localplans@charnwood.gov.uk

From:	Evans, Tim (Avison Young - UK) <Tim.Evans@avisonyoung.com>
Sent:	05 September 2024 08:46
To:	localplans@charnwood.gov.uk
Cc:	Alsbury, Craig (Avison Young - UK)
Subject:	RE: Charnwood Local Plan - Main Modifications - Representations on behalf of Jelson Homes
Attachments:	Jelson Reps to CBC LP MMs Final .pdf

Dear Sirs, thank you for confirming receipt of our representations to the Main Modifications.

Apologies when we checked again, Appendix 4 was missing from the set of representations that we submitted yesterday. Please find attached a set of representations with the missing appendices included this time.

Many thanks.

Tim Evans (he/him/his)
Director, Planning Development and Regeneration

+44 01216098389 **Mobile** +44 07958649745
tim.evans@avisonyoung.com | avisonyoung.com

From: localplans@charnwood.gov.uk <localplans@charnwood.gov.uk>
Sent: Thursday, September 5, 2024 7:19 AM
To: Evans, Tim (Avison Young - UK) <Tim.Evans@avisonyoung.com>
Cc: Alsbury, Craig (Avison Young - UK) <Craig.Alsbury@avisonyoung.com>
Subject: RE: Charnwood Local Plan - Main Modifications - Representations on behalf of Jelson Homes

CAUTION: External Sender

Dear Sir/Madam,

Thank you for your response to the Charnwood Local Plan Main Modifications consultation.

Please accept this email as confirmation of receipt.

All representations received will be forwarded to the Inspectors and will be taken into consideration by the Inspectors when preparing their report to Charnwood Borough Council.

Kind regards
Planning Policy

From: Evans, Tim (Avison Young - UK) <Tim.Evans@avisonyoung.com>
Sent: Wednesday, September 4, 2024 5:15 PM
To: localplans@charnwood.gov.uk
Cc: Alsbury, Craig (Avison Young - UK) <Craig.Alsbury@avisonyoung.com>
Subject: Charnwood Local Plan - Main Modifications - Representations on behalf of Jelson Homes

Dear sirs, please find enclosed the representations of our Client, Jelson Homes, to the consultation on the Main Modifications to the Charnwood Local Plan and updated housing land supply position.

I would be grateful if you could confirm safe receipt.

Kind regards,
Tim

Tim Evans (he/him/his)
Director, Planning Development and Regeneration

+44 01216098389 **Mobile** +44 07958649745
tim.evans@avisonyoung.com | avisonyoung.com
3 Brindleyplace, Birmingham B1 2JB

Twitter | Property Listings
LinkedIn | Instagram

Avison Young (UK) Limited | Legal Disclaimer

Data Protection For information about how and why we may process your personal data, your data protection rights or how to contact our Data Protection Officer, please view our Privacy Notice.

AVISON YOUNG

Charnwood Local Plan 2021-2037

Consultation on Main Modifications and Updated Housing Land Supply Data

Representations of Jelson Homes

September 2024

Contents

1. Introduction 5

2. The Plan Period 7

3. Housing Land Supply 8

4. Infrastructure Delivery 15

Appendices

Appendix 1 Legal Opinion of James Corbet Burcher of No5 Chambers

Appendix 2 Avison Young Analysis of sites contained in Council updated Housing Land Supply Sites List (EXAM 58M)

Appendix 3 Avison Young Housing Trajectory

Appendix 4 Jelson's representations in respect of the Draft Charnwood Transport Contributions Strategy

Prepared By: Craig Alsbury and Tim Evans
Status: Final
Draft Date: September 2023

For and on behalf of Avison Young (UK) Limited

1. Introduction

1.1 Avison Young ("AY") is town planning adviser to Jelson Homes ("Jelson") and is instructed to review and make representations in respect of the following documents, consulted on between 17 July 2023 and 4 September 2024:

- Schedule of Proposed Main Modifications
- Updated Housing Land Supply Position
- Schedule of Proposed Changes to Policy Maps 1 and 2

1.2 As the Council will know, Jelson has participated throughout the Examination of the Local Plan and has made detailed submissions on a number of key issues, including:

a) the Plan period;

b) how the Plan deals with Leicester's unmet housing need and the apportionment of this;

c) the approach that the Council has taken to identifying sites for allocation, including how this has been informed by sustainability appraisal;

d) whether the Plan will provide 5 years' worth of deliverable housing sites on adoption;

e) how the Plan proposes to deal with the provision of transport and other infrastructure and how it links to the County Council's proposals for Transport Strategies and a Charnwood Transport Contributions Strategy; and

f) plan viability.

1.3 None of the modifications that are proposed address the concerns that have been raised. As a consequence, the Plan cannot be sound in its current form. Indeed, it would be unlawful for the Council to adopt the plan in the form currently proposed (incorporating the Main Modifications that appear in EXAMS 81, 82, 83A and 83B). Jelson has taken Counsel's Opinion on the matter of the lawfulness and examination procedure and a copy of Counsel's Written Opinion is attached at **Appendix 1**. The Opinion identified three core issues:

1) The Plan does not "look ahead over a minimum 15 year period from adoption" and is therefore in breach of NPPF paragraph 22;

2) The Plan will not provide for a five year housing land supply, for the purposes of NPPF 69a; and,

3) The Plan is premised on a Charnwood Transport Contributions Strategy which is unlawful in its current format and would be vulnerable to legal challenge if published.

1.4 These three issues are separate, but point to the same outcome – the Plan has not allocated sufficient land for housing to meet the requirements of national planning policy and has failed to demonstrate how highway impacts can be mitigated.

1.5 In the light of the issues that are raised in these Representations, and Counsel's Opinion, we consider it necessary for the Council and the Inspector's to convene additional EiP Hearing Sessions to ensure that the relevant matters are appropriately addressed. Indeed, it must be the case that the re-opening of the hearing sessions are the only procedural pragmatic response to the Minister of State's 20 July 2024 letter to the Chief Executive of the Planning Inspectorate and the Government issuing a revised Procedure Guide for Local Plan Examinations in August 2024.

2. The Plan Period

2.1 The Main Modifications propose no change to the Plan period. It remains 2021 – 2037. The Plan is likely to be adopted in 2025 and it will have a plan period of just 12 years. That is 3 years less than the ***minimum*** 15 year period that is required by national planning policy (NPPF paragraph 22).

2.2 As things stand, the Plan is in serious conflict with the NPPF and is, thus, unsound, having failed to correctly apply national policy under s19(2)(a) of the Planning and Compulsory Purchase Act 2004.

2.3 Adopting it in this form would therefore be unlawful, being based on an incorrect interpretation of national planning policy.

2.4 To remedy the situation, the Plan must be modified by expending the period that it covers to 2040 as a minimum.

2.5 The Plan will necessarily need to allocate further sites. As we have asserted in our previous written submissions to the various stages of consultation on the Plan and the Inspectors MIQs this would need to be done following a further site assessment process.

3. Housing Land Supply

3.1 In order for the Local Plan to be sound it must provide a clear strategy for bringing sufficient land forward, and at a sufficient rate, to address objectively assessed needs over the plan period (NPPF 60 and 69a). Because the Council must also identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement, the Plan is also required to identify specific, deliverable sites for years one to five of the plan period and then sufficient developable sites, or broad areas of growth, for the remainder of the plan period.

3.2 The Council has taken the view that, in order to guard against housing land supply related risks, it should identify specific sites to satisfy the entirety of its housing requirement and allocate these for housing development in the emerging Local Plan. We agree that this is appropriate and necessary

3.3 The Glossary to the NPPF defines 'deliverable' sites as those which are:

"available now, offering a suitable location for development now and be available within a realistic prospect that housing will be delivered on the site within 5 years. In particular:

> *a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).*
>
> *b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.*

3.4 In terms of what constitutes a 'deliverable' housing site in the context of plan-making and decision taking the NPPG (para 007 ID 68-007-20190722) states that:

> *In order to demonstrate 5 years' worth of deliverable housing sites, robust, up to date evidence needs to be available to support the preparation of strategic policies and planning decisions. Annex 2 of the National Planning Policy Framework defines a deliverable site. As well as sites which are considered to be deliverable in principle, this definition also sets out the sites which would require further evidence to be considered deliverable, namely those which:*

- *have outline planning permission for major development*
- *are allocated in a development plan*
- *have a grant of permission in principle; or,*
- *are identified on a brownfield register*

3.5 It goes on to say that:

Such evidence, to demonstrate deliverability, may include

- *current planning status – for example, on larger scale sites with outline or hybrid permission* ***<u>how much progress has been made towards approving reserved matters, or whether these link to a planning performance agreement that sets out the timescale for approval of reserved matters applications and discharge of conditions</u>****;*
- *firm progress being made towards the submission of an application – for example,* ***<u>a written agreement between the local planning authority and the site developer(s) which confirms the developers' delivery intentions</u>*** *and anticipated start and build-out rates;*
- *firm progress with site assessment work; or*
- ***<u>clear relevant information about site viability, ownership constraints or infrastructure provision,</u>*** *such as successful participation in bids for large-scale infrastructure funding or other similar projects.*

3.6 Paragraph 74 of the Framework highlights that strategic policies should include a trajectory illustrating the expected rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies.

3.7 The Inspectors original MIQs advised the Council that its responses to the questions posed about HLS should include an updated housing trajectory, updated completions data for the years 2021/22 and other information / evidence it had obtained from site promoters in the lead up to and during the course of the Hearing Sessions. During those Hearing Sessions, the Council also provided the Inspectors with a series of 'updates' to its housing trajectory, which took account of new completions data and information that site promoters had provided regarding matters such as lead in times and delivery rates. There was much discussion during the early HLS Hearing Sessions about the reliability

of the assumptions the Council had made about when certain sites would start to deliver housing and the rates at which housing would be delivered, along with the robustness of the evidence underpinning those assumptions.

3.8 The Council's latest Local Plan Housing Trajectory is Exam Document 58J. This is based on completions and other data as at 31 March 2024. It shows the anticipated timescales in which each draft Local Plan housing allocation is expected to come forward together with the estimated annual completions from each site. It is accompanied by Housing Trajectory Update Notes (Exam 58K); an update to the Council's 5 Year Housing Land Supply Position upon adoption of the Plan – May 2024 (Exam 58L) and an updated Housing Land Supply Site List (Exam 58M). The additional documents and evidence provided by the Council does not, however, contain any information to support or explain the assumptions it has made and to justify the number of homes it is asserting will be delivered in the first five years after adoption of the Plan. Instead, the Council appears to have based its assumptions on the matters only site proformas and / or Statements of Common Ground that it asked the promoters / developers of each of the allocated sites to complete in March 2022 together with updated information on the delivery trajectories for certain sites which the promoters provided to the Council during the early part of the 2024 or during the Hearing Sessions. Developers returning trajectory proformas for allocated sites (many of which will clearly be biased in support the Councils position) falls significantly short of the level of detailed evidence and scrutiny on deliverability required by the NPPF. In addition, history has already confirmed during the timescale of this examination that trajectories alone are unreliable, evidenced by the level of slippage across the board between the 2022 and 2024 estimates. The Council's failure to provide clear evidence that sites will deliver new homes in the 5 year period post-adoption is a critical omission and one that makes it impossible for the Inspectors to reach robust, justified conclusions on the HLS issue.

3.9 That said, even based on the information that has been supplied by the Council, it is plain that trajectory and calculations are unreliable.

3.10 AY has undertaken, on behalf of Jelson, a robust assessment of the Council's latest Housing Trajectory Updated, Housing Land Supply Site List and the evidence underpinning it. This is included at **Appendix 2**. This demonstrates that there are serious issues with (i) the categorisation as 'deliverable' of some of the sites that it has included; (ii) assumptions that have been made about the number of dwellings that certain sites are able to accommodate; and, (iii) the lead in times and delivery rates that it has assumed. For example:

a) the Council has assumed that a significant number of sites will be capable of accommodating more dwellings than the developers / promoter / landowners have indicated that the site

could accommodate in the site proformas / Statements of Common Ground that they submitted to the Council. In our experience the capacity of most sites goes at the development management stage not up, because of issues that weren't understood and taken into account when the sites were originally allocated. Neither the Plan nor its supporting evidence base explains why the Council has taken the decision to increase and the capacity of certain sites. Moreover, there are meaningful and legitimate concerns about whether the allocated sites are capable of delivering the number of dwellings that the Council says they are. This needs to be addressed.

b) The Council's data on lead-in times is neither accurate (in that it does not reflect the information that landowners / promoters / developers have themselves provided, including submissions as regards the likely timing of planning applications, start dates and build rates) and nor is it otherwise robust. For example, it does not take into account several very important factors that are already, and will continue to have, a bearing on the timescales within which development will come forward. These include the impact that LPA staffing shortages is having for the validation and determination of applications for planning permission, completion of legal agreements, discharge of conditions etc. but also the delays applicants are experiencing during the planning application determination period when trying to resolve technical issues. From Jelson's direct experience and based on reviews of other sites it is clear that there are a number of issues consistently arising at the Development Management stage that were not properly explored / considered at the point of allocation when delivery numbers were assumed. These include:

i) meeting mandatory BNG requirements for 10% on-site provision;

ii) housing mix (which has led to two applications for planning permission for development on draft housing allocation sites being refused on the grounds that the detailed proposals did provide a policy complaint mix of house types);

iii) delays and uncertainties that applicants are encountering grappling with how Leicestershire County Council is proposing to secure developer contributions via the Charnwood Transport Contributions Strategy. This includes the consequence of understanding and assessing the viability of development sites with LCCs requests added into their appraisals. Charnwood has already openly acknowledged the potential for site specific viability to be required on an application by application basis and has indeed already invited applicants to take this approach on a number of sites. Some applications have even been taken to committee with the need for a future

viability review acknowledged, but not resolved. (e.g. see resolutions of the Council's Plans Committee on the following applications P/23/123/2 – land at Melton Road, Queniborough (**HA65)**; P/22/1224/2 - Queniborough Lodge, Melton Road, Queniborough (**HA4)**; and P/22/1154/2 – Land off Snells Nook Lane, Loughborough (**HA18**)). It is clear that other developers are simply waiting to see how the roof tax develops before progressing their applications;

iv) delays and delivery uncertainties arising from detailed design objections that are now being repeatedly raised by individual DM Officers and more particularly by the Council's recently appointed Urban Design Consultant. These comments are often being received many months and even years after submission of applications (e.g. on Jelson's sites at Syston (**HA2**); Fairhaven Farm, Anstey (**HA44**); and, land off Loughborough Road, Burton on the Wolds. It is of concern that our analysis highlights that the Council's Urban Design team / Consultants are yet to comment on the vast majority of the applications for planning permission / reserved matters submissions for the site's that the Council has included in its 5 year housing land supply site list (EXAM 58M). Therefore the degree to which this will affect deliverability and site capacity remains unclear.

