to Section 106 highway contributions would be to make provision for the site specific measures that were identified earlier on in the process as set out above.

36. So far as this opinion is concerned I am happy for it to be shown to BDC and indeed anyone else that my client wishes to disclose it to.

37. I will be happy to advise further if called upon so to do.

2 June 2013 **Jeremy Cahill QC**

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