localplans@charnwood.gov.uk

From: Bob Woollard <bob.woollard@panddg.co.uk>
Sent: 03 September 2024 09:28
To: localplans@charnwood.gov.uk
Cc: tom.dillarstone@williamdavis.co.uk
Subject: Consultation on Main Modifications to the Charnwood Local Plan 2021- 2037
Attachments: DM1 & D20 - William Davis Homes Ltd.docx; MM27 - William Davis Homes Ltd.docx; MM28 - William Davis Homes Ltd.docx; MM97 - William Davis Homes Ltd.docx; MM158 - William Davis Homes Ltd.docx; William Davis LCC CTCS Opinion.pdf

Hi

Please find attached our representations to the Main Modifications Consultation on behalf of William Davis Homes Ltd, along with a legal opinion that accompanies the representations in relation to MM158.

I would be grateful if you could acknowledge receipt. Thanks.

Best regards

Bob Woollard BA(Hons) MA MRTPI
Director

M:07817120602

Advance notice of leave: 12th to 26th August

Midlands Office - Planning and Design Group (UK) Ltd, Pure Offices, Lake View Drive, Sherwood Park, Nottingham NG15 0DT
01623 726256 midlands@panddg.co.uk

London Office - Planning and Design Group (UK) Ltd, 5 St John's Lane, London EC1M 4BH
020 7549 2858 london@panddg.co.uk

Oxford Office - Planning and Design Group (UK) Ltd, Bee House, 140 Eastern Avenue, Milton Park, Oxfordshire OX14 4SB
01235 854008 oxford@panddg.co.uk

Website: www.panddg.co.uk
LinkedIn: Planning and Design Group

For responding to:
- **Main Modifications** (EXAM 81-83)
- **Housing Land Supply** (EXAM 58J – 58M)

arnwood Local an 2021-2037
ain Modifications presentation Form

Ref:

(For official use only)

Please return to Charnwood Borough Council by 5PM on 4th September 2024 by:

- **Email: localplans@charnwood.gov.uk**
- **Post: Local Plans, Charnwood Borough Council Southfield Road, Loughborough, LE11 2TX**

The Privacy Statement can be found at: www.charnwood.gov.uk/privacy

This form has two parts –
Part A – Personal Details: need only be completed once.
Part B – Your representation(s). Please fill in a separate sheet for each representation you wish to make.

Part A

	1. Personal Details*	2. Agent's Details (if applicable)
	**If an agent is appointed, please complete only the Title, Name and Organisation (if applicable) boxes below but complete the full contact details of the agent in 2.*	
Title	Mr	Mr
First Name	Tom	Bob
Last Name	Dillarstone	Woollard
Job Title (where relevant)		
Organisation (where relevant)	William Davis Homes Ltd	Planning and Design Group
Address Line 1		Pure Offices
Line 2		Lake View Drive
Line 3		Sherwood Park
Line 4		Nottingham
Post Code		NG15 0DT
Telephone Number		07817120602
E-mail Address		bob.woollard@panddg.co.uk

(where relevant)

Part B – Please use a separate sheet for each representation

Name or Organisation:

3. To which modification to the Local Plan or to the Local Plan diagrams does this representation relate?

Modification Reference	DM1 & DM20

4. Do you consider the modification is (please tick as appropriate):

4.(1) Legally compliant	Yes	✓	No	
4.(2) Sound	Yes		No	✓

5. Please give details of why you consider the modification is not legally compliant or is unsound. Please be as precise as possible.
If you wish to support the legal compliance or soundness of the modification, please also use this box to set out your comments.

DM1 & DM20 refer to the updates to the Local Plan Diagrams.

The 'indicative diagram' for HA43 Land to the West of Anstey is fundamentally flawed and unsound, because the boundary does not contain sufficient area to deliver the site and specifically the associated infrastructure needed to support the development. At the northern end, it will be necessary to provide a new priority junction to Bradgate Road to the north of the currently identified allocation. Without this, a through route from Bradgate Road to Groby Road cannot be created and the impacts of traffic will be increased on The Nook.

Further, the dark orange areas are identified to be housing parcels, which means that when the provision of open space, landscape buffers and the relationship to the Conservation Area is taken into account, there is no identified location for an 2FE area for a school, which will necessarily have to be located outside of the allocation.

Finally, detailed landscape appraisal has demonstrated that the boundaries of the HA43 allocation unnecessarily and artificially constrain the developable area of the site, stifling the potential of the site to more beneficially deliver growth requirements and deliver infrastructure.

The diagram as proposed jeopardises the delivery of the allocation as it will directly result in elements of the development having to fall outside of the allocation, risking a conflict with policy.

As such defining these areas so directly in the absence of detailed site evidence risks delivery, is inflexible and wholly unsound.

(Continue on a separate sheet /expand box if necessary)

6. Please set out the change(s) to the modification you consider necessary to make it legally compliant and sound, in respect of any legal compliance or soundness matters you have identified at 5 above. You will need to say why each change will make the Local Plan legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of any policy or text. Please be as precise as possible.

In order to ensure that the modification is sound, it is necessary to ensure and acknowledge, in the both policy wording and the diagram, that the diagram is indicative only and not necessarily an absolute expression of the developable area. Clearly, the scale and level of detail contained in the diagram is not sufficient to provide accurate detail on the extent of the development, but it needs to be clearer in acknowledging the need for access and infrastructure.

As a minimum, the supporting text and diagram must recognise that supportive infrastructure may need to be delivered adjoining the allocation, in line with the evidence submitted to the Local Plan Examination and the detailed master plan submitted through planning application ref: P/21/2359/2.

The diagram needs to be amended to ensure, as a minimum, that the allocation includes land necessary to provide access to Bradgate Road and the required school site.

(Continue on a separate sheet /expand box if necessary)

7. Please set out any comments that you have on the updated housing land supply documents:

EXAM 58J: Housing Trajectory Update 2024
EXAM 58K: Housing Trajectory Update Notes July 2024
EXAM 58L: Update to Five Year Supply on Adoption May 2024
EXAM 58M: Updated Housing Land Supply Site List April 2024

(Continue on a separate sheet /expand box if necessary)

Please note *In your representation you should provide succinctly all the evidence and supporting information necessary to support your representation and your suggested modification(s). You should not assume that you will have a further opportunity to make submissions.*

8. Signature:	[redacted]	Date:	02/09/24

For responding to:
- **Main Modifications** (EXAM 81-83)
- **Housing Land Supply** (EXAM 58J – 58M)

arnwood Local an 2021-2037
ain Modifications presentation Form

Ref:

(For official use only)

Please return to Charnwood Borough Council by 5PM on 4th September 2024 by:

- **Email: localplans@charnwood.gov.uk**
- **Post: Local Plans, Charnwood Borough Council Southfield Road, Loughborough, LE11 2TX**

The Privacy Statement can be found at: www.charnwood.gov.uk/privacy

This form has two parts –
Part A – Personal Details: need only be completed once.
Part B – Your representation(s). Please fill in a separate sheet for each representation you wish to make.

Part A

	1. Personal Details*	2. Agent's Details (if applicable)
	**If an agent is appointed, please complete only the Title, Name and Organisation (if applicable) boxes below but complete the full contact details of the agent in 2.*	
Title	Mr	Mr
First Name	Tom	Bob
Last Name	Dillarstone	Woollard
Job Title (where relevant)		
Organisation (where relevant)	William Davis Homes Ltd	Planning and Design Group
Address Line 1		Pure Offices
Line 2		Lake View Drive
Line 3		Sherwood Park
Line 4		Nottingham
Post Code		NG15 0DT
Telephone Number		07817120602
E-mail Address		bob.woollard@panddg.co.uk

(where relevant)

Part B – Please use a separate sheet for each representation

Name or Organisation:

3. To which modification to the Local Plan or to the Local Plan diagrams does this representation relate?

Modification Reference	MM27

4. Do you consider the modification is (please tick as appropriate):

4.(1) Legally compliant	Yes	✓	No	
4.(2) Sound	Yes		No	✓

5. Please give details of why you consider the modification is not legally compliant or is unsound. Please be as precise as possible.
If you wish to support the legal compliance or soundness of the modification, please also use this box to set out your comments.