What is clear is that the Council's Urban Design Team did not input (at least not robustly) into the process of determining or testing site capacity assumptions. Comments being made now are requiring major re-working of submitted layouts and in a lot of cases are seeking design approaches that will result in material reductions in assumed site capacity. The incorporation of street trees in layouts is one such example that will affect assumed capacity on most sites going forward.

The above matters help in part to explain why the local planning authority's processing of applications taking so long and why capacity and timing assumptions included within the Council's Housing Trajectory and Housing Land Supply Site List can only be viewed with extreme caution.

v) A number of the sites that are proposed to be allocated are not deliverable and are not demonstrably developable either. They are: **HA6** – land at Brook Street, Syston; **HA9** – works opposite 46 Brook Street, Thurmaston; **HA10** – works adjacent to 46 Brook Street, Thurmaston; **HA42** – 32 Charnwood Road, Shepshed; **HA63** – The Leys, Hathern. This is because the sites are either in a viable commercial use (and are not therefore 'available') or they are sites have a history of unimplemented planning

permissions, which indicate that they are not demonstrably viable, or deliverable. The 48 dwellings that the Council says that these sites would deliver should simply not be in the assumed 5 year supply.

vi) Taking all of the above into account AY have prepared our own Housing Trajectory for the Local Plan draft housing allocations (**Appendix 3**). It demonstrates that the Council will not have 5 years' worth of deliverable housing sites at the point at which the Plan is adopted. It also indicates that, once it has a 5 year supply, it will not be able to maintain it through the Plan period. Indeed, our analysis indicates that the Council will not be in a position where it has a 5 years' worth of deliverable sites until 2029/2030. To assist the Inspectors we have produced below our assessment of the Council's housing land supply position on adoption of the Plan, using the Sedgefield approach (which the Council accepted as being the appropriate method for calculating its supply position, during the Hearing Sessions), applying the correct shortfall, applying the correct buffer and factoring in only sites that are demonstrably deliverable. This shows as follows:

	AY Assessment of Charnwood Borough Housing Supply as at 1 April 2024	**Total**
	Charnwood Borough housing requirement from 1st April 2021- 1,189 dwellings per annum.	-
a	Number of dwellings required for five years 1 April 2024 to 31 March 2029 (1,189 x 5).	5,945
b	Number of dwellings required for five years 1 April 2024 to 31 March 2028 including the shortfall against requirement (1,293 dwellings over first three years of Plan period) (5,945 + 1,293)	7,238
c	Number of dwellings required for five years 1 April 2023 to 31 March 2028 including the shortfall and 5% (rounded up) to ensure choice and competition in the market for land (NPPF paragraph 74a) (7,238 + 5% of 7,238).	7,600
d	AY Estimated supply from deliverable sites for five years 1 April 2024 to 31 March 2029.	5,912
e	Surplus over requirement (d - c).	-1,688
f	Annual housing target (c divided by five years) (rounded up).	1520
g	Number of years supply (d divided by f).	**3.89**

3.11 It is clear from the work that we have undertaken that (i) the Local Plan will not provide 5 years' worth of deliverable housing sites on adoption; and (ii) there are major gaps and flaws in the evidence underpinning the Council's housing trajectory and its HLS calculation – these must be addressed and the matter of HLS properly examined before the Plan is adopted.

3.12 Even if the Inspectors were to dismiss every challenge made to site deliverability and simply accept everything the Council says at face value then it must be remembered that even the Council's own claimed position of 5.01 years (under Sedgefield) or just 13 dwellings is incredibly fragile. It cannot be concluded that a supply position of 5.01 is sufficiently robust to find a plan sound on the measure.

3.13 Critically, the available information indicates that it is necessary for the Plan to identify additional sites for housing; sites that, together, can fill the forecast void in supply in the first five years of the Plan period and sure up its housing delivery going forward.

3.14 This gives rise to a procedural fairness issue. It is well-established that housing land supply matters and deliverability are best assessed through hearing sessions in which all participants can provide information and make submissions on the basis of the most up-to-date information. In the instant case, there has been such a significant delay and such changes to the evidence base that earlier sessions on housing land supply were conducted on a much earlier and very different basis. To a significant extent, the new information on sites simply demonstrates the correctness of the submissions that were made earlier in the hearings in open session. However, we have not been able to make submissions and discuss the significance of the current data and the current figure of **3.89 years**. Given the scale of the shortfall and the reasons for it, we respectfully submit that the appropriate course of action would be to schedule further hearing sessions on this point – alongside the question of plan duration and infrastructure. We shall return to this point in the conclusion below.

4. Infrastructure Delivery

Introduction

4.1 There are a number of fundamental issues with the way that the Local Plan proposes to deal with the provision of infrastructure; that is infrastructure that both the Council and the County Council have asserted will be required to support or facilitate the development proposed by the Plan. These concern:

a) the Plan's failure to provide the necessary clarity about what infrastructure will or is likely to be required and, critically, how infrastructure requirements link back to the allocations that the Plan proposes to make;

b) the Plan's failure to explain what the proposed Transport Strategies will contain, how and when these will be prepared, what status they will have, what role they will play in the determination of planning applications and how they will differ from the Charnwood Transport Contributions Strategy ("CTCS") that LCC is in the process of preparing;

c) the Plan's failure to address national planning policy requirements in respect of planning obligations and its references to the preparation of freestanding 'developer contributions policies' which are at risk of being unlawful;

d) the Plan's references to the pooling of developer contributions in ways that appear to replicate a levy or development tax and, if so, would be unlawful;

e) conflicts between the Plan and national planning policy as regards the approach that is to be taken to the preparation of transport assessments and its failure to account for the fact that assessments that are being undertaken at the application stage are: (i) not assessing cumulative impacts in the way that LCC has for plan-making purposes or the MMs appear to suggest will be expected going forward; and (ii) not forecasting the severe adverse impacts that LCCs modelling predicts and so are not justifying the making of developer contributions that LCC and CBC seem to believe are necessary in order to help deliver the infrastructure that is required to address the cumulative effects of planned growth;

f) there is an evident disconnect between how Policies INF1 and 2 suggests that transport impacts should be assessed and how LCC is proposing to secure developer contributions via the CTCS;

g) the Council's apparent reliance on LCCs CTCS as the means by which the developer contributions referred to in INF2 will be justified, having regard to the fact that Leading Counsel has advised interested parties that the CTCS, if adopted by LCC, will be unlawful;

h) the Plan's failure, even in a world with the CTCS, to grapple with the very significant funding gaps that will exist as regards infrastructure interventions, the implications this will have for infrastructure delivery, and the implications this will have for the determination of planning applications; and

i) the Council's failure to appropriately assess the implications of its stated infrastructure requirements for Plan viability.

4.2 We make submissions on each of these matters later in this Section but, before we do that, we set out for the benefit of the Council the relevant law and policy:

The Law - SPDs and DPDs

4.3 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.

4.4 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*."

4.5 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.

4.6 "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:

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.

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."

4.7 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.

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

4.9 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).

4.10 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).

4.11 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.

4.12 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.

4.13 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.

4.14 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)).

National Planning Policy on Planning Obligations

4.15 National planning policy is clear about where policies seeking developer contributions should be found. Paragraph 34 of the NPPF states as follows:

> *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.*

4.16 The NPPG makes the point even more explicitly:

> *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") (our emphasis)

The Law – Planning Obligations

4.17 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.

4.18 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).

National Planning Policy and Guidance on Transport Assessments

4.19 The Government is proposing to make significant changes to national planning policies that are concerned with the way in which transport impacts are assessed at both the planning making and development management levels (including an explicit shift from predict and provide to vision and validate). These are likely to have far-reaching implications for the Borough and County Councils bearing in mind how LCC has assessed the likely transport implications of the Plan to this point. However, as things currently stand, the NPPF states that:

All developments that will generate significant amounts of movement should be required to provide a travel plan, and the application should be supported by a transport statement or transport assessment so that the likely impacts of the proposal can be assessed. (paragraph 117)

4.20 The NPPG goes on to describe the approach that should be taken to the preparation of Transport Assessments and what they should contain. Insofar as relevant to these representations, it states that:

The scope and level of detail in a Transport Assessment or Statement will vary from site to site but the following should be considered when settling the scope of the proposed assessment:

- *.....a qualitative and quantitative description of the travel characteristics of the proposed development, including movements across all modes of transport that would result from the development and in the vicinity of the site;*
- *an assessment of trips from all directly relevant committed development in the area (ie development that there is a reasonable degree of certainty will proceed within the next 3 years);*
- *data about current traffic flows on links and at junctions (including by different modes of transport and the volume and type of vehicles) within the study area and identification of critical links and junctions on the highways network......;*
- *......measures to mitigate the residual impacts of development (such as improvements to the public transport network, introducing walking and cycling facilities, physical improvements to existing roads.* (Paragraph 015 Reference ID: 42-015-20140306) (our emphasis)

4.21 As regards committed development, the NPPG also states that:

> *It is important to give appropriate consideration to the cumulative impacts arising from other committed development (ie development that is consented or allocated where there is a reasonable degree of certainty will proceed within the next 3 years). At the decision-taking stage this may require the developer to carry out an assessment of the impact of those adopted Local Plan allocations which have the potential to impact on the same sections of transport network as well as other relevant local sites benefitting from as yet unimplemented planning approval.* (paragraph 014 Reference ID: 42-014-20140306) (our emphasis)

Issues Arising

Infrastructure Requirements

4.22 As proposed to be modified by MM156, Policy INF1 states that the Council "*will work with infrastructure providers, developers and partner organisations to ensure the delivery of new and improved infrastructure necessary to support our development strategy and to create sustainable, safe and healthy communities reducing health inequalities*". The Policy indicates that the infrastructure to which it is referring is set out in Appendix 3 to the Plan (an Infrastructure Schedule). However, Appendix 3 does not describe all of the infrastructure that is likely to be required; it defers, in the main, to the Transport Strategies which it says will develop the package of interventions required in each of the three Strategy areas[1]. As a consequence, the Plan is completely unclear as to what will be required in the way of

[1] In addition, the costs referred to in Appendix 3 do not align with the costs quoted in LCCs CTCS

infrastructure, why certain items of infrastructure are required, what it will cost and how it will be delivered. The absence of such important information begs critical questions about plan deliverability, viability and compliance with national planning policy. As a consequence, it its not demonstrably sound.

The Transport Strategies

4.23 Policy INF2 is now proposed to be headed "*Development and Delivery of Transport Strategies*" (MM158). There are also proposals to introduce references to the Transport Strategies in other locations (see for example MMs 74, 75, 84, 92, 96, 97, 101, and 138).

4.24 MM138 states that the Transport Strategies will be key to seeking to secure public and private funding for improvements to sustainable travel modes in the three Transport Strategy areas.

4.25 MM158 proposes that the supporting text to Policy INF2 is re-written. As amended, the text states that: "*to ensure that the development provided for in the Plan and in other adjoining areas does not have a severe adverse impact on the highway network our approach is twofold*". The second limb of its approach is "*to adopt a coordinated approach to the development and delivery of transport measures required to mitigate the impacts of growth*". It goes on to say that the Council's evidence has identified an "*effective package*" of infrastructure interventions that are required to offset predicted transport impacts. The package, it says, has three main elements comprising: improvements to sustainable modes of travel; targeted improvements to the Major Road Network; and targeted improvements to the Strategic Road network. The text proceeds to say that the "*ongoing refinement and delivery of the transport measures required to support the Local Plan are being pursued through the development of Transport Strategies in partnership with the Leicestershire and Leicester City highway authorities and National Highways. These strategies are being developed around three geographic areas…*" and that the strategies will provide "*a robust, evidence-based platform for seeking to secure the delivery of the transport measures over the lifetime of the Local Plan*" with funding coming from bids to Government and developer contributions.

4.26 We infer from the MMs that the Transport Strategies are going to be important documents and that: (i) they will describe the transport infrastructure / interventions that are demonstrably necessary to prevent the development of the Plan's allocations from having a severe adverse impact on the operation of parts of the highway network; (ii) they will specify (or provide robust estimates of) the cost of each of the infrastructure items identified in the Strategies); and (iii) because MM158 says that the Strategies will provide "*a robust, evidence-based platform for seeking to secure the delivery of the*

transport measures over the lifetime of the Local Plan" they will define the infrastructure that each allocation in the Plan either needs to deliver or contribute to the delivery of.

4.27 However, the lack of any explanation or specificity is itself a major soundness failure, for the purposes of NPPF 36. It is not clear from the Plan when and how the Strategies will be produced, who will produce them, precisely what they will contain, what status they will have (e.g. whether they will be DPDs, SPDs or something else) and, thus, what role they will have in the determination of applications for planning permission. It is also not clear what relationship they will have with LCCs CTCS (if any) which already contains LCCs assessment of the infrastructure costs for the three Transport Strategy areas and proposes a levy type approach to securing developer contributions towards these (although see later in these Representations regarding the CTCS). This lack of clarity is unacceptable. The Plan has not been positively prepared, nor is it justified or effective, or in all the circumstances compliant with national policy.

4.28 In addition, there are two procedural flaws that flow from the Council's proposal to produce Transport Strategies, and which have substantially disadvantaged participants in this examination process. These are as follows:

4.29 First, it appears from the MMs that the Transport Strategies will be documents that contain: statements about the development and use of land which the local planning authority wish to encourage during any specified period; an economic objective which is relevant to the attainment and development of land (developer contributions); and, probably also, development management policies intended to guide the determination of planning applications. If that is right, the Strategies will have content that falls within the definition of Local Plan policy and which should not be promulgated through any other medium; including guidance, an SPD or something else. Moreover, because the content of the Strategies will be so inextricably linked to the policies and proposals in the Local Plan, this is content that should be included in the Plan and examined now.

4.30 The fact that such important material is not being examined as part of this plan-making process brings into serious question the Plan's strategy, its ability deliver the growth that is proposed (and therefore its ability to satisfy the Borough's objectively assessed need for development), and its consistency with national planning policy. If we have misunderstood, and it is the Council's intention to produce the Transport Strategies as DPDs, the Local Plan and the evidence base for it should be clear about the timescales for preparation of the DPDs, and the uncertainties relating to the final content of the Strategies, has been factored into the Plan and its spatial strategy. This is absent as things stand.

4.31 Secondly, whilst we note that it is not clear who is to produce the Strategies, the suggestion so far (including in submissions made by LCC) is that LLC is preparing them. In this context, LCC is the Local Highway Authority (not the Local Planning Authority) and so does not have the power to produce / adopt anything other than guidance and informatives. That, it seems to us, is not what the Transport Strategies will be.

Failure to Address National Policy Requirements for Planning Obligations

4.32 At paragraphs 4.15 and 4.16 we described what the NPPF and NPPG say about how local planning authorities should set out their policy requirements for Planning Obligations. The NPPF is clear that such requirements should be capable of being "*accurately accounted for in the price paid for land". *As the Plan is currently drafted, it is impossible for developers to understand and quantify the contributions that they are going to be expected to make. As a consequence, the Plan falls a long way short of according with this important national policy.

4.33 In addition, the NPPG is clear that 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*.* Yet MM152 states that: "*In view of the availability of funding compared with total cost of infrastructure, it is likely that in most cases it will be necessary to prioritise the allocation of development contributions to different kinds of infrastructure <u>and this exercise will be achieved by the preparation of a Planning Obligations Supplementary Planning Document</u>"* (our emphasis). There is also reference at MM154 to an LCC "*Developer Contributions Policy*". Not only would such documents appear to conflict with Government policy and guidance, there is, it seems to us, a significant risk that such documents would also fall into the trap of containing material that it would be unlawful to set out in anything other than a DPD. It would be wholly inappropriate for the Local Plan to encourage or endorse the preparation of an SPD when a DPD will be required and, as noted above, if a DPD is required, it would be inappropriate for the Local Plan not to contain this material now, or for it to be clear about how the DPD making timescales and uncertainties have been factored in to the strategy articulated in the Plan.

The Pooling of Developer Contributions

4.34 The pooling of developer contributions is referred to in MM152 and MM156. MM156 comprises the amendments that are proposed to be made to Policy INF1 and so are particularly important. As currently drafted, we are not satisfied that the Plan is describing an approach to the pooling of contributions that would be lawful.

4.35 The pooling of contributions may be lawful in circumstances where the contributions are to be spent on a specific item of infrastructure, where the requirement for the contribution meets the test of materiality and where the contribution fairly and reasonably relates to the proposed development in scale and kind. However, INF1 refers to supporting development that "*contributes to the reasonable costs of <u>any infrastructure required to mitigate the impacts of the development strategy</u>…….including cumulative and cross boundary impacts*" (our emphasis). This is the same approach that is being promulgated by LCC in its Draft CTCS which we consider to be unlawful. The Plan should be amended and either references to the pooling of contributions removed or additional text included that describes the lawful circumstances in which developer contributions might be pooled.

Issues for and Arising from Transport Assessments at the Planning Application Stage

4.36 The transport evidence base that underpins the Plan comprises a worst case, peak hour, predict and provide approach to assessing the traffic and transport implications of development. This is not consistent with Government policy. Moreover, it is an approach that fails to assess the likely impacts of individual allocations and, instead, it loads all of the forecast traffic from all of the proposed allocations (and some out of Borough developments) onto the network, adds background growth and then models the effects of this to determine where additional highway capacity might be needed.

4.37 The evidence has referred to the implications of 'all growth' as 'cumulative effects'. The Plan now also refers to these cumulative effects and appears to be suggesting in Policy INF1 (MM156) that when applications for planning permission are made, applicants will be required to (i) take account of these cumulative effects (the effect of the Plan strategy or all development proposed in the Plan) and (ii) make financial contributions towards the cost of the infrastructure that these cumulative effects require in order to mitigate against severe impacts. However, if this is indeed what INF1 proposes to require, it is at odds with national planning policy and guidance on the preparation of Transport Assessments.

4.38 As noted at paragraph 4.20 and 4.21, it is necessary for applicants to give appropriate consideration, in their Transport Assessments, to the combined effects of their proposals and other committed development. However, committed development is specifically defined as developments that are (i) permitted or allocated (in an adopted Plan); (ii) <u>and</u> in respect of which there is a reasonable degree of certainty that they will proceed in the next 3 years; (iii) <u>and</u> that will generate trips that impact the same sections of the transport network. In Charnwood, there are no circumstances in which an applicant will be required to replicate the strategic modelling that LCC has undertaken for plan-making purposes in support of an application for planning permission. It is also very unlikely that

applicants will be required to assess the impacts arising from all permitted and allocated developments in the Transport Strategy area in which their proposals are located. As a consequence, there is a serious disconnect between the strategic modelling that LCC has undertaken and what this says about the likely impact of proposed growth, the approach the Council appears to be taking infrastructure delivery (including securing developer contributions) based on LCCs modelling and what is being evidenced at the planning application stage. There are already a number of live examples where applicants proposing developments on sites that are proposed to be allocated have produced Transport Assessments that LCC has agreed, and which are demonstrating that the proposals will not give rise to severe adverse impacts, contrary to what LCC has asserted in its Local Plan representations and on the basis of which the Council is promoting this plan.

4.39 In the same way that the Plan needs to be further amended to remove or alter inappropriate references to the pooling of developer contributions, it must also be amended to clarify its references to the assessment, by applicants, of cumulative effects.

4.40 If the Council remains of the view that the Plan must explain what it expects applicants to include in their Transport Assessments, or if it must describe the types of proposals that the Council will find acceptable in transport terms, it must only include text that is consistent with national planning policy and guidance and, as things stand, it does not. It strays into inappropriate / unacceptable territory because it is proceeding on the incorrect basis that its evidence base is robust and that all of the proposed allocations will, without mitigation, contribute to the generation of severe adverse impacts.

The Relationship Between Local Plan Policies INF1 and 2 and the CTCS

4.41 LCC has taken it upon itself to produce a CTCS and, within it, to include a Policy on securing developer contributions and details of the sums that it proposes to seek, on a per dwelling basis, across the three Transport Strategy areas. LCC asserts that its proposed Policy is freestanding of Local Plan Policies INF1 and 2 but is consistent with them. LCC launched the Draft CTCS in July and invited representations up to 23 August 2024.

4.42 Paragraph 1.3 of the Draft CTCS states that the document has been prepared in response to:

a) the cumulative and cross-boundary impacts that future growth across Charnwood will have on the transport network;

b) immediate and ongoing pressures across Charnwood in part due to a recent shortfall in housing land supply and the absence of an up to date local plan;

c) CBCs proposed spatial strategy which disperses growth across a relatively wide geographic area and relatively smaller-scale sites, increasing to the extent to which impacts are cumulative rather than site-specific. It goes on to state that in most cases, the only practicable and proportionate way of addressing such cumulative impacts is through pooling contributions towards the delivery of mitigation schemes;

d) and the financial challenges facing LCC which are severely constraining its ability to fund infrastructure.

4.43 LCC notes that it will use the CTCS to request, secure and pool 'appropriate' contributions from developers 'throughout' Charnwood as set out in the Draft Policy that appears at CTCS paragraph 6.4. It also asserts that the CTCS is the only practicable and proportionate means of funding and delivering the transport mitigation required.

4.44 The Policy that appears in the Draft CTCS is very similar to the one that LCC tried to introduce through its Interim Transport Contributions Strategy in 2023. That was the subject of a legal challenge by Barrat David Wilson ("BDW"). Those proceedings were the subject of a Settlement Agreement dated 8 June 2023 in which LCC agreed that the Interim Strategy was not an adopted policy of the Council and that it would not seek additional highways and education contributions over and above those already recorded in a Draft S106 Agreement for BDWs proposals at Queniborough.

4.45 The Local Plan does not expressly refer to the CTCS. However, it is apparent that the CTCS contains much of the information that the Plan suggests will be included in the proposed Transport Strategies. The Plan must be clear about the respective roles of the Transport Strategies and the CTCS, assuming the Council recognises the CTCS as a legitimate approach and one that is consistent with the Local Plan.

4.46 There has therefore been a serious procedural and evidential issue, which creates a major soundness error – both in respect of (a) deficiency in the evidence base and (b) deliverability of the entire plan. LCC appears to be of the view that (i) Policies INF1 and 2 provide an appropriate framework for it seeking developer contributions to specifically address the cumulative impacts that its technical evidence forecasts; and (ii) the CTCS is all LCC needs going forward in order to secure the developer contributions that it needs to help deliver the transport infrastructure that the Plan requires. Whilst the CTCS is merely a draft document in consultation, its mere existence (and substantial flaws) are a highly relevant consideration for the current examination. Jelson, Redrow and all participants have had no opportunity to address these points in open session at the hearings, and thereby both to make submissions but also understand CBC/LCC's true intended approach, and thereby be able to respond accordingly.

4.47 We do not agree that the Plan, as currently drafted, provides a clear framework for the implementation of the CTCS not least because, for all their failings, Policies INF1 and 2 do talk about applicants providing evidence of the effects of their specific proposals whereas the CTCS promotes a straightforward levy, or tax on development that is ignorant of the different scales of the proposed allocations and their respective effects. However, the Plan's references to cumulative and cross boundary effects, and the pooling of contributions, are identical to those used in the CTCS and, as a consequence, the MMs appear to be been drafted with the CTCS in mind. If that is the case, then there is a serious flaw at the heart of the plan, which not merely goes to soundness, but which has not been the subject of discussion at the hearings. This is an additional reason why the Plan needs to be clearer about its infrastructure delivery strategy and what will be required of developers in accordance with the Plan and national planning policy / guidance.

4.48 The CTCS is not the solution to the infrastructure delivery issue. Attached to these Representations are Jelson's representations in respect of the Draft CTCS (**Appendix 4**). As will be seen, Jelson (and others) have identified a large number of issues with the CTCS, many of which go to the evidence that underpins it and, thus, the evidence that underpins the Local Plan. Jelson's representations were accompanied by Leading Counsel's Opinion on the CTCS. This confirmed that, if the CTCS were to be adopted as currently proposed, it would be unlawful. Counsel has also advised that obligations sought pursuant to the CTCS would likely be unlawful also. The Council and the Inspectors will recall that Jelson made precisely these points in response to Q3 at the Local Plan EiP Hearing Session on 21 February this year.

4.49 In the light of the fundamental flaws in the CTCS and the lack of clarity as regards the relationship between it and Policies INF1 and 2, further amendments need to be made to the Plan and further evidence provided on infrastructure delivery.

Infrastructure Funding Issues

4.50 The Draft CTCS estimates that the transport infrastructure that is needed to support the growth proposed by the Plan will cost in the order or £202m (albeit this is based on incomplete information as regards cycling and walking interventions and preliminary estimates for road infrastructure and so will likely increase). We have calculated in our CTCS representations that, even if all of the remaining allocated sites contribute in line with the CTCS, LCC will still be facing a £140m shortfall. Neither the Council nor LCC have a plan for plugging this finding gap and so neither authority can explain or evidence how the infrastructure that they are asserting is necessary can be delivered. We are not convinced that this infrastructure is actually required (and it certainly cannot be linked to the impacts that the allocations will each have) but, if we are wrong and the Councils are right, the funding gap

they are facing has serious implications for the delivery of the Plan strategy and, therefore, the soundness of the Plan. This must be addressed before the Council attempts to adopt the Plan.

Plan Viability

4.51 The Council's assessment of Plan viability is therefore completely incorrect. In breach of the provisions of the NPPF (NPPF 36 and 58), it is not clear from the Plan what developers are going to be expected to contribute to the cost of infrastructure delivery, it is not clear whether the Council's viability work has taken appropriate account of the asks that are going to be made of the developers of specific sites and, as will be seen from Jelson's CTCS representations, there are a number of significant issues with the viability work that has been undertaken in support of the sums that LCC is suggesting it will seek in line with that. This also requires further examination at this stage if the Council and the Inspectors are to be satisfied that the Plan is deliverable.

Conclusions on Infrastructure

4.52 The Council and LCC are seeking infrastructure to support the growth proposed by the Plan, which is not actually required. We do not believe that the development of each of the proposed allocations will contribute to the creation of a severe adverse impact somewhere on the road network. Th Council and LCC are proceeding on an incorrect basis through INF1 and 2 (and the CTCS) which have been drafted and justified on this basis.

4.53 If the Councils are right, the Plan must be clear about the infrastructure that is required, the cost of this, what developers are going to be expected to contribute and how and when the infrastructure is to be delivered. Without full evidence and policy content on each of these matters the Plan will be at odds with national planning policy on the setting of Planning Obligation requirements and, critically, will not be 'justified' or 'effective'.

4.54 The proposal to defer the infrastructure solution to Transport Strategies is fundamentally flawed. It is wholly at foods with NPPF 36. There is no way these can be anything other than DPDs and so they should be being embedded in the Local Plan and examined now.