While the aspirations of MM27 are sound, practically, on sites that have multiple ownerships, or contractual obligations for delivery, is it would be wholly impractical to require full comprehensive design and layout. It is recognised that the wording does not go so far as to require comprehensivity, but it must also acknowledge the imperative to deliver should not be impeded by the failure of a party or parties to engage with others acting positively and proactively. National Planning Policy is emphatic about the need to deliver new homes and the plan should not unwittingly impose further barriers.

Similarly, the laudable desire to provide appropriately collaborative highways solutions, must not prevent the delivery of much needed housing provided that safe access can be provided without server impacts on the local highway network. Bullet i) suggests that a proliferation of new site access point might raise deliverability risks, when in fact the reverse is more likely to be the case. In addition the need for greater site accessibility and connectivity should not be stifled by a misguided notion that fewer access points are better.

The modification is not sound because it risks inhibiting the deliverability of allocated sites.

(Continue on a separate sheet /expand box if necessary)

6. Please set out the change(s) to the modification you consider necessary to make it legally compliant and sound, in respect of any legal compliance or soundness matters you have identified at 5 above. You will need to say why each change will make the Local Plan legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of any policy or text. Please be as precise as possible.

The design and layout of development can contribute to managing its impact on, and accessibility to, infrastructure. We ~~expect~~ encourage the design and layout of development on our allocated sites to be considered comprehensively with development at nearby sites, especially with regards to the following clusters of adjacent or adjoining sites:

- *Syston – sites HA1, HA2, HA3 and HA8*
- *Loughborough – sites HA15, HA16 and HA17.*
- *Loughborough – HA18 and LUC3 (Loughborough Science and Enterprise Park)*
- *Shepshed (West) – HA32 and HA34*
- *Shepshed (South) – HA39, HA40 and HA41*
- *Barrow upon Soar – HA45 and HA46*
- *Queniborough – HA64 and HA65*

Proposals should respond positively to opportunities for integrating infrastructure provision between sites, including in respect of site access arrangements, other highways and transport requirements and landscaping and other green infrastructure. For highways and transport, this particularly relates to:

i. *avoiding a proliferation of new site access points ~~and~~ unless required to avoid potential deliverability risks and where safe to do so ~~(e.g. due to highway safety or capacity issues);~~*
ii. *avoiding duplication and/or conflict between sites in respect of other localised off-site transport requirements (e.g. the installation of new footways, cycleways, crossing facilities, bus stops or passenger transport service provision); and*
iii. *facilitating opportunities to provide joint/linked on-site transport infrastructure in those cases where sites directly adjoin, for instance the provision of spine road(s), walking and cycling facilities and/or passenger transport services that connect through/between the sites (unless this would jeopardise delivery), which may reduce or negate some of the likely off-site transport infrastructure requirements described through (i) and (ii) above.*

(Continue on a separate sheet /expand box if necessary)

7. Please set out any comments that you have on the updated housing land supply documents:

EXAM 58J: Housing Trajectory Update 2024
EXAM 58K: Housing Trajectory Update Notes July 2024
EXAM 58L: Update to Five Year Supply on Adoption May 2024
EXAM 58M: Updated Housing Land Supply Site List April 2024

(Continue on a separate sheet /expand box if necessary)

Please note *In your representation you should provide succinctly all the evidence and supporting information necessary to support your representation and your suggested modification(s). You should not assume that you will have a further opportunity to make submissions.*

8. Signature:		Date:	02/09/24

For responding to:
- **Main Modifications** (EXAM 81-83)
- **Housing Land Supply** (EXAM 58J – 58M)

Charnwood Local Plan 2021-2037

Main Modifications Representation Form

Ref:

(For official use only)

Please return to Charnwood Borough Council by 5PM on 4th September 2024 by:

- **Email: localplans@charnwood.gov.uk**
- **Post: Local Plans, Charnwood Borough Council Southfield Road, Loughborough, LE11 2TX**

The Privacy Statement can be found at: www.charnwood.gov.uk/privacy

This form has two parts –
Part A – Personal Details: need only be completed once.
Part B – Your representation(s). Please fill in a separate sheet for each representation you wish to make.

Part A

	1. Personal Details*	2. Agent's Details (if applicable)
	**If an agent is appointed, please complete only the Title, Name and Organisation (if applicable) boxes below but complete the full contact details of the agent in 2.*	
Title	Mr	Mr
First Name	Tom	Bob
Last Name	Dillarstone	Woollard
Job Title (where relevant)		
Organisation (where relevant)	William Davis Homes Ltd	Planning and Design Group
Address Line 1		Pure Offices
Line 2		Lake View Drive
Line 3		Sherwood Park
Line 4		Nottingham
Post Code		NG15 0DT
Telephone Number		07817120602
E-mail Address		bob.woollard@panddg.co.uk

(where relevant)

Part B – Please use a separate sheet for each representation

Name or Organisation:

3. To which modification to the Local Plan or to the Local Plan diagrams does this representation relate?

Modification Reference	MM28

4. Do you consider the modification is (please tick as appropriate):

4.(1) Legally compliant	Yes	✓	No	
4.(2) Sound	Yes		No	✓

5. Please give details of why you consider the modification is not legally compliant or is unsound. Please be as precise as possible.
If you wish to support the legal compliance or soundness of the modification, please also use this box to set out your comments.

MM28 refers to the diagrams as assisting with the interpretation of policies. Notably the diagram for HA43 is proposed to be amended, because the LEA did not agree with the identified school location. This highlights a specific danger in referring the these indicative growth locations as 'illustrative diagrams'. The wording confers a degree of fixedness and inflexibility which may not adapt to requirements emerging through more detailed evidence prepared for planning applications. As such, referring to them as *'illustrative diagrams to assist with interpreting policy'* and identifying areas in *'darker orange, where housing should be located within the allocation boundary'* restricts the flexibility to respond to context and constraints issues, or opportunities to enhance the local environment and local infrastructure, some of which might practically have to be delivered adjoining the identified site. As such defining these areas so directly in the absence of detailed site evidence risks delivery, is in flexible and wholly unsound.

(Continue on a separate sheet /expand box if necessary)

6. Please set out the change(s) to the modification you consider necessary to make it legally compliant and sound, in respect of any legal compliance or soundness matters you have identified at 5 above. You will need to say why each change will make the Local Plan legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of any policy or text. Please be as precise as possible.

2.65. For a number of sites, we have included site specific policies that are required to address specific constraints, wider objectives or other issues related to those sites. Site policies should be read in conjunction with the place-based and topic-based policies in the plan. If there is no site policy this means that the issues relating to that site are adequately addressed by applying place-based and topic-based policies in this local plan. ~~Some of the site policies are accompanied by illustrative diagrams to assist with interpreting the policies. In some cases these diagrams show, in darker orange, where housing should be located within the allocation boundary.~~ When development is complete, designations of Countryside, Areas of Local Separation and Green Wedge will extend into the allocation up to the edge of the built form of the development.

7. Please set out any comments that you have on the updated housing land supply documents:

EXAM 58J: Housing Trajectory Update 2024
EXAM 58K: Housing Trajectory Update Notes July 2024
EXAM 58L: Update to Five Year Supply on Adoption May 2024
EXAM 58M: Updated Housing Land Supply Site List April 2024

(Continue on a separate sheet /expand box if necessary)

Please note *In your representation you should provide succinctly all the evidence and supporting information necessary to support your representation and your suggested modification(s). You should not assume that you will have a further opportunity to make submissions.*

8. Signature: [redacted]

Date: 02/09/24

For responding to:
- **Main Modifications** (EXAM 81-83)
- **Housing Land Supply** (EXAM 58J – 58M)

arnwood Local an 2021-2037
ain Modifications presentation Form

Ref:

(For official use only)

Please return to Charnwood Borough Council by 5PM on 4th September 2024 by:

- **Email: localplans@charnwood.gov.uk**
- **Post: Local Plans, Charnwood Borough Council Southfield Road, Loughborough, LE11 2TX**

The Privacy Statement can be found at: www.charnwood.gov.uk/privacy

This form has two parts –
Part A – Personal Details: need only be completed once.
Part B – Your representation(s). Please fill in a separate sheet for each representation you wish to make.