4.55 Any suggestion that the details of the planning obligations that are to be requested of developers may sit within SPDs is wholly inappropriate and must be removed from the Plan. Therefore the following Main Modifications / Paragraphs need to be removed:

- MM74 (Paragraph 3.25)
- MM75 (Policy LUA1: second bullet point)

- MM84 (Policy LUC1: bullet point 2)
- MM92 (Policy SUA1; bullet point 2)
- MM96 (suggested new paragraph after 3.205)
- MM97 (Policy SC1; bullet point 2 and bullet point 2(2))
- MM101 (Policy OS1 bullet point 3)
- MM138 (paragraph 7.54)
- MM139 (paragraph 7.56)
- MM152 (paragraph 9.5)
- MM156 (Policy INF1)
- MM158 (Policy INF2, paragraphs 9.19; 9;21 to 9;26 inclusive)

4.56 Any suggestion that the Council will pool developer contributions and that pooled contributions will be spent on unspecified infrastructure items designed to address cumulative or cross border impacts is wholly inappropriate and must be removed from the Plan.

4.57 Any implied or actual reliance, by the Council, on LCCs CTCS would be a grave error for the myriad of reasons set out in Jelson's representations on the CTCS.

5. Conclusion

5.1 Taking all of the above into account our Client would respectfully request that the Inspectors hold further examination sessions, in accordance with paragraphs 5.20 and 6.10 of the recently updated Procedure Guide for Local Plan Examinations (9th edition, dated 28 August 2024), in which the consequences of the above issues (plan period; housing land supply; and infrastructure) could be explored further and the necessary further main modifications considered.

Appendix I

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT 1990

AND THE CHARNWOOD LOCAL PLAN

OPINION

Introduction

1. I am instructed by Redrow Homes ("Redrow") and Jelson Homes ("Jelson"), through their respective consultants, Savills and Avison Young, to advise in respect of the draft Charnwood Local Plan 2021-37 ("the Draft Local Plan") which is presently begin examined under s20 of the Planning and Compulsory Purchase Act 2004 ("PCPA").

2. Specifically, I am asked to advise on three substantive soundness failures:

   (1) The plan period post-adoption, which will not be for the necessary minimum 15 year period after adoption as required by NPPF 22;

   (2) The housing land supply for the first five years post-adoption, in the light of additional evidence submitted after the hearing sessions;

   (3) The plan's approach to infrastructure and contributions, especially the consequences of the Charnwood Transport Contributions Strategy, which was subject to consultation up to 23 August 2024.

3. Procedurally, I am then asked to advise whether it would be necessary to hold further examination sessions, in accordance with paragraphs 5.20 and 6.10 of the recently updated Procedure Guide for Local Plan Examinations (9th edition, dated 28 August 2024), in which the consequences of the above issues could be explored further and the necessary further main modifications considered.

4. All of this requires consideration in the specific new context set by the Letter of the Minister of State (dated 30 July 2024), in which the new Government's approach to

examination procedure has been explained. This evidently post-dates the start of the present consultation.

Factual, Legal and Policy Background

5. I shall address the specific factual, legal and policy matters under each of the three headings. The plan history will be well-known to those instructing.

Issue 1: Plan Period

2037 End Date: 12 Years from Adoption

6. The Draft Local Plan has a plan period date of 2021-37. That end date of 2037 is referred to throughout the document. Most notably, Policy DS1 sets the Spatial Strategy up to 2037 and specifies both the overall requirement (19,024) and the minimum number of homes required in the individual areas. Policy DS3 has also made allocations by express reference to that requirement and strategy. No further allocations have been made to address needs beyond that point through 2038, 2039 and 2040.

7. The Draft Local Plan was submitted for examination on 3 December 2021 and accordingly the current examination has been conducted under the NPPF (2021). NPPF (2021) 22 (and its successor in NPPF (2023)) provides (so far as applicable and with all underling and bold emphasis added both here and below):

> "*Strategic policies should look ahead over a **minimum** 15 year period **from adoption**, to anticipate and respond to long-term requirements and opportunities, such as those arising from major improvements in infrastructure.*"

8. The Council has now indicated in its Local Development Scheme that it wishes to seek the necessary resolution at the end of 2024. However, the likely elapse of time (following upon earlier delays) would make any hypothetical resolution impossible prior to 2025.

9. At the date of adoption, the Draft Local Plan will not contain strategic policies that look ahead 15 years from the date of adoption. The strategic policies will only look ahead 12 years.

10. This issue is not addressed through the Main Modifications.

NPPF 22

11. NPPF 22 was specifically altered on 24 July 2018 from the 2012 wording:

> *157. Crucially, Local Plans should:*
>
> *- plan positively for the development and infrastructure required in the area to meet the objectives, principles and policies of this Framework;*
>
> *- be drawn up over an appropriate time scale, **preferably** a 15-year time **horizon**, take account of longer term requirements, and be kept up to date;*

12. The original NPPF 22 change was a response to a specific recommendation by the Local Plans Expert Group in their Report to the Communities Secretary and the Minister of Housing and Planning (March 2016), Summary Recommendation S38:[1]

> *"S38. Importantly, however, we particularly recommend that local plans must generate the confidence that they are planning sustainability over the full local plan period (at least 15 years)."*

13. Appendix A Main Recommendations paragraph 41 also stated:

> *41. Boosting supply – To boost significantly the supply of housing paragraph 47 of the NPPF should be amended to require:*
>
> *i. Local Plans should identify a housing requirement with sufficient deliverable or developable sites or broad locations to meet full objectively assessed housing need (FOAHN) over the full plan period for their local area, including any unmet need from within or beyond the Housing Market Area, plus an additional allowance for flexibility appropriate to local circumstances, as far as is consistent with the policies set out in this Framework.*

[1] https://assets.publishing.service.gov.uk/media/5a81813aed915d74e33fe924/Local-plans-report-to-governement.pdf

*ii. Local Plans should make a further allowance; equivalent to 20% of their housing requirement, in developable reserve sites as far as is consistent with the policies set out in this Framework, for a **minimum** fifteen year period **from the date of plan adoption**, including the first five years (this recommendation does not apply where it has been demonstrated that a local authority does not have sufficient environmental capacity to exceed its local plan requirement). The purpose of reserve sites is to provide extra flexibility to respond to change (for example, to address unmet needs) and/or to help address any actions required as a result of the Government's proposed housing delivery test.*

iii. Local Plans should contain a policy mechanism for the release of reserve sites in the event that monitoring concludes that there is less than 5 years housing land supply or there is a need to address unmet needs;

*iv. Local Plans should be supported by a Housing Implementation Strategy ("the HIS") that illustrates the expected rate of housing delivery through a housing trajectory for the whole of the plan period (**at least fifteen years**) and also sets out the mechanisms by which the local authority will manage delivery of a five-year supply of housing land to meet its housing requirement.*

14. The Government then set out in its March 2018 version the precise wording now in NPPF 22: "*a minimum 15 year period from adoption*". The two terms are very clear, the term is a minimum figure and it starts at the date of adoption, which is statutorily the date of the authority's resolution, see section 23(5) PCPA:

> "*(5) A document is adopted for the purposes of this section if it is adopted **by resolution** of the authority.*"

15. There is (and has never been) any PPG provision that qualifies that term "from adoption".

16. In short, NPPF 22 does not allow for any shorter period post-adoption to be chosen for the strategic policies. This was a distinct change made from the NPPF 2012 wording which referred to a "15-year time horizon" being merely "preferable".

Inspector's Questions and Council's Response

17. The Inspectors first raised this issue in their original Question 1.21 "1*.21 Are any adjustments to the Plan period necessary for consistency with the NPPF's provision that strategic policies should look ahead for a minimum 15 year period from adoption?*". The

Council's response (March 2022) was over-optimistic and rapidly proven wrong by further plan delays into 2023 and now, deep into 2024:

> *1.21.1. The Plan period remains justified. The Plan period is from 2021 to 2037 and adoption before the end of 2022 would provide for it to look ahead for 15 years at that point. The Local Development Scheme (LDS) submitted with the Local Plan (SD/16) sets out an anticipated adoption date of October 2022 based on submission in October 2021. The Plan was ultimately submitted in December 2021 which still allowed for a period of 12 months between submission and adoption before the end of 2022. An updated LDS was approved by the Council's Cabinet and published in April 2022. This sets out an updated anticipated adoption date of December 2022 or January 2023 based on the hearing sessions beginning in July 2022. Achieving adoption before the end of 2022 and therefore a 15-year period for the Plan on adoption remains achievable but the Borough Council acknowledges that there is scope for an unanticipated matter to arise and cause delay.*
>
> *1.21.2. Should it not be possible to adopt the Plan before the end of 2022, the Borough Council believes that it would still be reasonable for the Plan with its current Plan period to proceed to adoption. This because of the significant benefits of having a plan in place and the closeness to 15 years that the Plan would still look ahead. The Borough Council is aware of other cases where this approach has been followed. The North East of Leicester and West of Loughborough Sustainable Urban Extensions allocated in the Plan would continue to deliver homes beyond the end of the Plan period and the Plan allocates a significant amount of employment land. In addition to the general requirement to review plans every five years, the Plan includes a policy to trigger an early review when the apportionment of unmet housing or employment need within the Housing Market Area/Functional Economic Market Area arises.*

18. Paragraph 1.21.2 was notably brief, referring simply what would be "reasonable" as opposed to the strict policy wording of the NPPF. NPPF 22 allows for no exception and thus the idea of simply breaching the policy requirement was not something that could be excused in this way.

19. The Inspectors again raised this issue in their Supplementary Question "1. Are any adjustments to the Plan period (2021 – 2037) necessary to accord with NPPF paragraph 22 which states that strategic policies should look ahead for a minimum 15-year period from adoption, having regard to the delays in the Examination process?"

20. The Council's response (January 2023) recorded a generalised wish to avoid delayed adoption, but again did not squarely address the terms of NPPF 22:

The Council's written statement to Matter 1 question 21 sets out the reasons why it would be reasonable to proceed to adoption in 2023 with the plan period to 2037. In addition, to the points that have already been made, the Council considers its approach to adopt a Local Plan without further delay, is in line with government objectives set in written ministerial statements (EXAM15 Appendix J), it is the most effective means of significantly boosting the supply of housing in the borough and is therefore fully in line with a key objective within the NPPF. The preparation of any Local Plan requires the preparation of extensive range of supporting evidence and making sure this is up to date at submission and over the examination of the Local Plan is challenging. Making adjustments to the plan period would therefore introduce risks that parts of the evidence become out of date.

There are examples of Local Plans being adopted with less than 15-year plan period where the Local Plan inspector in each case will have reached a balanced judgement against paragraph 22 of the NPPF. The Hart Local Plan Inspector's report (February 2020) considered this issue at paragraph 33 – (the wording of paragraph 22 of NPPF at this time was the same 2021 NPPF). (Charnwood Matter 10 Statement Appendix 1). The Local Plan Inspector's report for the Royal Borough of Windsor & Maidenhead Council February 2022 found the Plan to be sound with a plan period running to 2033. (See Appendix 1 to this Statement).

21. Neither of the Council's two examples are applicable, and the Council's reference to them raises significant further questions about its intended approach here.

22. The Hart Local Plan Inspector's findings were published on 10 February 2020 and were based on the 2012 wording: NPPF (2012) 157:

32. There has been some suggestion that the Plan period should be extended. The Plan looks forward 13 years after anticipated adoption, which is below the preferred 15 year time period set out in Paragraph 157 of the NPPF. However, the NPPF's preference is not a set requirement and I consider 13 years to be an appropriate time scale in this instance, particularly as there is now a requirement to review plans every five years.

23. The Windsor and Maidenhead Inspector's Report also makes clear that it was assessed against the NPPF (2012), paragraphs 1 and 2, and the express terms of NPPF 22 were not addressed at all.

Existing Submissions and Error of Law

24. For present purposes, I shall not summarise again the detailed, repeated and consistent submissions made by both Savills and Avison Young in their respective hearing statements as to all the practical and methodological reasons why NPPF 22

must be applied correctly, from the date of adoption – notwithstanding delays to the examination process.

25. The simple point is that the correct interpretation of NPPF 22 is ultimately a matter of law. Those acting on behalf of Redrow and Jelson (and a considerable number of other participants) have all identified that there will be a clear breach of NPPF 22, and the Council's position that it can simply overlook NPPF 22 is incorrect, and to a very significant extent.

26. Again for present purposes, I need not summarise the extensive case law in respect of the interpretation of the NPPF at examination. As far back as *Gallagher Homes v Solihull MBC* [2014] EWCA Civ 1610, on appeal from [2014] EWHC 1283 (Admin), the courts have been clear that the NPPF must be interpreted correctly.

27. The Council's answer to this has not addressed the strict terms of NPPF 22 at all. They have instead repeatedly referred to a wider wish to have the plan adopted notwithstanding the breach. However that falls a long way short of compliance with NPPF 19(2)(a).

28. On this basis alone, the Local Plan is not sound, as presently drafted and the Main Modifications have entirely failed to address a central issue.

Consequences

29. If the plan were to proceed to adoption, this would form a clear basis for a legal challenge by way of s113 PCPA on the basis that (a) the document is not within the appropriate power.

30. I shall return below to the question of further hearings and how this new issue (including the sheer length of the disparity with the 15 year requirement) provides the basis for re-opening the hearings post-Main Modifications.

Issue 2: Housing Land Supply

NPPF 68 and 74: Five year Supply of Deliverable Sites

31. Under NPPF (2021) 68 (now NPPF (2023) 69a):

> *68. Strategic policy-making authorities should have a clear understanding of the land available in their area through the preparation of a strategic housing land availability assessment. From this, planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability and likely economic viability. Planning policies should identify a supply of:*
>
> *a) specific, deliverable sites for years one to five of the plan period.*

32. NPPF (2021) 74 in turn provides:

> *74. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies.*

33. The definition of deliverable is set out in the Glossary, and has been summarised in the Avison Young submissions.

Council's EXAM 58K, L and M and New Information

34. By their letter of 22 March 2024 (EXAM 80), the Inspectors asked the Council to update the examination documents, as follows:

> *4. In advance of the Matter 7 hearing session, the Council updated the housing land supply information in the suite of documents in Exam 58 to the end date of 31.12.23. Although representors had an opportunity to provide comments on the updated information at the Matter 7 hearing sessions, it has not been possible for representors to submit comments in writing.*
> *As the end of the 2023/24 monitoring year is now imminent, the Council should update the information in the Exam 58 suite of documents to reflect completions and commitments as at 31.3.24. The updated documents should be made available for consultation alongside the consultation on the main modifications to the Plan.*

35. The result is the various EXAM 58K, L and M documents.

36. Both Savills and Avison Young have analysed the updated housing land supply information on a site by site basis and their calculations are set out in the Avison

Young Statement at [paragraph 3.7, Table] and the attached Appendix 1, Excel spreadsheet.

37. EXAM 58L identifies an extremely marginal 5.01 years supply, applying the Sedgefield method, i.e. by just 13 dwellings. That serves as an immediate warning as to the limited margin for error in the housing land supply exercise. However, in any event, the evidence overwhelmingly points to a much greater shortfall.

38. As their submissions have made clear, there are numerous aspects to the housing land supply that are not merely new, but unexplained. These include significant delays to applications and grants of permission, arising across a range of sites and for diverse reasons. Much of this has involved sharp changes of position even within 12-18 months from the position at the time of the 2023 hearing sessions.

39. The scale of the deficit identified by Avison Young and Savills – at 3.89 years – is therefore very significant, in circumstances where the supply is already extremely marginal.

<u>Consequences</u>

40. The evidence, as now updated, does not confirm that there will be the requisite five year supply of deliverable sites. Indeed, it points in exactly the opposite directon – a supply that falls well short of 5 years.

41. On this basis alone, there is again a pressing for the matter to be reconsidered at further hearing sessions, notably because so much of the material provided by the Council is new, and of a character that is necessarily detailed and best capable of being interrogated in open session.

<u>Issue 3: Infrastructure</u>

<u>The CTCS Consultation and Counsel's Opinion</u>

42. Savills and Avison Young's representations refer to the Opinion of Paul Tucker KC and Constanze Bell which has been submitted to Charnwood Transport Contributions Strategy ("CTCS") for consultation (on 23 August 2024). They have asked for this document to be submitted to the examination. It raises a number of highly relevant matters not just for the CTCS exercise, but ultimately the present examination.

43. In summary, that Opinion explains comprehensively that the CTCS preparation has been based upon a fundamental error of law in respect of the scope of such a document. Reference has been made in detailed terms to the historic case law on the limits of SPDs, including notably *William Davis Ltd v Charnwood BC* [2017] EWHC 3006 (Admin) and *R. (on the application of Skipton Properties Ltd) v Craven DC* [2017] EWHC 534 (Admin) which significantly constrain the scope of an SPD. They also note a number of other broader administrative law principles that are being contravened by the CTCS, not least the lack of an appropriate evidence base and an attempt to replicate CIL without statutory authority.

44. Notably, they also refer to the Settlement Agreement (dated 8 June 2023), concluded in judicial review litigation brought by Barratt David Wilson (BDW) against the County Council in respect of seeking developer contributions pursuant to its Interim Strategy. There is an important recent local history of positions being adopted that cannot withstand legal challenge. This is a continuation of that history.

Judicial Review of the CTCS

45. I agree with the conclusions of the Opinion in full. It is evident that, if published, CTCS would be the subject of immediate judicial review litigation and would relatively rapidly be quashed by the court at a final hearing, assuming that the County Council were not to concede to judgment early.

The Significance of the CTCS to INF1 and INF2

46. It is in that complex territory that INF1 and INF2 now fall to be assessed.

47. The Borough Council have at the same time both raised the CTCS in the examination and yet refused to submit it. They have evidently relied upon it, as part of their justification for INF1 and INF2 as drafted.

48. The Inspector's letter of 22 March 2024 (EXAM 80) observed:

> *5. There was discussion at the hearing session under Matter 8 on 21 February 2024 around whether the Council would be seeking to produce a Supplementary Planning Document (SPD) or a Development Plan Document (DPD) as the basis for securing developer contributions. In the absence of a Community Infrastructure Levy (CIL), the mechanism for securing developer contributions to transport infrastructure needs to be clear and secure. We would ask the Council to provide clarification on and justification for its preferred approach.* ***However, it is our view that the most secure way to achieve the desired outcome would be through a DPD.***
>
> *6. Policy INF1 is subject to a main modification (Main8.d). Following evidence from Leicestershire County Council at the session on Matter 9 on 22 February 2024, a further change is necessary to ensure that the policy and supporting text seek to secure developer contributions that reflect the priorities for infrastructure.*

49. The Council responded on 14 April 2024 (EXAM 80A):

> *5. Securing Developer Contributions*
>
> *With regard to the approach to securing developer contributions,* ***the Council's preferred approach is secure this through a Supplementary Planning Document (SPD)*** *for the following reasons:*
>
> *The document will build upon and provide more detailed guidance on the application of Local Plan policies INF1 and INF2.* ***That is ordinarily the function of an SPD****, not a Development Plan Document (DPD) (which would normally embody a new suite of policies and proposals).*
>
> *The preparation of both the Transport Contributions Strategy and the Planning Obligations SPD will incorporate the evidence base that has been tested through the examination, the preparation of a separate DPD would require its own evidence base. There is an urgency to completing the policy framework for securing contributions to infrastructure, given that two thirds of the local plan allocations either have the benefit of planning permission or a submitted planning application, it is therefore important that contributions can be sought as soon as possible within the plan period. This is better served by the more streamlined process for the preparation of an SPD.*
>
> *It would be easier to keep an SPD up to date, and that is the experience of other SPDs which have been prepared for a similar purpose.* ***The preparation of SPD is a tried and tested approach and has been demonstrated that it works.***

From a development management perspective, an SPD will carry just as much weight as a DPD, not least because it will be easier to keep up to date as costs change.

Finally, it should be noted that Leicestershire County Council are in the final stages of preparing the Transport Contributions Strategy and are due to consult on the draft document later in the spring*. The Council have committed to preparing a Planning Obligations Supplementary Planning Document within the adopted Local Development Scheme 2024-2027. These two documents together will build upon and provide more detailed guidance regarding the application of Local Plan policies INF1 and INF2.*

50. The Council therefore have an "in principle" approach that they wish to defer the topic to an SPD. In practice, the CTCS has formed a crucial part of their assessment process, even whilst it has been kept away from the present examination.

Lack of Evidence and Incorrect Presentation of Role of SPD

51. There are myriad problems with the Council's intended approach, as recorded above and as now revealed through the publication of CTCS for consultation: both substantively and procedurally.

52. Substantively, the Council have not provided the requisite evidence to this examination as to what the contributions will be, why they are justified and how they will impact on the deliverability of multiple sites that are central to the plan's strategy.

53. As a sub-point, the Council have done nothing to address the Inspector's observation in EXAM 80 that "the most secure way to achieve the desired outcome would be through a DPD".

54. The Council's explanation for this is something of an echo of their response to Issue 1 above: wrong in law, and with respect, diverting from the very real evidential gap. It is not the function of an SPD to "*build upon and provide more detailed guidance on the application of Local Plan policies INF1 and INF2*" where the SPD seeks to impose contributions at amounts that have not been tested at examination. As Counsel's Opinion submitted to the CTCS has observed, an SPD cannot seek to supplant a

DPD. It has not had the parallel examination of a DPD, and therefore has not been assessed for robustness.

55. The Council's explanation therefore contains a series of statements that are wrong in principle or where examples are suggested but not actually cited.

56. In particular, it is said that "*an SPD will carry just as much weight as a DPD*". An SPD does not carry s38(6) PCPA force and therefore cannot as a matter of law attract the same weight.

57. It is also said that "*The preparation of SPD is a tried and tested approach*". No example is given, and the detailed case law summarised in the parallel Counsel Opinion – including *William Davis v Charnwood BC* and *Skipton Properties v Craven DC* actually point directly the opposite way. As the Inspectors have observed: the most secure way is through the DPD route.

Main Modifications to INF1 and INF2

58. The submissions of Savills and Avison Young have analysed the terms of INF1 and INF2 as proposed to be modified. In summary, the resulting text is neither clear, nor can it be sound. MM156 introduces text that is striking in its vagueness and refers to an Appendix 3 which is both incomplete in respect of the description of infrastructure and does not align with the CTCS. The multiple references to Transport Strategies in MM158 and the earlier MMs 74, 75, 84, 92, 96, 97, 101, and 138 also refer in the vaguest of terms to a coordinated approach and an effective package of interventions. These sit alongside the difficulties that arise from the proposal to pool contributions under MM152 and MM156.

59. All of this points to a central flaw in the Borough Council's approach, compounded by the approach of the County Council.

60. Put simply, they have not submitted the necessary evidence to the examination in respect of transport infrastructure matters, nor explored how this will affect allocations. This in turn has significant implications for housing land supply in the first five years (as raised in Issue 2) above.

Parallel Challenge to CTCS

61. For now, the Borough Council and this examination are faced with a significant procedural challenge. In practice, the Council have referred to the CTCS document, even if it has not been submitted.

62. If it is published, then it will be subject to legal challenge (and indeed a quashing order) in due course.

63. If a decision is taken not to publish, the CTCS, then this merely confirms the correctness of Redrow and Jelson's position on the lack of an appropriate basis for INF1 and INF2.

64. In any event, all of this is new information which has arisen long after the hearing sessions closed and indeed some time after EXAM 80.

65. Therefore, again on this ground alone, there is a pressing need for hearing sessions to be re-opened, notwithstanding the current Main Modifications exercise.

66. Put another way, the Main Modifications do not address a fundamental soundness issue and, with respect, entirely overlook the significance of the flaws within INF1 and INF2.

Hearing Sessions

67. I turn then to the question of procedure and the justification for hearings across all three issues.

68. The Procedure Guide for Local Plan Examinations notes at [5.20]

> *5.20. It might occasionally be necessary for the Inspector to arrange one or more further hearing sessions during the reporting period, for example to resolve a fundamental soundness issue. Significant representations on the proposed MMs might also give rise to the need for further hearings (see Section 6 below).*

69. Section 6 then includes [6.10]:

> *6.10. The Inspector will consider all the representations made on the proposed MMs before finalising the examination report and the schedule of recommended MMs. Further hearing sessions will not usually be held, unless the Inspector considers them <u>essential to deal with substantial issues raised in the representations, or to ensure fairness.</u>*

70. There is a recognition in [5.21] of the specific importance of testing certain matters ("problems") through hearing sessions, and the way in which issues may arise over the course of an examination that necessitate further such sessions: "*In some cases, however, it may not be possible for the Inspector to determine whether or not such problems exist until the evidence has been thoroughly tested at the hearing sessions.*"

71. The Minister of State's letter also signals the end to an earlier era of Government instruction to apply "pragmatism" to the examination exercise, in circumstances where this might defer consideration of fundamental soundness failings:

> *"I also want to empower Inspectors to be able to take the <u>tough decisions</u> they need to at examination, to ensure they can focus their time on those plans that are capable of being found sound and to realise this Government's aim of universal plan coverage."*

72. At present, it is uncertain precisely how long it will take to resolve the fundamental soundness failings of this plan.

73. What is clear is that the Council has adopted three separate positions (1) on plan period; (2) on 5 year housing land supply and (3) on infrastructure, that are directly contrary to national policy, or tied to an evidence base which is demonstrably not robust. Indeed, in the latter respect (3), the intended approach is in effect tied to a separate document/process that is unlawful.

74. The [5.20] and [6.10] criteria for re-opened hearings are thus met in this case: (a) to seek to resolve a fundamental soundness issue, (b) to address significant representations; (c) to deal with substantial issues raised in the representations, and (d) in all the circumstances, to ensure fairness.

75. I make clear again that none of the flaws are necessarily capable of being addressed through a specific course of action that can be addressed in 6 months or less, in accordance with the Minister of State's letter.

76. However, the re-opening of such hearings remains in effect the only procedurally pragmatic step for this examination.

77. It would allow all participants an appropriate format in which to consider and make submissions on each of these important issues, recognising the extent of the new material and the seriousness of the issues. It would take account of the parallel events with the CTCS which are ultimately central to the future of the Draft Local Plan.

78. In the absence of such hearings, participants including Redrow and Jelson would also have been significantly procedurally disadvantaged, in being required to make detailed submissions only at the Main Modifications stage on a draft plan and an evidence base that has moved on considerably since the last set of hearings.

Conclusion

79. In conclusion, my advice is that:

(1) The Plan cannot lawfully be adopted in circumstances where it will cover well short of the minimum 15 year period after the date of adoption, as required by NPPF 22;

(2) On the basis of the Avison Young analysis, which should be scrutinised closely, the Plan cannot be found to be capable of providing for the necessary five year housing land supply under NPPF 68a and 74. Again a decision to proceed in the face of overwhelming evidence of a shortfall would amount to an error of law;

(3) The plan's approach to infrastructure and contributions is impermissibly uncertain and ineffective on its own terms. It is also so closely tied to the

Charnwood Transport Contributions Strategy, which proposes an approach that is unlawful, that this critical component is unlawful.

80. There are therefore a number of fundamental soundness failings, each of which would merit in the first instance its own bespoke hearing session.

81. The precise consequences to follow those would have to be determined post-hearings. This may not include further progress of the examination, but would have the clear procedural advantage of allowing all participants to comment on the considerable new information that has arisen. It would also allow the Minister of State's letter to be the subject of the necessary detailed submissions.