Part A

	1. Personal Details*	2. Agent's Details (if applicable)
	**If an agent is appointed, please complete only the Title, Name and Organisation (if applicable) boxes below but complete the full contact details of the agent in 2.*	
Title	Mr	Mr
First Name	Tom	Bob
Last Name	Dillarstone	Woollard
Job Title (where relevant)		
Organisation (where relevant)	William Davis Homes Ltd	Planning and Design Group
Address Line 1		Pure Offices
Line 2		Lake View Drive
Line 3		Sherwood Park
Line 4		Nottingham
Post Code		NG15 0DT
Telephone Number		07817120602
E-mail Address		bob.woollard@panddg.co.uk

(where relevant)

Part B – Please use a separate sheet for each representation

Name or Organisation:

3. To which modification to the Local Plan or to the Local Plan diagrams does this representation relate?

Modification Reference	MM97

4. Do you consider the modification is (please tick as appropriate):

	Yes		No	
4.(1) Legally compliant	Yes	✓	No	
4.(2) Sound	Yes		No	✓

5. Please give details of why you consider the modification is not legally compliant or is unsound. Please be as precise as possible.
If you wish to support the legal compliance or soundness of the modification, please also use this box to set out your comments.

In order to ensure that the MM97 is sound, it is necessary to ensure that the approach to the seeking of contributions would meet the conventional policy tests, and which could then be sought and taken into account where they meet the test of materiality. This would ensure that the contributions would be CIL compliant. As it stands the modification is not sufficiently clear that contributions must be proportionate and must only seek to mitigate impacts arising directly from the development proposed

(Continue on a separate sheet /expand box if necessary)

6. Please set out the change(s) to the modification you consider necessary to make it legally compliant and sound, in respect of any legal compliance or soundness matters you have identified at 5 above. You will need to say why each change will make the Local Plan legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of any policy or text. Please be as precise as possible.

ensures the timely and coordinated delivery of infrastructure to support sustainable communities and address ~~cumulative~~ impacts arising from the development proposed, with coordination across authority boundaries as necessary in accordance with Policy INF1 and INF2 including: - contributing to new primary schools in Anstey and Barrow upon Soar with additional primary school capacity at Cossington to serve Sileby; and
- ~~contributing~~ appropriate and relevant contributions to the measures to be identified through the relevant Transport Strategy for either the Soar Valley or the North of Leicester to be prepared under INF2, where impacts arise from the development proposed;

7. Please set out any comments that you have on the updated housing land supply documents:

EXAM 58J: Housing Trajectory Update 2024
EXAM 58K: Housing Trajectory Update Notes July 2024
EXAM 58L: Update to Five Year Supply on Adoption May 2024
EXAM 58M: Updated Housing Land Supply Site List April 2024

(Continue on a separate sheet /expand box if necessary)

Please note *In your representation you should provide succinctly all the evidence and supporting information necessary to support your representation and your suggested modification(s). You should not assume that you will have a further opportunity to make submissions.*

8. Signature: [redacted] Date: 02/09/24

For responding to:
- **Main Modifications** (EXAM 81-83)
- **Housing Land Supply** (EXAM 58J – 58M)

Charnwood Local Plan 2021-2037

Main Modifications Representation Form

Ref:

(For official use only)

Please return to Charnwood Borough Council by 5PM on 4th September 2024 by:

- **Email: localplans@charnwood.gov.uk**
- **Post: Local Plans, Charnwood Borough Council Southfield Road, Loughborough, LE11 2TX**

The Privacy Statement can be found at: www.charnwood.gov.uk/privacy

This form has two parts –
Part A – Personal Details: need only be completed once.
Part B – Your representation(s). Please fill in a separate sheet for each representation you wish to make.

Part A

	1. Personal Details*	2. Agent's Details (if applicable)
	**If an agent is appointed, please complete only the Title, Name and Organisation (if applicable) boxes below but complete the full contact details of the agent in 2.*	
Title	Mr	Mr
First Name	Tom	Bob
Last Name	Dillarstone	Woollard
Job Title (where relevant)		
Organisation (where relevant)	William Davis Homes Ltd	Planning and Design Group
Address Line 1		Pure Offices
Line 2		Lake View Drive
Line 3		Sherwood Park
Line 4		Nottingham
Post Code		NG15 0DT
Telephone Number		07817120602
E-mail Address		bob.woollard@panddg.co.uk

(where relevant)

Part B – Please use a separate sheet for each representation

Name or Organisation:

3. To which modification to the Local Plan or to the Local Plan diagrams does this representation relate?

Modification Reference	MM97

4. Do you consider the modification is (please tick as appropriate):

4.(1) Legally compliant	Yes	✓	No	
4.(2) Sound	Yes		No	✓

5. Please give details of why you consider the modification is not legally compliant or is unsound. Please be as precise as possible.
If you wish to support the legal compliance or soundness of the modification, please also use this box to set out your comments.

In order to ensure that the MM158 is sound, it is necessary to ensure that the supporting text reflects both national planning policy and will ensure compliance with the CIL regulations. As it stands, the text does not sufficiently clarify that contributions can only mitigate impacts arising directly from the development proposed.

William Davis Ltd has significant concerns about the approach to the CTCS as outlined in the accompanying legal opinion. The CTCS fails to adequately distinguish between existing and future impacts of development, does not identify specific impacts or infrastructure requirements for individual allocations, and does not differentiate between the impacts of developments of different scales. Additionally, it does not link proposed mitigation measures to proposed allocations, imposes charges on developments regardless of their sustainability, and lacks a mechanism to secure the full cost of mitigation measures. It also acknowledges the need for further work to refine evidence and schemes, notes that costs may change over time, proposes per-dwelling contribution sums that differ from recent consultations, and does not address the potential for double counting between CTCS and INF2 contributions. Moreover, the CTCS does not clarify its enforcement mechanism. Therefore, it is recommended that the CTCS be adopted as a DPD/CIL to ensure proper scrutiny and address these concerns. (enc: Legal Opinion)

(Continue on a separate sheet /expand box if necessary)

6. Please set out the change(s) to the modification you consider necessary to make it legally compliant and sound, in respect of any legal compliance or soundness matters you have identified at 5 above. You will need to say why

each change will make the Local Plan legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of any policy or text. Please be as precise as possible.

9.25 We will expect development to mitigate the direct impact of additional traffic arising from the development proposed by improving accessibility, encouraging travel by sustainable modes of transport and through the necessary highway improvements. Development should not have an unacceptable impact on highway safety, and assessment of the impacts should include consideration of the cumulative and/or cross-boundary impacts of growth and the need for pooled contributions ~~to ensure that the network remains robust~~ where such impacts are identified. Where applicable, the potential for co-ordinating developer contributions with those of neighbouring authorities to mitigate impacts will be investigated.

7. Please set out any comments that you have on the updated housing land supply documents:

EXAM 58J: Housing Trajectory Update 2024
EXAM 58K: Housing Trajectory Update Notes July 2024
EXAM 58L: Update to Five Year Supply on Adoption May 2024
EXAM 58M: Updated Housing Land Supply Site List April 2024

(Continue on a separate sheet /expand box if necessary)

Please note *In your representation you should provide succinctly all the evidence and supporting information necessary to support your representation and your suggested modification(s). You should not assume that you will have a further opportunity to make submissions.*

8. Signature:	[redacted]	Date:	02/09/24

RE: IN THE MATTER OF LEICESTERSHIRE COUNTY COUNCIL'S DRAFT CHARNWOOD TRANSPORT CONTRIBUTIONS STRATEGY

OPINION

Introductory Matters

1. We are instructed on behalf of a number of parties ('the Clients') who are presently involved in the promotion of land for residential development within Leicestershire in general and Charnwood Borough in particular

2. A document known as the Charnwood Transport Contributions Strategy ('CTCS') was released for consultation by Leicestershire County Council ('LCC') on 10th July 2024, the consultation will close on 23rd August 2024.

Executive Summary

3. We consider that the CTCS is unlawful in that it tries to introduce what ought to be development plan policy outside of a development plan document ('DPD'). In addition, we also consider that in any event the CTCS is poorly conceived in its content and approach and does not adequately justify the sums sought.

Background

4. The detailed factual background is set out in our instructions, and we advise on that basis. The following is therefore only a summary of the most salient facts.

5. The Charnwood Development Plan comprises a Core Strategy (adopted in November 2015), the Saved Policies of the Borough of Charnwood Local Plan (2004), and a number of individual Neighbourhood Plans. A new Local Plan ('the Emerging Plan' or 'EP') was submitted for examination in December 2021.

6. There have so far been four hearing sessions regarding the EP (June and October 2022, February 2023 and February 2024). Consultation regarding main modifications ('MMs') began on 24th July 2024 and will run until 4 September 2024. Various participants at the February 2024 Hearing Sessions noted to the Local Plan Inspectors that the appropriate way of securing the sort of contributions being sought through the CTCS would be through the use of the Community Infrastructure Levy ('CIL') charging regime. For reasons which are not clear, this has not been pursued to date.

7. The evidence base behind the plan is extensive and technical documents include viability work by Aspinall Verdi.

8. LCC's evidence and representations and SoCGs with Charnwood Borough Council ('CBC') have referred to a requirement for developers to help fund transport interventions which are needed in order to mitigate the cumulative effects of the proposed allocations and the combined impact of development planned in neighbouring authorities.

9. LCC has modelled how the highway network is likely to function with background growth as well as the development traffic generated from all of the proposed allocations along with relevant developments proposed in neighbouring authorities. LCC have then identified and costed major interventions likely to be needed in that scenario and attributed that cost to the various developers. It has concluded that the Borough should be split into the following three areas: North of Leicester; The Soar Valley; and Loughborough and Shepshed ('the three areas') and that developers within each area contributing to the cost of the identified interventions on an equal basis (i.e. a £ per dwelling basis), irrespective of the level of impact that their proposals would individually have upon the highway network.

10. We are instructed that LCC has concluded that it considered it "too difficult" to assess the likely effects of each individual allocation, to then determine the infrastructure improvements that each allocation is likely to require, and to then work with CBC to specify that in the policies that each allocated site has in the Plan.

11. The per dwelling basis for financial contributions relies on figures that are considerably lower than the figures which have been advanced in recent planning application consultation responses. We are instructed that on LCC's proposed contributions and, in the absence of public sector funding to plug the gaps, there will be a significant level of uncertainty about which of the identified mitigation measures can be funded, when and in what order. LCC notes that there may be circumstances in which site viability rules out the making of contributions. If such

circumstances were to arise, LCC would obviously secure even less in the way of contributions and the gap would further increase.

12. The EP promises Transport Strategies for the three areas, and it is assumed that they will provide fuller details of the interventions that are required. At present EXAM75 which LCC submitted to the Local Plan EIP in late summer 2023 "*sets out the broad contents of, and the framework for*" the Transport Strategies, "*explains the rationale behind the Strategies, the context in which they are being developed, the work that has been done to date and the work that is ongoing to inform the strategy documents that will eventually be approved by the County Council's Cabinet*". There is no proposal to subject the Transport Strategies to any form of independent testing or examination. It is LCCs expectation that the implementation of the Transport Strategies and, we assume, the CTCS, will be given effect in CBC by Local Plan Policies INF1 and 2.

13. The MMs retain the references (in INF2) to local Transport Strategies, albeit there is also a reference in the amended text to requests for developer contributions needing to be informed by "appropriate evidence" and by a policy framework. In addition, Policy INF2 states that development will be supported where it is underpinned by a robust travel plan and transport assessment and where it demonstrates that such impacts can be appropriately and adequately mitigated.

14. These MMs follow hearing sessions on infrastructure and plan viability and submissions by several of the Clients in response to questions posed by Inspectors in February 2024[1]. Several of the Clients made submission in response to these questions.

15. On 10 February 2023, LCCs Cabinet met to consider a Report of the Council's Chief Executive which recommended an '*interim approach*' to securing developer contributions for, and managing development in respect of, highway needs, pending the adoption of Policies INF1 and INF2 of the Charnwood Local Plan. That Report was accompanied by a document entitled "*Interim Transport Contributions Strategy for Developments in Charnwood District*" ('the Interim Strategy'). That Interim Strategy identified 10 highway improvement schemes which were said to be aimed at managing the cumulative effects of the housing growth planned by the Borough Council and cross boundary issues arising in particular areas. Each scheme had a concept scheme drawing and a cost estimate. The total combined cost of the 10 schemes was

[1] The questions concerned the lawfulness and robustness of the approach to contributions and the appropriateness of apportioning costs.

estimated at £46.9m. The Strategy noted LCCs proposal to produce the 3 area-based Transport Strategies for Charnwood and to attribute scheme costs on an area-by-area basis but was silent regarding how much developers would be expected to contribute. The Interim Strategy was said to be an Interim one because it was aiming to address sites which might come forward in advance of the EP being adopted and without contributing towards highway schemes which were (presumably) only justifiable based upon cumulative contributions.

16. In May 2023, both authors of this opinion were instructed in respect of a legal challenge brought by Barratt David Wilson (BDW) directed at LCC seeking developer contributions pursuant to its Interim Strategy in respect of a then pending appeal in respect of a proposed residential development at Queniborough. Proceedings were issued but were rapidly compromised by a Settlement Agreement dated 8 June 2023 in which LCC agreed that the Interim Strategy was not to be treated as an adopted policy of LCC[2] and that it would not seek additional highways and education contributions over and above those already recorded in a Draft S106 Agreement which had by that stage been agreed, but which did not make provision for any monies covered by the Interim Strategy.

17. In May 2024 CBC informed all relevant applicants for planning permission that LCC would henceforth seek contributions in line with a new document, the Draft Charnwood Transport Contributions Strategy ('draft CTCS'). Various requests have now been made of the Clients seeking contributions relying on the draft CTCS. As noted above, the draft CTCS was released for consultation by Leicestershire County Council ('LCC') on 10th July 2024, the consultation will close on 23rd August 2024. The CTCS is supported by a Viability Report and set of FAQs.

18. The Clients have commissioned detailed technical work to consider the transport and viability evidence underpinning the draft CTCS.

19. The draft CTCS contains 6 Sections. We note that the fifth describes the interventions, or mitigation schemes, that LCC considers need to be delivered together with cost estimates for each. The sixth describes LCCs proposed approach to funding the mitigation measures and presents a Draft Policy on developer contributions, together with details of the sums that it proposes to seek from applicants going forward.

[2] CBC intimated that it was not proposing to adopt the Interim Strategy as policy.

20. We note that para. 1.5 of the draft CTCS advises that the document will be kept under review to reflect more detailed evidence when it becomes available. No review dates or periods are provided, nor is it clear what might trigger a review. Para. 1.6 explains that no site-specific highways issues are addressed, accordingly such matters are presumably intended to be addressed in addition to the draft CTCS approach.

21. The Draft Policy within the CTCS is said to be freestanding of Local Plan Policies INF1 and 2 but 'generally in accordance' with them (CTCS paragraph 6.4).

22. LCC asserts that, without the mitigation identified, severe cumulative impacts would arise (which would presumably be argued to be contrary to NPPF paragraphs 114 and 115). This conclusion has been reached after all proposed growth is added to the network. However, there is no identification of what baseline position has been adopted for this assessment (ie without permitted development). No assessment of the contribution of any individual allocation to the impact and no consideration of whether the impact of development without the mitigation package would be 'severe'.