82. In the absence of such a procedure, the ultimate decision to adopt would be challengeable under s113 PCPA 2004.

JAMES CORBET BURCHER

No5 Chambers

30 August 2024

Appendix II

© 2021 Avison Young (UK) Limited

Appendix 2

Exam 58M – AY Review of Charnwood Five Year Housing Land Supply (2024-2029) Large Sites			
Planning Application / Draft LP Allocation Reference	**Site Address**	**Number of dwellings to be discounted from supply**	**Reason**
P/21/2425/2	5 Latimer Street Anstey	11	Full planning permission granted in October 2023. No applications made to discharge conditions as yet. Site controlled by Bass Family – no evidence that they will develop the site or that it has been sold to a developer / housebuilder
P/21/0760/2 (HA45)	Land south of Melton Road, Barrow upon Soar	130	Resolution to grant outline planning permission in December 2022. S106 never signed and Council appears to be re-assessing outline planning application. No prospect of outline permission, reserved matters, technical approvals being secured and development commencing within 5 years
P/21/07592/2 (HA46)	Land off Melton Road, Barrow upon Soar	135	As above
n/a	Residual land off Nottingham Road Allocation	10	Land controlled by Jelson – no intention to develop due to site constraints / current use (landscaping)
P/20/2392/2 (HA59)	Land off Humble Lane, Cossington	40	Site benefits from outline planning permission (granted in October 2022). No discharge of conditions applications made, no evidence that applicant will make RM submission. Ay have therefore removed 40 dwellings from 5 year HLS
P/23/0805/2 (HA26)	Land at Limehurst Avenue, Loughborough	(514) 216 net	Resolution to grant full planning permission in October 2023. S106 has never been signed. No evidence from operator that development will commence / proposal will deliver housing within 5 year period
P/18/0431/2 (HA19)	Park Grange Farm, Newstead Way, Loughborough	15	Full planning permission granted in November 2021. Applications made in May 2024 to discharge pre-commencement conditions. Still a number of substantive issues that are

			preventing the Council approving DOC application. Consent will lapse if conditions are not approved by 10 November 2024. Significant uncertainty as to whether development will come forward.
P/20/1404/2	Former Druid Arms, Pinfold Gate, Loughborough	20	Site benefits from full planning permission (granted in 2021) still pre-commencement conditions to discharge. Permission would lapse on 1 November 2024 if those applications are not made to LPA. Moreover site currently in viable use as a martial arts centre. No evidence that the site will come forward in five years.
P/14/1833/2	West of Loughborough SUE	79	AYs view is that the site won't deliver more than 200 dwellings per annum. 79 dwellings have been taken out of 5 year HLS supply to reflect this
P/20/0155/2	Radmoor House, Radmoor Road, Loughbroough	40	Full planning permission granted on appeal in June 2021. All pre-commencement conditions discharged on 7 May 2024. AY have visited the site and there is no evidence that development has commenced. Therefore full planning permission has lapsed.
P/21/1260/2	Land at Ashby Road, Markfield	93	Outline planning application approved in May 2023. Penland Estates made an application in June 2023 to vary s106 agreement. This was approved in May 2024. No reserved matters application to date and developer has not provided the Council with evidence on timescales for this.
P/22/1168/2	Land at Gaddesby Lane, Rearsby (HA66)	25	Outline planning permission approved in March 2024. No RM application made to date. Applicants have not confirmed timescales for this and DoC submissions with the Council. We have therefore removed 25 dwellings from supply to reflect likely lead in times.
P/21/2085/2 (HA51)	Land north of Cossington Lane, Rothley	40	Outline planning permission approved in October 2023. Site not controlled by a developer or housebuilder. Applicant hasn't provided Council with any evidence that sets out timescales for making RM submission of

			discharging conditions. We have therefore removed 40 dwellings from 5 year HLS
P/16/1660/2 (LUA3)	Birstall SUE	193	AY assume that the site won't deliver more than 200 dwellings per annum and have adjusted number of homes that will be delivered in 5 year period to reflect this change to delivery rates.
P/21/0738/2 (HA53)	Land off Barnard's Drive Sileby	100	Outline planning permission granted in April 2023 (Gladman). No RMA to date or applications to discharge conditions. Promoter had a pre-app in connection with RM submission in summer 2023 but no progress made with site since then. No evidence that site will deliver housing within 5 years. 100 house removed from supply.
P/21/2639/2 (HA3)	Barkby Road, Syston	40	Taylor Wimpey secured outline planning permission at appeal (February 2024). No applications to discharge conditions or for RMA made to date. We suggest that commencement is pushed back by a further year and 40 dwellings removed from 5 year HLS.
P/19/1410/2	Barkby Firs Ambulance Station, Syston	26	Full planning permission approved in October 2023. No applications made to discharge pre-commencement condition. Site not controlled by a developer or housebuilder. No evidence that the site is viable and likely to come forward for development in 5 years.
P/20/2017/2	Land at Maplewell Road, Woodhouse Eaves	36	Outline planning permission granted on appeal in October 2021. No RM or DoC application have been made to date. Site not controlled by developer or housebuilder. Permission will lapse on 3 October (one months time) if application RMA not made by then. In our view site isn't likely to come forward for development and has been removed from supply
P/20/2044/2	Land off East Road Wymeswold	45	Outline planning permission approved in January 2022. Reserved matters application made in in 2022 but withdrawn in February 2024. Not clear why. Site controlled by Davidsons. Council hasn't been provided with

			any evidence to indicate that the site will come forward for development within 5 years.
Total number of homes to be removed from 5 years HLS		**1294**	

Appendix III

© 2021 Avison Young (UK) Limited

Housing & Employment Trajectory

Policy Ref.	CHARNWOOD BOROUGH	2021/ 2022	2022/ 2023	2023/ 2024	2024/ 2025	2025/ 2026	2026/ 2027	2027/ 2028	2028/ 2029	2029/ 2030	2030/ 2031	2031/ 2032	2032/ 2033	2033/ 2034	2034/ 2035	2035/ 2036	2036/ 2037	TOTALS	AY Comments
		16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1		
	Past Completions	792	661	821														2274	
	Commitments Leicester Urban Area	14	38	41	**15**	**15**	**15**	**4**										**142**	
	Commitments Loughborough Urban Centre	344	109	134	**55**	**127**	**45**	**1**		**15**	15							**845**	
	Commitments Shepshed Urban Area	169	136	78	**43**	**46**	**32**	**29**		**27**	26							**586**	
	Commitments Service Centres – Anstey, Barrow upon Soar, Mountsorrel, Quorn, Rothley, Sileby	251	251	193	**197**	**121**	**134**	**111**	**75**	**40**	20							**1393**	
	Commitments Other Settlement– Estimated completions from commitments	6	17	24	**106**	**42**	**155**	**190**	**67**	**81**								**688**	
	Commitments Small Village or Hamlet– Estimated completions from commitments	8	8	-1	**8**	**1**												**24**	
	TOTAL ALL – Estimated completions from commitments	792	559	469	424	352	381	335	142	163	61	0	0	0	0	0	0	3678	

Policy Ref.	CHARNWOOD BOROUGH	2021/ 2022	2022/ 2023	2023/ 2024	2024/ 2025	2025/ 2026	2026/ 2027	2027/ 2028	2028/ 2029	2029/ 2030	2030/ 2031	2031/ 2032	2032/ 2033	2033/ 2034	2034/ 2035	2035/ 2036	2036/ 2037	TOTALS	AY Comments
		16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1		
ALLOCATIONS Leicester Urban Area		0	0	0	5	11	45	100	154	229	275	260	220	190	130	100	100	1819	
HA1	Land South East of Syston									25	75	100	100	100	100	100	100	700	No PA to date - Council has no evidence to demonstrate that the site will deliver housing in first five years of plan. Last response from promoter (April 2022) said that the site would deliver housing in 26/27. No obvious progress since then and supply pushed back by Council as consequence. AY have taken supply out of first 5 years.
HA2	Barkby Road, Syston								10	40	40	40	40	30				200	Jelson site - full planning application for up to 251 dwellings. Not yet determined and being revised to take account of officer comments (will reduce site capacity marginally). Jelson have agreed trajectory with LPA
HA3	Land north of Barkby Road, Syston						15	40	40	40	40	20						195	TW granted outline planning permission on appeal in January 2024. No reserved matters application to date. Assume that site starts delivering one year later in plan period than Council has on this basis.

HA4	Queniborough Lodge							40	40	40	5							125	Resolution to grant outline permission on 20 June 2024 to agreeing highways contributions (£35,778.93 per dwelling), on other financial contributions. AY have taken 40 dwellings out of 5 year housing land supply and moved it in to 6-10 year period.
HA5	Land at Melton Road, Syston				5	11	10											26	Detailed planning permission for 26 houses (P/19/1410/2) granted in October 2023. Council has adjusted trajectory because work didn't start on site in 23/24 as applicant advised.
HA6	Brook Street, Syston																	0	Site currently in industrial use, no application for planning permission. Owners apparently 'amenable' to housing development. SHLAA Proforma suggests that site has capacity for 10 dwellings not the 15 assumed by the LPA. No evidence to demonstrate that there is a reasonable prospect that the site available and could be viably developed at the point envisaged. No Song etc. Remove 15 dwellings from trajectory
HA7	Land off Barkby Thorpe Lane, Thurmaston									40	40	40	40	20				180	SocG (May 2022) said that Bellway were gearing up to submit PA. No PA as yet - no evidence that the land owner is preparing PA and that it will secure consents need to ensure that the site will deliver housing within 5 years.
HA8	Woodgate Nurseries, Barkby Lane, Thurmaston								12	24	10							46	Jelson site - Jelson has confirmed that the site will deliver housing within the timescales indicated in the current trajectory.
HA9	Works opposite 46 Brook Street, Thurmaston																	0	Council say will deliver 7 houses, but site is currently in business use, owner says that notice would need to be served on occupiers to have him vacate. No evidence site is available.
HA10	Works adjacent 46 Brook Street, Thurmaston										0							0	Council say the site will deliver 5 houses within 6+ years. No SOCG or other evidence to demonstrate that there is a reasonable prospect that the site available and could be viably developed at the point envisaged. Remove from supply
HA11	Rear of Manor Medical Centre, Melton Road, Thurmaston											20						20	SHLAA proforma states site could only accommodate 8 dwellings. No SoCG or any other evidence to say whether site is developable.
HA12	Land at Gynsill Lane & Anstey Lane, Glenfield									10	40	40	40	40	30			200	No PA - SHLAA said that site wouldn't deliver until 6-10 year period. Socage of Feb 2022 talks about site promotion not timescales for submission of PA. Council has no evidence to demonstrate that the site will deliver housing in first five years of plan.
HA13	Park View Nursery Site off Gynsill Lane, Glenfield						20	20										40	Outline planning permission granted in January 2024. RM application submitted in August 2024 for 40 dwellings. Site controlled by housebuilder. No evidence to suggest that the site is not deliverable
HA14	Land off Cliffe Road / Henson Close, Birstall									10	25							35	Jelson have confirmed expected timescales for delivery with the Council.
ALLOCATIONS Loughborough Urban Centre		**0**	**0**	**0**	**0**	**7**	**15**	**98**	**136**	**459**	**323**	**343**	**290**	**190**	**180**	**186**	**63**	**2290**	

Policy Ref.	CHARNWOOD BOROUGH	2021/ 2022 16	2022/ 2023 15	2023/ 2024 14	2024/ 2025 13	2025/ 2026 12	2026/ 2027 11	2027/ 2028 10	2028/ 2029 9	2029/ 2030 8	2030/ 2031 7	2031/ 2032 6	2032/ 2033 5	2033/ 2034 4	2034/ 2035 3	2035/ 2036 2	2036/ 2037 1	TOTALS	AY Comments
HA21	Part of Baxter Gate Opportunity Site, Loughborough										100	110						210	No SoCG, no PA and no developer interest
HA23	Market Street					7				50	15							72	Detailed planning permission granted for 7 units on part of site in April 2022 (expires April 2025). Site not controlled by a developer
HA24	Southfields Council Offices, Southfield Road											53	110					163	Council owned site. They say it will be developed in 6-10 year period. No SoCG, no PA and no developer interest.
HA26	Former Limehurst Depot									216								216	Site was previously allocated for mixed use development in 2004 Local Plan but has never come forward for development. OPA submitted and resolution to grant in December 2023. No evidence it will deliver in 5 years so remove from 5 year HLS
HA28	Land off Derby Square															37		37	No SoCG. SHLAA indicates site capacity is 37 units not 43. No PA and no developer interest. Assume 37 not 43
HA29	Southfields Road Car Park, Loughborough										33							33	Council owned site - they say that will bring forward for development. Leave in as reasonable prospect that the site is developable.
HA15	Land south of Loughborough							25	46	46	90	90	90	90	90	90	63	720	Part of site has OPP for up to 120 dwellings (2023) and is subject of a RMA (submitted November 2023) for 177 dwellings which has not yet been determined. Council have assumed 120 will deliver in first 5 years of plan period (not possible given RMA is for 117) we suggest remove a further years worth of delivery from supply.
HA16	Laburnum Way, Loughborough							33	50	50	50	50	50	50	50	39		422	SoCG of 27 April 2022, indicates that Bloor Homes intended to submit PA by end of 2022 and development would commence in 26/27 monitoring year. No PA, no further SoCG since then. Assume that the site won't deliver in timescales Council move supply back by one further year.
HA17	Moat Farm, Land south west of Loughborough.										25	40	40	40	40	20		205	SoCG (May 2022) confirms landowners timescales for bringing forward for development.
HA18	Land to r/o Snells Nook Lane, Loughborough							40	40	40								120	Site owned by William Davis. Resolution to grant full planning permission July 2024, subject to s106 & conditions. Wm Davis has agreed with Council to date by which site will start to deliver housing back by 1 year as a result.
HA19	Park Grange Farm, Newstead Way						15											15	FPP granted in November 2021 (HD Developments). Application to discharge some pre-commencement conditions approved in July 2023. Application to discharge remaining pre-commencement conditions submitted in May 2024 and has yet to be determined. FPP will lapse if not approved by 1 November 2024. Leave as it for now.
HA20	Land off Parklands Drive, Loughborough									20	10							30	No PA, no publicly available SoCG - Council say that 'promoter' confirmed trajectory in April 2024. No clear evidence that housing completions will begin on site within 5 years. Move 20 of out 5 year HLS