Scope of this Opinion

23. Against this background we are asked to address the following matters:

a) whether the approach that LCC is proposing to take to securing developer contributions towards highways / transport mitigation measures through the draft CTCS is lawful;

b) whether adopting a blanket per dwelling approach to securing developer contributions as articulated in the Draft CTCS falls into conflict with Policy INF2 as proposed to be modified;

c) if the answer (a) is yes how should the Interested Parties set about challenging LCC on its approach;

Legal Background

(i) What Comprises a DPD?

24. By the PCPA 2004 s.38(1) and (3) a development plan is defined as consisting of: the regional strategy (if any); and the development plan documents (taken as a whole) which have been adopted or approved.

25. A development plan document ("DPD") is defined in the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") at s.37 as: *"a local development document which is specified as a development plan document in the local development scheme*."

26. By virtue of s17(3) PCPA 2004 Local Development Documents must, taken as a whole, set out the authority's policies (however expressed) relating to the development and use of land in their area.

27. "Local Development Documents" are further defined under regulations 5 and 6 of The Town and Country Planning (Local Development) (England) Regulations 2012 ("The 2012 Regulations") in the following terms:

*"**5. Local Development Documents***

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains
statements regarding one or more of the following—

(i) the development and use of land which the local planning authority wish to encourage during any specified period;
(ii) the allocation of sites for a particular type of development or use;
(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b) …

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—
(a) any document which—
(i) relates only to part of the area of the local planning authority;
(ii) identifies that area as an area of significant change or special conservation; and
(iii) contains the local planning authority's policies in relation to the area; and
(b) any other document which includes a site allocation policy.

6. Local plans

Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan."

28. Section 20 of the 2004 Act requires a DPD to be submitted to the Secretary of State for independent examination, to be assessed for 'soundness'. Subsequent sections make detailed provision in respect of that examination and its consequences. The 2012 Regulations provide for the descriptions of various documents and how they are to be characterised.

29. Section 19 of the 2004 Act concerns the preparation of local development documents.

30. Section 19(3) of the 2004 Act provides that, in preparing local development documents, the local authority must comply with their statement of community involvement (SCI).

31. The Council is legally required to prepare and adopt a statement of community involvement and once adopted it has to comply with it (See Section 18 of The Act 2004 as amended by the Planning Act 2008).

32. SPDs are defined negatively, they are those documents which fall within regulation 5(1)(a)(iii) or (1)(b) of the 2012 Regulations but do not form part of the local plan and so are not DPDs.

33. Regulations 12 and 13 of the 2012 Regulations provide for public participation in making SPDs and the right to make representations about SPDs. Whilst an SPD must be made the subject of public participation, the adoption of a local plan is a much more procedurally onerous affair, requiring the carrying out of the obligations in the 2004 Act at s.20. The obligations include notification of the proposed preparation of a local plan.

34. On the issue of what amounts to appropriate consultation, the general principle identified by Lord Woolf M.R. (as he then was) in the seminal case of *R. v North and East Devon Health Authority ex p Coughlan [2001] Q.B. 213* at [108] is as follows:

> *"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for particular proposals to allow*

those consulted to give intelligent consideration and an intelligent response. Adequate time must be given for this purpose and the produce of consolation must be conscientiously taken into account when the ultimate decision is taken."

35. By regulation 8(1) of the 2012 Regulations, a local plan or a supplementary planning document must indicate whether the document is a local plan or a supplementary planning document.

36. Policies in an SPD must not conflict with the adopted development plan (reg.8(3)) whereas those in a local plan must be consistent with it (reg.8(4)), but while a local plan may contain a policy which supersedes one in the adopted development plan, if it does so, the local plan must state that fact and identify the superseded policy (reg.8(4) and (5)).

37. In *William Davis Ltd v Charnwood BC [2017] EWHC 3006 (Admin*), a local planning authority's "housing mix" policy was quashed by the High Court on the basis that it had been published in a supplementary planning document rather than a development plan document. The High Court held that the policy regulated the development of land and, by virtue of the *Town and Country Planning (Local Planning) (England) Regulations 2012* reg. 5(1)(a)(i) and reg.5(1)(a)(iv), should therefore have been produced as a local development document.

38. In *R (oao Wakil (t/a Orya Textiles) v Hammersmith and Fulham LBC [2012] EWHC 1411 (QB),* the adoption by a local planning authority of a planning document was quashed as procedurally flawed and unlawful where it had been wrongly characterised as a supplementary planning document rather than a development plan document, in respect of which the procedural requirements had not been met, and where the local authority had failed to consider whether it should be subjected to a sustainability appraisal and/or environmental impact assessment.

39. In *R. (on the application of Skipton Properties Ltd) v Craven DC [2017] EWHC 534 (Admin)* the High Court quashed a local authority document concerning the negotiation of affordable housing contributions on the basis that its content meant that it should have been prepared as a development plan document and should therefore have been subject to public consultation, a strategic environmental assessment, and an independent examination. The affordable housing contributions interim policy contained statements in the nature of policies which pertained to the development and use of land which the local authority wished to encourage, pending its adoption of a new local plan which would include an affordable housing policy. The development and use of land was either "residential development including affordable housing"

or "affordable housing". It was thus an interim policy in the nature of a DPD. The local authority's failure to comply with the statutory conditions for DPD adoption rendered its adoption unlawful.

40. In terms of where policies seeking contributions should be found, tolerably clear guidance is to be found in NPPF:

"34. Plans should set out the contributions expected from development. This should include setting out the levels and types of affordable housing provision required, along with other infrastructure (such as that needed for education, health, transport, flood and water management, green and digital infrastructure). Such policies should not undermine the deliverability of the plan".

41. The National Planning Practice Guidance makes the point even more explicitly:

*"**Where should policy on seeking planning obligations be set out?***
Policies for planning obligations should be set out in plans and examined in public. Policy requirements should be clear so that they can be accurately accounted for in the price paid for land. Such policies should be informed by evidence of infrastructure and affordable housing need, and a proportionate assessment of viability.
…
***It is not appropriate for plan-makers to set out new formulaic approaches to planning obligations in supplementary planning documents or supporting evidence base documents, as these would not be subject to examination**. Whilst standardised or formulaic evidence may have informed the identification of needs and costs and the setting of plan policies, the decision maker must still ensure that each planning obligation sought meets the statutory tests set out in regulation 122. This means that if a formulaic approach to developer contributions is adopted, the levy can be used to address the cumulative impact of infrastructure in an area, while planning obligations will be appropriate for funding a project that is directly related to that specific development.*
…
Paragraph: 004 Reference ID: 23b-004-20190901" (emphasis added)

(ii) What Contributions may be Lawfully Required

42. Regulation 122 of the Community Infrastructure Regulations 2010 ("the CIL Regs") provides that 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.

43. That constitutes the statutory test and also forms the policy test as set out in the NPPF (paragraph 57) and PPG (Paragraph: 002 Reference ID: 23b-002-20190901).

44. The practical operation of the test has been repeatedly considered by the courts including in ***R. (Midcounties Co-operative Ltd v Forest of Dean DC*** *[2013] EWHC 1908; [2014] EWHC 3348 (Admin); [2015] EWHC 1251 (Admin)* ("Midcounties Co-Operative"). The cases all concerned the same development and the offer through a planning obligation to provide town centre improvements in mitigation for an out-of-centre foodstore. In the latest of the cases, Singh J. held (at [116]) that although the planning officer had stated in his report that proposed S106 benefits were "necessary" nowhere in the report had he explained why they were necessary. The case emphasises the level of detail to which the decision maker must descend in order to allow the proper application of the CIL Regs.

45. A helpful summary was provided by the Court of Appeal in ***R. (on the application of Peter Wright) v Forest of Dean District Council*** *[2017] EWCA Civ 2102* ("Forest of Dean") (a decision which was subsequently upheld in the Supreme Court: [2019] UKSC 53):

"25.The only issue that arises in these appeals is whether the proposed community benefit fund donation of a proportion of the turnover derived from the development was properly taken into account as a material consideration by the Council when it considered and approved the planning application for the proposed development.