HA22	Devonshire Square									27								27	Part of the site is within FZs 2 &3. SHLAA suggests that site could only accommodate 27 dwellings, which probably reflects site constraints. No SoCG or any other evidence on ownership or delivery. Reduce supply by 12 dwellings to reflect site capacity issues.
HA25	138-144 Knighthorpe Road, Loughborough									10								10	SHLAA says that site could only accommodate 10 dwellings and that it would come forward in 11-15 year period. Not controlled by developer and not subject of SoCG. Remove 5 from HLS to reflect actual site capacity given no evidence to prove can accommodate 15 dwellings.
HA27	Former Main Post Office, Sparrow Hill, Loughborough													10				10	SHLAA highlights that site capacity is 10 dwellings. No SoCG and no evidence to indicate why Council has increased site capacity to the degree it has. Remove 6 dwellings from HLS
ALLOCATIONS Shepshed Urban Settlement		**0**	**15**	**48**	**50**	**50**	**81**	**116**	**138**	**248**	**277**	**228**	**208**	**208**	**148**	**126**	**42**	**1983**	
HA30	Land off Fairway Road									40	40	20						100	SHLAA says that site wouldn't start delivering until 6-10 year period. Agent has indicated that the landowner won't submit application for planning permission until site has been allocated in LP. Latest LP evidence indicates that promoter is seeking pre-application advice. On this basis remove 40 units from 5 year HLS
HA31	Land north of Ashby Road, Shepshed				50	50	50	50	10									210	Site under construction
HA32	Land off Tickow Lane (south)								44	44	44	44	44	44	44	44	42	394	Site controlled by Wm Davis. SoCG of May 2022 highlights hybrid PA expected in summer 2022 and development to start delivering housing in 25/26. Revised trajectory can't be right on this basis. Therefore take 44 dwellings out of 5 years HLS
HA33	Land at Oakley Road, Shepshed									30	40	40	40	40	14			204	
HA34	Land off Tickow Lane (north), Shepshed									44	44	44	44	44	44	42		306	SoCG of May 2022 said that landowner would submit outline application in summer 2022 and that site would start delivering housing in 24/25 monitoring year. No PA as yet. Site not controlled by developer. No evidence (in spite of Council saying trajectory confirmed by promoters in April 2024) that site will deliver an housing in 5 years. Take out 88 dwellings from 5 year HLS.
HA35	Land North of Hallamford Road and West of Shepshed									10	40	40	40	40	40	40		250	Previous applications on site were refused and appeal withdrawn by applicant. Doesn't appear to be developer interest according to SHLAA. It suggests that site would deliver in 11-15 year period not within 5 years.
HA36	20 Moscow Lane, Shepshed									25	25							50	Council says that trajectory was confirmed by promoter in April 2024. No publicly available information / SoCG etc. Don't know if site is controlled by a developer. No PA. No clear evidence that it will deliver in 5 years. Take 25 dwellings out of 5 year HLS

HA37	Land rear of 62 Iveshead Road		15	48														63	
HA38	Land to rear of 54 Iveshead Road,									5								5	
HA39	Land fronting Ashby Road & Ingleberry Road, Shepshed										25	40	40	40	6			151	Current planning application with LPA proposes development of the site for up to 200 dwellings. Still issues to be resolved before PP could be granted.
HA40	Land to the west of the B591/Ingleberry Rd & north of Iveshead Lane						31	50	50	50	19							200	Outline PA submitted for up to 200 dwellings approved in March 2024. RM application made in April 2024 for 200 dwellings. Not yet determined - still issues to resolve. Won't deliver housing next year. Take out 31 from 5 year HLS
HA41	Land south of Ashby Road Central							16	34									50	OPP granted in June 2023 for 50 dwellings. RM application submitted by Places for People in November 2023 (50 dwellings also) amendments submitted in July 2024. Assume RMA in 2025/26 so supply gets pushed back by one year (all still within 5 years).
HA42	32 Charnwood Road, Shepshed																	0	History of unimplemented consents. Most recent application (outline for 15 units) submitted in September 2021 but has still not been determined. No progress since September 2023. Site not deliverable remove 15 units from supply
ALLOCATIONS Service Centres – Anstey, Barrow upon Soar, Mountsorrel, Quorn, Rothley, Sileby		**0**	**41**	**127**	**0**	**0**	**22**	**88**	**105**	**368**	**683**	**598**	**194**	**100**	**90**	**99**	**19**	**2534**	
HA43	Land west of Anstey								65	90	90	90	90	90	90	90	19	714	Comprises full application for 150 dwellings (Wm Davis) submitted in February 2022, as yet undetermined and no apparent progress since Oct 23 & Hybrid (350 outline & 150 full) which was submitted in April 2022 (WmD & Chapman Estates) no progress since Oct 23. Council have already pushed back supply by 6 months on advice of promoter. We say push backby a further 12 months
HA44	Fairhaven Farm, Anstey						22	25										47	Jelson site might need to reduce overall numbers due to having to address concerns of Urban Design Team
HA45	Land to south of Melton Road, Barrow upon Soar									40	40	40	10					130	Gladman submitted outline PA in May 2021 for 130 dwellings. Resolution to grant in December 2022. S106 never signed. Council now re-assessing application. No prospect of delivering in 5 years.
HA46	Land off Melton Road, Barrow upon Soar									40	40	40	15					135	Gladman submitted OPA for 135 dwellings in in 2021. Resolution to grant April 2023. S106 never signed. Won't deliver housing in 5 years.
HA47	Land adjoining 84 Melton Road, Barrow upon Soar									18								18	
HA48	Land off Willow Road, Barrow upon Soar							10	40	40	40	40	40	10				220	Bloor Homes made hybrid application for construction of 220 dwellings (full) and primary school (OUT) in January 2024. Applicant working to resolve a number of issues that have arisen during consultation. Applicant agreed trajectory in April 2024. We think push back supply by further year.

HA49	Land off Cotes Road, Barrow upon Soar								65	75	50	30						220	St Philips submitted OPA for 60 dwellings in Feb 2023 (not yet determined). WM Davis submitted OPA for 70 dwellings in September 2023 (not yet determined) & Rosconn submitted an OPA for 130 dwellings in February 2023 (also not yet determined). We think that development will commence 1 year later than the Council do.
HA50	East of Loughborough Road, Quorn		41	64														105	Site under construction
HA51	Land south of Rothley									25	15							40	OPA for 40 dwellings approved in October 2023. Site not controlled by a developer / housebuilder. No RMA or sign of one. Council have pushed back delivery by 1 year. Take out of 5 year HLS
HA52	971 Loughborough Road, Rothley															9		9	
HA53	Land off Barnards Drive, Sileby							40	40	40	40	40	28					228	Gladman made OPA for 228 dwellings in March 2021. Approved in March 2023. No RMA to date. Council claim promoter had pe-app in summer 2023. No evidence to suggest that this is imminent. Push back completions by 12 months.
HA54	Homefield Road, Sileby			55														55	
HA55	Rear of The Maltings site High Street, Sileby							13										13	Application for full planning permission for 13 dwellings made in September 2021. Scheme revised to address consultee concerns in July 2024. Still significant ecology and drainage issues which are yet to be resolved. However, think possible will come forward in 5 years.
HA56	Land off Kendal Road (South of Butler Way and Gray Lane), Sileby											19						19	
HA57	36 Charles Street, Sileby												11					11	
HA58	9 King Street, Sileby			8														8	Under construction
ALLOCATIONS Other Settlements		**0**	**0**	**0**	**0**	**5**	**65**	**152**	**241**	**230**	**179**	**60**	**40**	**0**	**0**	**0**	**0**	**972**	
HA59	Land to rear of Derry's Garden Centre, Cossington							25	40	40	25							130	OPA for 130 dwellings approved. RMA submitted in June 2024 (Bellway). DoC applications received also. Council has adjusted trajectory to reflect this. We say needs to be pushed back by further year.
HA60	Land off Melton Road, East Goscote								36	60	60	60	40					256	OPA approved in Oct 22 (Gladman). RMA made in December 2022 (Redrow) but refused in June 2024. DoC applications made also. Trajectory amended by Council to reflect this
HA61	Land to the rear of 89 Loughborough Road, Hathern						25											25	Series of planning permissions granted for residential development (between 12 and 18 dwellings on land) since 2014. Current application (Cadeby Homes) submitted in November 23 seeks FPP for erection of 25 homes. Issues with design and amenity preventing determination. Suspect will deliver within 5 years.

Policy Ref.	CHARNWOOD BOROUGH	2021/ 2022	2022/ 2023	2023/ 2024	2024/ 2025	2025/ 2026	2026/ 2027	2027/ 2028	2028/ 2029	2029/ 2030	2030/ 2031	2031/ 2032	2032/ 2033	2033/ 2034	2034/ 2035	2035/ 2036	2036/ 2037	TOTALS	AY Comments
		16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1		
HA62	The Leys, Hathern																	0	Morris Homes secured planning permission for erection of 6 dwellings on the site in 2007. That consent was never implemented and has now lapsed. SHLAA says that alternative use has now come forward on the site. No evidence of it being developable, in spite of what Housing Allocation Agreement form says.
HA63	Land off Zouch Road, Hathern					5	40	11										56	Wm Davis secured FPP for 56 units in April 24. Currently making DoC applications. Debatable whether site will deliver 5 houses by March 2025 so have pushed back by 12 months
HA64	Land at Threeways Farm, Queniborough							40	40	40	40							160	Resolution to grant outline permission on 20 June 2024 (Hallam Land) to agreeing highways contributions (£35,778.93 per dwelling), and other financial contributions.AY have taken 40 dwellings out of 5 year housing land supply and moved it in to 6-10 year period to allow for submissio of RM, DoC, technical approvals etc.
HA65	Land off Melton Road, Queniborough								40	40	19							99	Hollins Strategic Land made application for OPP for 99 dwellings in December 2022. Scheme has been revised during determination to address consultee comments (July 2024. Won't realistically start delivering housing within timescales Council has suggested. AY have increased number to reflect what has been applied for and moved 40 dwellings out of 5 year HLS.
HA66	Land off Gaddesby Lane, Rearsby								40	25								65	OPP for 65 dwellings (March 2024) Clarendon Land and Development. No RMA. No DoC. Push back delivery by 12 months as a consequence
HA67	44 Hoby Road, Thrussington								26									26	OPA for 26 dwellings made by SI Thrusington in February 2024. Currnetly adressing consultee comments.
HA68	Land off Old Gate Road, Thrussington									25	35							60	
HA69	The former Rectory & Land at Thurcaston								19									19	Parker Strategic Land submitted OPA for 19 dwellings in June 2022. Stil trying to resolve issues that have arisen during consultation. Promoters confirmed trajectory in April 2024. Push back by 12 months to allow for approval of OPA, DoC, sale of site and submission and approval of RM
	TOTAL ALL – Estimated completions from DRAFT ALLOCATIONS	0	56	175	55	68	228	554	774	1534	1737	1489	952	688	548	511	224	9593	
LUC2	**Estimated completions from WEST OF LOUGHBOROUGH SUE**		14	65	68	80	200	200	200	200	200	200	200	200	200	200	200	2427	Delivery rates amended to no more than 200 dpa to reflect AY view on what realistic delivery rates are (even this is generous)
LUA2	**Estimated completions from NORTH EAST OF LEICESTER SUE**		32	112	150	150	200	200	200	200	200	200	200	200	200	200	200	2644	As above

LUA3	Estimated completions from DIRECTION OF GROWTH NORTH OF BIRSTALL				75	150	200	200	200	170	150	120	120	100	100	90	82	1757	as above
	TOTAL ALL – Estimated completions from SUE's		46	177	293	380	600	600	600	570	550	520	520	500	500	490	482	6828	
	Windfall Allowance							63	63	63	63	63	63	63	63	63	63	630	
	Estimated total completions	792	661	821	772	800	1209	1552	1579	2330	2411	2072	1535	1251	1111	1064	769	20729	
	Estimated cumulative completions	792	1453	2274	3049	3846	5055	6607	8186	10516	12927	14999	16534	17785	18896	19960	20729	20729	
	Annualised housing requirement	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189	1189		
	Cumulative requirement	1189	2378	3567	4756	5945	7134	8323	9512	10701	11890	13079	14268	15457	16646	17835	19024		
	MONITOR - No. dwellings above or below cumulative requirement	-397	-925	-1293	-1707	-2099	-2079	-1716	-1326	-185	1037	1920	2266	2328	2250	2125	1705		

Appendix IV

Avison Young
3 Brindleyplace, Birmingham B1 2JB
© 2021 Avison Young (UK) Limited

AVISON YOUNG

3 Brindleyplace
Birmingham
B1 2JB, United Kingdom
T: +44 121 236 8236
avisonyoung.com

BEST MANAGED COMPANIES Platinum member

Our Ref: 01B902672

Your Ref:

23 August 2024

Leicestershire County Council
County Hall
Glenfield
Leicester
LE3 8RA

By Email Only

Dear Sir / Madam

Draft Charnwood Transport Contributions Strategy
Representations of Parker Strategic Land

Avison Young is town planning adviser Parker Strategic Land ("PSL") and is instructed to make Representations on PSLs behalf to Leicestershire County Council ("LCC") concerning its Draft Charnwood Transport Contributions Strategy ("CTCS"). These are set out below.

We begin by making a number of general observations before setting out for LCC a summary of Leading Counsel's Opinion on the CTCS and then concluding with some observations of a more technical nature. Importantly, we conclude that the approach that LCC is proposing to take is unlawful. As a consequence, LCC should withdraw the CTCS immediately.

Should LCC need to discuss the content of this letter with Avison Young or PSL, it should contact Craig Alsbury in the first instance (Email: craig.alsbury@avisonyoung.com Tel: 07831 106876).