26. Section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that, in dealing with an application for planning permission, a planning authority must have regard to all "material considerations", including "any local finance consideration" defined in section 70(4) (added from 15 January 2012, by section 143(4) of the Localism Act 2011) as "(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or (b) sums that a relevant authority has received, or will receive, in payment of Community Infrastructure Levy".

27. What amounts to a material consideration has been considered in a series of cases to which we were referred, including… Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited [2017] UKSC 66 ("Aberdeen)... I can be relatively brief. The relevant law is uncontroversial. Indeed, all parties rely upon the same well-established propositions.

28. So far as relevant to these appeals, the following propositions can be drawn from the cases.

(i) *A planning decision-maker has a statutory duty to have regard to all material considerations; and to have no regard to considerations which are not material. Whilst the weight to be given to a material consideration is a matter for the decision-maker, what amounts to a material consideration is a question of law for the court to determine.*

(ii) *The fact that a matter may be regarded as desirable (for example, as being of benefit to the local community or wider public) does not in itself make that matter a material consideration for planning purposes. For a consideration to be material, it must have a planning purpose (i.e. it must relate to the character or the use of land, and not be solely for some other purpose no matter how well-intentioned and desirable that purpose may be); and it must fairly and reasonably relate to the permitted development (i.e. there must be a real – as opposed to a fanciful, remote, trivial or de minimis – connection with the development). These criteria of materiality, oft-cited since, are derived from the speech of Viscount Dilhorne in Newbury at page 599H, and known as "the Newbury criteria". They were very recently confirmed by the Supreme Court in Aberdeen (at [29] per Lord Hodge JSC, giving the judgment of the court).*

(iii) *For a benefit to be material, it does not have to be necessary to make the development acceptable in planning terms; although, by section 106 of the Town and Country Planning Act 1990 and regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948), a planning obligation may only be taken into account in the determination of any planning application if it is so necessary. Although paragraph 206 of the NPPF provides that "planning conditions should only be imposed where they are necessary…", the statutory requirement for necessity does not apply to the attachment of a condition to the grant of planning permission.*

(iv) *Financial considerations may be relevant to a planning decision. For example, financial dependency of one part of a composite development on another part may be material, as may financial viability if it relates to the development. However, something which is funded from the development or otherwise offered by the developer will not,*

by virtue of that fact alone, be sufficiently related to, or connected with, the development to be a material consideration.

(v) Off-site benefits are not necessarily immaterial. An off-site benefit may be material if it satisfies the Newbury criteria."

46. In Good Energy Generation Ltd v Secretary of State for Communities and Local Government [2018] EWHC 1270 ("Good Energy Generation"), Lang J held that the Secretary of State was entitled not to give weight to either a community investment scheme or a reduced electricity tariff which were both open to residents as proposed by the applicant because they were not material considerations. It was held (at [86] and [92]) that the local tariff "*was essentially an inducement to make the proposal more attractive to local residents and the local planning authority"* whilst the community investment scheme "*plainly was not necessary to make the development acceptable in planning terms, applying regulation 122 of the CIL Regulations. It was merely a potential investment opportunity."*

47. More recently in HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government [2018] EWHC 3141 (Admin) ("HJ Banks"), Ouseley J assessed the wider distinction between compliance with the CIL Regs and the ability of planning obligations to be material considerations (with emphasis added):

"60. If the language of regulation 122 is to be interpreted as if it said that an obligation which did not comply with the tests was not a material consideration where it was not necessary for acceptability, a condition to the same effect could still be used lawfully, if it were otherwise a suitable alternative. This seems an odd result. The expressed aim of the regulation is to prevent the weight or significance of a specific reason for the grant of planning permission being given to an agreement which fails the tests. The tests are rather more restrictive than would be necessary merely to prevent agreements which embody immaterial considerations being taken into account. But of course, that, in its turn, creates the problem of how an agreement which was a material consideration but failed the tests should be dealt with. There is an obvious difficulty in drawing a distinction between what is material, and what, in any given decision, constitutes a reason for the grant of permission: does it mean that it could be taken into account in favour of the grant of permission just so long as it did not constitute of itself a reason for the grant of permission? ***My initial reaction was that the language of regulation 122 should be interpreted as if it forbad a non-compliant CIL from being a material consideration. But I now consider that cannot be right in the light of the very specific language and tests in regulation 122, and the different tests for materiality and the lawfulness of conditions. Problematic though it may be, drawing a distinction between "reasons for the grant of***

permission" and "a material consideration" would fit with the tests in the CIL Regulations being more stringent than those necessary for a lawful condition or a material consideration. It may not be easy to operate in practice, but then neither would the straight substitution of "material consideration". So, the differing treatments which agreements, which did not comply with regulation 122, have received at times in the IR and DL does not of itself show that an error of law was made*.*

61. The crucial argument, however, is not about compliance with CIL regulations, but is much more fundamental: were the obligations material considerations at all? This issue is not resolved simply by showing an agreement not to be CIL compliant. The agreement in Forest of Dean was held to be immaterial, by reference to ordinary planning principles of materiality, and not by reference to CIL Regulations. The problem there with the community contribution from the wind turbine operator was that the fund could be spent on any community benefit without any restriction, even to a planning purpose, let alone one related to the particular planning proposal. It was a source of funds for unspecified community benefits, desirable no doubt but immaterial in planning terms. The purpose of the fund was too broad for the fund to be a material consideration in a planning decision; [58].

62. The vice of the Forest of Dean fund, submitted Mr Brown, was the vice of Discover Druridge, as described by the Inspector in C93, a description with which the Secretary of State agreed. There was no limit on what the fund could be spent on; it was not confined to a planning purpose or one related to the development proposed. It was again too broad. I cannot see any material distinction between the Discover Druridge fund and the community fund in Forest of Dean. No party, including the Secretary of State, suggested one. Mr Elvin recognised the difficulties. The Inspector and Secretary of State both concluded correctly that Discover Druridge was not CIL compliant. But compliance with CIL is not the be all and end all of the issue. The issue which the Inspector and Secretary of State also had to address was whether Discover Druridge was itself a material consideration. They ought to have concluded that it was not. This meant that it could not be taken into account at any stage of the planning balance either in relation to the specific topic of tourism, or in what the Secretary of State calls "the overall planning balance" preceding his consideration of paragraph 149, or in his consideration of the balance in paragraph 149. I accept therefore the premise of Mr Brown's argument that the Secretary of State has unlawfully taken an immaterial consideration into account as a moderate benefit to which he accorded moderate weight.

...

The skills fund, prayed in aid in support of Mr Brown's argument, was not shown to be an immaterial consideration. The fact it was not CIL compliant does not make it immaterial. It did not suffer from the vice of Discover Druridge. Its purpose was clear and defined. There may be scope for debating materiality, but FoE's contention is too debateable for me to hold it immaterial in a side-wind to this challenge, and then also to subtract its moderate weight from what ought to have weighed in favour of the proposal. That would be to make a decision which it is for the Secretary of State to make."

48. It is also important to note that the mere inclusion of a policy in the development plan is not sufficient to make what is otherwise irrelevant relevant. In *Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All E.R. 636* ("Tesco Stores"), later affirmed by *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd [2017] P.T.S.R. 1413* ("*Aberdeen*"), Lord Hodge stated (at [51]) (with emphasis added):

"The inclusion of a policy in the development plan, that the planning authority will seek such a planning obligation from developers, would not make relevant what otherwise would be irrelevant. Section 37(2) (para 25 above) requires the planning authority to have regard to the provisions of the development plan "so far as material to the application" and treats its provisions as a relevant consideration only to that extent. Thus, a green belt policy will be relevant to an application if the site of the application falls within the specified green belt and a requirement that a certain amount of open space is provided in a proposal for residential development will be relevant to an application for residential development. Similarly, a requirement in the plan that an applicant should agree to contribute to the cost of offsite infrastructure, which is related to its development, will be relevant to the application. But the words, which I have emphasised, mean that if a planning obligation, which is otherwise irrelevant to the planning application, is sought as a policy in the development plan, the policy seeking to impose such an obligation is an irrelevant consideration when the planning authority considers the application for planning permission."