General Observations

The Draft CTCS presents number of significant issues. These include:

a) whilst LCC has not confirmed what status the document will have, it proposes to use the CTCS as a means of introducing a 'Policy' that its intended to guide the determination of applications for planning permission. The CTCS ought, therefore, to be prepared and adopted as a Development Plan Document, not as mere guidance;

b) it is informed by an assessment of the traffic / transportation impacts that might arise if all of the Local Plan's proposed allocations are delivered as currently envisaged. It has also had regard to the likely effects of developments that are proposed close to Charnwood but in neighbouring authorities. It fails to differentiate between the impacts that will be caused by developments occurring beyond Charnwood (which developers within Charnwood cannot be responsible for mitigating) and the impacts that might be caused by the development of the proposed allocations within Charnwood;

AVISON YOUNG

c) 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 be required to address) and impacts that will likely be caused by the development of the sites that are proposed to be allocated in the Local Plan;

d) it fails to identify the precise impacts that the development of each of the allocations will have and the infrastructure that each may require in order for it to be deemed acceptable in planning terms;

e) it fails to differentiate between the impacts that developments of different sizes will inevitably have;

f) it admits the need for evidence based links between proposed mitigation measures and specific sites but fails to provide this;

g) it proposes to utilise contributions secured via the CTCS to fix existing problems with the public transport system (problems that arise from LCCs failure to secure Government funding for its BSIPs);

h) it proposes to tax the developers of sustainable developments as a means of improving the sustainability credentials of less well connected rural sites and, critically, fails to reflect the credentials of the most sustainable sites in its proposed approach;

i) it admits that, in whatever charging scenario it contemplates, the CTCS will not generate enough revenue to cover the full cost of the infrastructure that LCCs considers is going to be required. The reality is that LCC is going to experience a massive funding gap – around £125m as a consequence of adopting a reduced set of contribution figures and a further £15m lost to developments that already have planning permissions; so £140m in total. There is no indication as to how this gap is going to be plugged and thus how interventions are going to be delivered, even if the CTCS is adopted and implemented as currently drafted;

j) it admits that further work is required to refine its evidence base and schemes. The LCWIP work is some way from being complete and walking and cycling interventions account for the majority of the infrastructure costs that the CTCS identifies;

k) it notes that the costs quoted in the document will likely change over time (no doubt at least in part as a consequence of (j)) and so fails to provide the certainty that developers and national policy requires. It seems likely that costs will increase over time and that the funding gap referred to above will widen;

l) it is proposing to introduce per dwelling contribution sums that are materially different to those that have been applied in recent consultations on planning applications, and by CBC when taking applications to Planning Committee. At the Launch Event, LCC was not clear about whether, between now and when the CTCS is adopted, it will be applying the higher numbers previously quoted or the new, lower figures;

m) the CTCS, if adopted, will apply only to developments proposed within the Transport Strategy areas, yet there will inevitably be proposals for development within Charnwood but beyond these parts of the Borough. The CTCS is silent on how these will be dealt with;

Avison Young (UK) Limited registered in England and Wales number 6382509. Registered office, 3 Brindleyplace, Birmingham B1 2JB. Regulated by RICS

n) the CTCS is concerned only with extracting developer contributions from the promoters of housing and 'employment' developments, yet there will be other traffic generating proposals advanced in the Borough through the lifetime of the Local Plan which LCC appears not to be concerned with, notwithstanding the fact that they will likely have implications for how the transport / mobility networks operate;

o) LCC acknowledges that its proposed approach is likely to result in a situation where what it believes is 'necessary infrastructure' is delayed in its delivery, relative to the pace at which development comes forward (because of funding gaps). LCCs acceptance of the fact that the transport networks will be able to accommodate the traffic generated by development for undefined / undefinable periods, without mitigation, completely undermines the case for mitigation. Moreover, the CTCS does not address itself to a scenario in which certain interventions are never delivered; and

p) it proposes an approach to developer contributions / obligations which fails the statutory and policy tests for planning obligations.

Leading Counsel's Opinion

The above have caused PSL and other interested parties to take the step of seeking Leading Counsel's opinion on whether, if adopted by LCC, the CTCS would be lawful. The group ("the Instructing Group") has instructed Paul Tucker KC and he and Constanze Bell have provided their advice in the form of a Written Opinion. A copy of their Opinion is enclosed with this letter.

The Opinion that Counsel have provided is very clear. There are a number of critical issues with the CTCS and the approach that LCC is proposing to take with it is unlawful. The issues identified by Counsel can be summarised as follows:

First, seeking developer contributions on a per dwelling basis in the manner proposed by the CTCS is likely to be considered to be unlawful. There are a number of reasons for this as follows:

a) the CTCS 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 s106 to achieve a tariff-based approach;

b) it seeks to impermissibly include a formulaic approach to the collection of monies secured by s106, contrary to policy (NPPF paragraph 34) and guidance contained in the NPPG, and appears not to have regard to either as a material consideration in doing so;

c) the tariff-based approach articulated in the CTCS requires no 'development specific' assessment, no appropriate evidence and seeks to disregard the policy tests as well as regulation 122(2) of the CIL Regulations 2010; and

d) it seeks to require by policy the provision of monies which do not meet the test of materiality, in a manner that is directly comparable to the unlawful tariff-based approach taken in the City of Aberdeen, struck down by the Supreme Court (see Case reference at paragraph 45 of the Opinion).

Secondly, the 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, without the policy mechanism or those sums ever being the subject of appropriate, independent scrutiny. It proposes a blanket application which fails to differentiate between sustainable sites that will not have any impact requiring mitigation and those that will. 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; an economic objective which is relevant to the attainment and development of land (developer contributions); and development management policies intended to guide the determination of planning applications. It is explicitly intended to be taken into account as comprising policy when assessing development proposals and is not, on its face, merely a background document. The CTCS is, therefore, an attempt to introduce what clearly amounts to development plan policy by means other than as part of a development plan document ("DPD"). As a consequence, it will be unlawful.

Thirdly, it is poorly conceived in its content and approach and does not adequately justify the sums sought.

Fourthly, whilst LCC has made it very clear that the CTCS is intended to be adopted as LCC policy, it is not clear what this means and what status LCC is expecting the CTCS to have in planning terms. LCCs powers, acting in this context as Local Highway Authority, extend only to providing guidance. Its powers do not extend to promoting planning policy, including in the form of an SPD. In addition, and were LCC to propose adopting the CTCS as an SPD, it would fall foul of Regulation 8(3) of the 2012 Regulations which requires that policies in an SPD must not conflict with the adopted development plan. The CTCS very clearly does conflict with the adopted development plan.

Finally, the CTCS is not consistent with emerging Local Plan policy INF2 which 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 impacts can be appropriately and adequately mitigated. The CTCS is at odds with such an approach.

The opinion of Leading Counsel is that the decision to adopt the draft CTCS as policy would undoubtedly be a decision amenable to judicial review.

Other Matters

In addition to seeking Leading Counsel's opinion, the Instructing Group has taken independent expert advice on the transport evidence that underpins the CTCS (from ADC), and the Viability Report produced by Aspinal Verdi ("AV") (from Savills). The findings of these assessments can be summarised as follows:

Transport

a) the technical work that underpins the CTCS comprises a worst case, peak hour, predict and provide approach to assessing the traffic and transport implications of development. This is not consistent with Government policy and is not appropriate – the suggestion that adding capacity to a highway network (to enable yet more car trips) is an appropriate and solution to

the challenges that our communities and businesses face in terms of mobility, is outdated and is bound only to result in unsustainable outcomes;

b) the modelling undertaken by LCC, and its proposal to define 3 Transport Strategy areas, fails to reflect how transport systems operate and traffic flows within a network. Traffic does not confine itself to local authority areas and nor does it confine itself to Transport Strategy Areas. Traffic flows into Charnwood from all neighbouring authority areas, and authorities beyond, and traffic flows from one Transport Strategy area to another. As a consequence, issues at, say, junctions in the Loughborough / Shepshed area will not only be caused by traffic originating in that area. The CTCS fails to recognise or address this;

c) the strategic level modelling that has been undertaken by LCC has generated results that are not being replicated when developments are being tested in the real world at the planning application stage. More specifically, the conclusions that are being reached in Transport Assessments (conclusions that are being agreed by LCC), are at odds with the assertions in the CTCS about all of the proposed allocations having a severe adverse impact on the highway network. Site specific assessments are demonstrating that this is not the case. As noted earlier in these Representations, the CTCS admits the need for evidence based links between proposed mitigation measures and specific sites but it neither provides this evidence and nor does it address itself to a scenario in which the site-specific work doesn't justify the level of contribution sought. This is particularly problematic when Policy INF2 as proposed to be modified expressly allows for that outcome;

d) as suspected, the CTCS takes no account whatsoever of the different impacts that different scales of development will likely have – it takes the view that a development of 15 homes should contribute as much per dwelling as a development of 960 homes. That cannot, on any analysis, be correct;

e) LCCs proposals for cycling and walking infrastructure are designed to address issues that have existed for decades and are not issues that will be caused by the development of the proposed allocations. Moreover, the majority of the interventions proposed cannot reasonably be linked to any of the proposed allocations and their direct effects;

f) there is a contradiction in the relative sustainability of the Transport Strategy areas and the amount that developers in each are expected to contribute. The North of Leicester area is arguably the most sustainable of the three areas – residents in this area are closest to the primary destinations for the majority of journeys and they have the best access to walking, cycling and public transport networks - yet North of Leicester attracts the highest per dwelling contribution;

g) the contributions that the CTCS would seek towards public transport are designed to address existing issues and compensate for LCCs failure to secure Government funding for network improvements. It is not appropriate for the promoters of new developments to be asked to address existing deficiencies;

h) there is a significant risk that, adopting the CTCS approach will lead to developers paying twice for the same infrastructure. This is not addressed at all by LCC;

i) the highway interventions that are referred to in the CTCS have been subject to high level / preliminary design work and it is on the basis of this that schemes have been costed. The interventions have not been subject to the assessment and design rigour that will be required at the planning application stage. It is highly likely that, in due course, scheme designs and scheme costs will change. This has the potential to impact significantly on the deliverability of schemes applying the formulas in the CTCS;

j) as noted above, there will inevitably be a very substantial difference between the amount of funding that LCC is able to secure via the CTCS and the cost of the interventions that LCCs considers need to be delivered. An inability to fund all interventions means that LCC would have to prioritise its spending and that will likley lead to an even greater disconnect between the intervention and the development that is being asked to contribute to it. It also means that LCC will not be able to deliver interventions that it is asserting are necessary to ensure that new developments do not have a severe adverse impact and this must mean that, on LCCs approach / assumptions, a large number of the developments that are to be brought forward within Charnwood (if not all) will be deemed to have a severe adverse impact that cannot be satisfactorily mitigated. This is not correct but it is the only conclusion that LCC can reach on the basis of the approach it is proposing to take. So the CTCS is set up to fail, and set up to impact adversely on the delivery of development.

Viability

k) development types - the viability work should take account of a wider range of development types e.g. later living, brownfield housing;

l) LR data - AVs reliance on Land Registry data and the pricing of new build homes is a concern. There are often 6-9 month lags between transactions and these being registered by LR and new build asking prices are not reflective of prices paid (which can be upward of 5% lower at the point of transaction);

m) house prices - AV appears to conclude that house prices have risen by 10% - 25% in the North of Leicester and Loughborough / Shepshed areas but the LR House Price Index for Charnwood shows a decrease of 4.62% for the same period;

n) build costs – it is right to apply different costs to different sizes of developments but AV has rebased its BCIS costs for the CTCS work from East Midlands to Charnwood. It has not explained why and this change in approach will have had a significant positive impact on its analysis. The assessment should be undertaken on the same basis as previously;

o) external works costs – AV has made allowances of between 5% and 20% for external works. Savills typically experience external costs ranging from 10% to 20% excluding site works and utilities. There should be an additional allowance for these in AVs appraisals;

p) contingency – AV allows 3%. Build costs continue to rise at pace, particularly on larger sites where there tends to be a greater number / level of unknowns / abnormals. We consider anything less than 5% to be inappropriate (even on greenfield sites) and a contingency of between 8% and 10% should be applied to brownfield or larger strategic sites;

q) professional fees – AV has assumed 7% for professional fees. Savills commonly experience 8% to 12% of all build costs (base, externals, infrastructure and abnormals). Brownfield and larger strategic sites may incur professional fees in excess of 12%;

r) finance costs – Savills note the difficulties associated with setting an appropriate finance rate in a constantly changing economic environment whilst also having regard to the different financing methods used by developers. However, the 6% finance cost assumptions used by AV is too low in the current climate. This is the same as the rate that AV applied in 2021 when the base rate was 0.1% compared with the current rate of 5%. A finance cost of 8% would be appropriate in the present circumstances;

s) missing data – AV appear to have made no allowances for (i) site works (site prep), which we consider should be added in at £150K to £250K per acre (£371K to £617K per hectare); (ii) garages, which we consider should be added in at £7K to £12K per plot; and (iii) EV charging points, which have been removed from AVs assessment having been included in its 2023 work; and

t) benchmark land value – AV has not published the data that it has used to derive BLVs and AV has not explained how it has calculated the uplift that it has applied. Moreover, AV does not appear to have 'taken a step back' and checked whether the conclusion it has reached is reasonable and reflects best practice. Savills are concerned that its own Greenfield Development Land Value Index shows a decrease in land values in this part of England from August 2023 to July 2024 yet the AV work suggests that land values have increased by between 18.75% and 41.67%. Savills has also noted that the net to gross ratio adopted by AV varies from 63% - 85%, which they do not agree with. They consider this to be too simplistic and by adopting this approach there is a danger that site specifics such as ground conditions, SuDs, topography and others are not taken into account, leading to sites being regarded as viable that are clearly not. This element of AVs work requires greater scrutiny, explanation and evidence.

It is clear from the matters raised by ADC and Savills that, even if LCC could lawfully proceed with the CTCS (which it cannot), it faces a not inconsiderable number of technical issues that it will need to address before it has an approach that be considered appropriate and robust.

Next Steps

We consider that the above combination of legal and technical issues cannot be remedied by modifying the CTCS. It must, therefore, be withdrawn and LCC must reconsider how it works with the Borough Council and developers to address the issues that it considers are relevant, in a manner that is lawful an consistent with national planning policy and guidance.

Yours faithfully

Avison Young

Avison Young

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

17 August 2024