49. Holgate J in *Norfolk Homes Ltd v North Norfolk DC [2020] EWHC 2265 (QB),* rightly concluded that a planning obligation is a freestanding legal instrument and does not form part of a planning permission, whether in the context of ss.70 or 73. It is separately enforceable.

Discussion

50. Our Clients have identified several issues of concern arising from the draft CTCS, all of which appear to us to be well founded:

a) it fails to adequately distinguish between issues that currently impact the performance of the highway, walking and cycling networks (issues that developers of the proposed allocations should not ordinarily be required to address), and impacts that would be likely to arise as a result of proposed allocations;
b) it fails to identify the precise impacts that each of the allocations will have and the infrastructure that each may require in order for it to be acceptable in planning terms;
c) it fails to differentiate between the impacts that developments of different scales will have;
d) it fails to link proposed mitigation measures to proposed allocations;
e) it proposes to impose a charge upon developments irrespective of the credentials of each such site. Thus, the developers of sustainable developments may find themselves funding infrastructure which relates to improving the sustainability credentials of less well-connected rural sites;
f) it does not provide a means by which the full cost of the identified mitigation measures will be secured and thus does not provide a mechanism for the delivery of the package of measures that would otherwise be considered necessary, and which would presumably need to be funded in addition to such a charge by means of a planning obligation;
g) it expressly admits that further work is required in order to refine LCC's evidence base and the proposed schemes;
h) it notes that the costs quoted in the document would be likely change over time (presumably beyond simply indexation);
i) it is proposing to introduce a per dwelling contribution sums that are materially different to those that have been applied in recent consultations on planning applications, and therefore by CBC when taking applications to its Planning Committee; Indeed, remarkably, at the Launch Event for the draft CTCS, LCC was unclear about whether, it would be seeking the figures within the draft CTCS or its previous approach until the CTCS is adopted.

51. We note that the mitigation measures that LCC has considered to be necessary have been identified from an assessment that has considered the likely highways impacts if <u>all</u> of the EP's allocations are delivered. It also seems to have considered developments that are proposed close to Charnwood but located within neighbouring authorities. LCC notes that a minority of the allocated sites already have planning permission and that (obviously) these would not contribute towards the cost of the mitigation measures that have been identified (draft CTCS paragraph 3.4). However, any contributions sought under the draft CTCS may be deployed to address existing (or soon to be existing) impacts arising from developments which have already permitted. Similarly, the eighteen Loughborough Area Local Cycling and Walking Infrastructure Plan (LCWIP) schemes which are to be funded by the draft CTCS (fig. 6.4, p.52,

Table 7.9, p.97) do not appear to be directly linked to any of the allocations which are proposed in the Local Plan.

52. The application of the draft CTCS would place a very significant financial burden on developments within Loughborough, Shepshed and North of Leicester for improvements to walking, cycling and passenger transport infrastructure, yet these are located in the most sustainable parts of the Borough. The draft CTCS proposes to use monies raise to address the existing problems with the attractiveness of passenger transport services across the County (draft CTCS 4.13). Notably, LCC has attempted and failed to secure Government funding for its Bus Service Improvement Plans ("BSIPs") and aim to now fund BSIPS through developer funding secured through the draft CTCS.

53. Policy INF2 as modified states that specific requests to fund the Transport Strategies will need to be supported by appropriate evidence, as well as to transport assessments for individual sites. The draft CTCS does not however address what happens when site-specific work does not justify the level of contribution sought. INF2 expressly appears to allow for that outcome. The draft CTCS identifies 10 highway improvement schemes that LCC considers need to be delivered in order to mitigate the cumulative impacts of all of the proposed allocations and developments planned in neighbouring authorities. Four lie within the Loughborough / Shepshed strategy area; one straddles this and the Soar Valley; one straddles the Soar Valley and North of Leicester and four lie in the North of Leicester strategy area.

54. It is clear that there is a myriad of technical and evidential issues with the CTCS as proposed/ drafted. For the sake of clarity, we intend to address each of the issues raised in our instructions in turn.

55. We consider that seeking developer contributions on a per dwelling basis through the CTCS is likely to be considered to be unlawful were the matter to be litigated. There are a number of reasons for this:
    (a) It seeks to impermissibly replicate the CIL charging regime without including any of the safeguards of that regime endorsed by Parliament; which is especially egregious since CIL was introduced because of what were considered to be shortcomings in the power of s.106 to achieve a tariff-based approach;
    (b) It seeks to introduce policy which ought to be contained within a development plan into a non-DPD;

(c) It seeks to impermissibly include a formulaic approach to the collection of monies secured by s.106, contrary to policy (NPPF §34) and guidance (NPPG – supra), and appears not to have regard to either as a material consideration in doing so; and

(d) It seeks to require by policy the provision of monies which do not meet the test of materiality and is starkly comparable to the unlawful tariff-based approach in the City of Aberdeen, struck down in the Supreme Court case of ***Elsick*** (supra).

56. Dealing firstly with the CIL issue. Section 205 of the Planning Act 2008, provides that the Secretary of State "*may with the consent of the Treasury make regulations providing for the imposition of a charge to be known as [CIL]*" (subsection (1)), and that *"[in] making the regulations the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable*" (subsection (2)). The CIL Regulations were made under that power and came into force in 2010.

57. CIL was consciously introduced as a means to impose a generalised levy upon particular forms of development in order to obtain a formula-based contribution to pay for infrastructure which would be to the general public benefit, but would not necessarily meet the tests of regulation 122(2) were it to be sought in whole or part for the development under consideration. Indeed, CIL was specifically introduced because it was considered that a tariff-based approach would not be lawfully within the power of s.106[3]. It addressed what was perceived as a shortcoming of the power in s.106 to address wider infrastructure requirements, and whilst s.106 can be used to secure 'pooled' contributions[4], that is subject to the express requirement that **any** singular contribution secured by a s.106 in policy terms must still meet the tests of policy (and regulation 122(2).

58. Thus, the means by which generalised infrastructure contributions can be sought is the CIL regime. It is a significant shortcoming of the current CIL system, especially since amendments to regulation 123, that there is no requirement to actually spend any of the monies raised through CIL on any particular projects even if CIL was expressly promoted on the intention to do so.

---

[3] See, for example "Valuing Planning Obligations in England, Department for Communities and Local Government", DCLG, May 2006, and the discussion of what was then called Planning Gain Supplement and was expressly referenced as a 'tax'. Followed by the subsequent Green Paper "Homes for the future: more affordable, more sustainable" DCLG, 2007, Cmnd. 7191.

[4] NPPG 006 Reference ID: 23b-006-20190901

59. In this instance it is tolerably obvious that the draft CTCS is seeking to replicate CIL through the medium of policy, without express Parliamentary power, and without proceeding through any of the safeguards imposed by Parliament upon the collection of CIL. Indeed, if it had been lawfully possible to achieve the same objective as CIL simply through the adoption of policy such as the draft CTCS, then it would have made a nonsense of the lengthy Government angst about Planning Gain Supplement which led to the introduction of CIL in 2010.

60. That angst is explained by the fact that such an approach was considered on occasion to comprise no more than a development tax[5], and such a tax would be required to be approved as such by Parliament under the constitutionally important provisions relating to the introduction of a Finance Bill promoted to Parliament in that way. That CIL is not considered to be a tax is solely because of the specific safeguards in the 2008 Act that monies collected can only be directed towards infrastructure relevant to land use planning.

61. The term 'roof tax' is sometimes used to describe generalised requests for contributions which have been promoted elsewhere on a per dwelling basis. However, the very fact that a proposal is promoted as a 'tax,' however colloquially, ought itself to be a warning of its likely illegality. There is a fine, but important line between pooled contributions which are justified and those which are legally dubious. Thus, generalised comparison with other approaches to 'pooled contribution policies' should not give comfort to LCC. Pooled s.106 contributions for a specific item of infrastructure (eg a relief road needed by multiple developments to make them acceptable) are not in principle unlawful, provided that appropriate safeguards are in place – crucially that the requirement for any such contribution meets the threefold test of materiality in the ***Newbury*** case; – most importantly that the contribution fairly and reasonably relates to the particular development in scale and kind. That test is palpably failed in the case of the CTCS.

62. Purporting to introduce a parallel regime to CIL through this draft policy – is in our view not lawful.

63. Dealing with the remaining concerns (set out at paragraph 55 above) on legality together. If it were permissible to introduce a formulaic approach and if the (fundamental) problems set out above could be overcome[6] then there is still a major problem in promoting such an approach through the promulgation of policy through the medium of an SPD or other non-DPD policy, rather than through a DPD. The most obvious point is that Government specifically advises

[5] See for example para 1.7 of the 2006 DCLG publication (supra).
[6] Eg linking a development to a specific piece of infrastructure that was fairly and reasonably related to it in scale and kind for example, and met the other tests of policy and materiality.

(NPPF §34 and PPG (supra)) that this should **only** be done through a DPD where the implications of such an approach can be scrutinised and tested. However the point goes further, and one must ask whether or not the policy is of the nature of a development plan policy. In our view it plainly is, despite the purported 'hook' of linking the draft CTCS in CBC to INF2 of the emerging plan.

64. The implications of the draft CTCS have plainly not been tested or scrutinised in any forum, and it is difficult to see how the viability and transportation testing of individual allocations within the EP could act as a substitute for this process (even if that had been done). Additionally, and obviously INF2 is an emerging policy, and will only apply to CBC's area and not the remainder of Leicestershire, despite LCC being the LHA for most of the County. Indeed, it is difficult to understand on what statutory basis LCC is acting in any event other than as local highway authority, and its powers might extend to the promotion of guidance, but not planning policy and certainly not planning policy that might comprise an LDD[7] let alone one which only applies to part of its area.

65. In terms of the draft CTCS itself, is in substance, a local development document whose policy requirements patently should have been brought forward as policy within a development plan pursuant to the statutory process prescribed under the 2004 Act (even had they been otherwise justified). Indeed, the same legal error committed in relation to the interim policy has in our view been repeated with respect to the approach within the draft CTCS.

66. The draft CTCS explicitly sets out LCC's proposed approach to securing developer funding for the proposed mitigation measures and presents a Draft Policy on developer contributions which is expressly intended to inform how planning applications are determined. Indeed, it condescends to the details of the sums that it proposes to seek from applicants going forward, without those sums ever being the subject of scrutiny in terms of their objective justification, nor the impact upon viability of proposed development, still less their fairness – ie a blanket request which doesn't differentiate between sustainable sites which do not generate any impact relating to the mitigation for which the contributions are being sought.

67. The draft CTCS is patently a document containing statements about: the development and use of land which the local planning authority wish to encourage during any specified period (reg. 5(a)(i)); an economic objective which is relevant to the attainment and development of land (developer contributions) (reg. 5(a)(i)ii); and development management policies intended to guide the determination of planning applications (reg. 5(a)(iv)). It is explicitly intended to be

[7] Local development document.

taken into account as comprising policy when assessing development proposals and is not, on its face, merely a background document.

68. The draft CTCS would appear falls within the description set out in reg. 5(a)(i) and reg. 5(a)(iv), it is a local plan policy, and should not be promulgated through any other medium. To do so would, on the face it, circumvent the will of Parliament.

69. Were LCC to decide to adopt the CTCS in this form, then it would mean that the Clients would have been improperly denied the opportunity to engage with the viability implications contribution calculations through the EP EIP, let alone the relevance of the supposed mitigation schemes to individual development schemes and the amounts of any such contributions. The soundness of the policy has not been tested in the forum of an EIP. Such an approach would, in our view be unlawful.

70. We would reiterate that this tariff-based approach is very different from an instance where an allocation has been promoted, subject to the expectation that it will contribute towards the delivery of key infrastructure (such as a bypass) and that a high-level viability assessment is undertaken at local plan examination, with the detailed costing of the scheme and the precise sums being assessed & sought within an SPD.

71. National policy and guidance require that the approach to calculating developer contributions is set out in the Development Plan, at least in the first instance. LCC's approach is in our view likely to be concluded to be contrary to both law and national policy and guidance.

72. By virtue of regulation 8(3) of the 2012 Regulations, policies in an SPD must not conflict with the adopted development plan. The Council's adopted development plan is not the emerging local plan and the introduction of the draft CTCS therefore creates conflict with the adopted Development Plan, so even as an SPD it would be legally problematic.

73. Even pre-supposing the above issues were capable of being overcome, we are also asked to consider whether the per dwelling approach in the draft CTCS is consistent with Policy INF2.

74. We strongly consider that it is not. Policy INF2 as amended by MMS refers to requests for developer contributions needing to be informed by "appropriate evidence" and by the policy framework. INF2 also states that development will be supported where it is underpinned by a robust travel plan and transport assessment and where it demonstrates that such impacts can be appropriately and adequately mitigated. That is a conventional approach to the seeking of

contributions which would meet the conventional policy tests, and which could then be sought and taken into account where they meet the test of materiality.

75. The approach in the draft CTCS is a flat per-dwelling tariff-based approach which requires no development specific assessment, no appropriate evidence and seeks to disregard the policy tests as well as regulation 122(2). We would reiterate that it would appear to fall into precisely the same legal error as did Aberdeen City Council in the ***Elsick*** case (supra).

76. Furthermore, it is unclear what will actually be paid for under the CTCS contribution and what will be covered by the INF2 contribution. It is unclear how 'double counting' will be avoided. It is also unclear how it might be enforced. Thus, if there was a sufficient link between a given proposal and a contribution secured under the draft SPD which might meet the policy tests – then it is hard to see how LCC might be compelled to spend money which has been collected preferentially in respect of one scheme rather than another. To the contrary it would appear to be little more than an attempt to introduce a local tax without the express authority of Parliament, which, in the words of Lord Templeman in the seminal case of *M v Home Office [1993] UKHL 5*, would be to reverse the result in the English Civil War.

77. By virtue of regulation 8(3) of the 2012 Regulations, policies in an SPD must not conflict with the adopted development plan. The EP and draft CTCS are in our opinion in conflict in terms of the approach to contributions.

78. The decision to adopt the draft CTCS as policy would undoubtedly be a decision amenable to judicial review. The challenge would have to be brought promptly and no later than 6 weeks from the date of its adoption.

79. If a period of 6 weeks from adoption passes, without a challenge being brought, then LCC would no doubt seek to rely upon the presumption of regularity – namely that administrative acts are presumed to be lawful unless and until they are successfully challenged in the High Court[8]. However, even if that were to occur then we would re-stress the words of Lord Hodge in the Elsick case quoted above:

"The inclusion of a policy in the development plan, that the planning authority will seek such a planning obligation from developers, would not make relevant what otherwise would be irrelevant."

[8] The maxim is known by the Latin phrase "omnia praesumuntur rite esse acta".

80. The same would obviously apply to policy which is promulgated further down the policy ladder in a non-DPD. Thus, even if no challenge to the draft CTCS were made, it would not mean that merely because such an approach were to be set out in a policy document which had not been challenged that it would comprise a lawful approach. To the contrary, it could properly be argued at each application stage, and worse, it could be argued that a planning permission which made such a contribution, and which was taken into account by the decision maker would be vulnerable to challenge (see the ***Good Energy*** case – supra). That said any permissions which have been granted on the basis that account has been taken of a contribution being made under the draft CTCS or its predecessor would benefit from the Presumption of Regularity if they are not challenged within the requisite 6-week period.

Conclusions

81. We advise accordingly. Should anything else arise please do not hesitate to contact us further.

Kings Chambers
36 Young Street
Manchester M3 3FT

Paul G Tucker KC
Constanze Bell

17th August 2024