

LAND AT NORTH WEST BICESTER, CHARLOTTE AVENUE, BICESTER

APPEAL BY FIRETHORN TRUST

LPA REF: 21/01630/OUT

PINS REF: APP/C3105/W/23/3315849

**CLOSING SUBMISSIONS ON BEHALF OF
THE LOCAL PLANNING AUTHORITY**

Introduction

1. The Appellant seeks outline planning permission for development described as

“Outline planning application for up to 530 residential dwellings (within Use Class C3), open space provision, access, drainage and all associated works and operations including but not limited to demolition, earthworks, and engineering operations, with the details of appearance, landscaping, layout and scale reserved for later determination.”

2. The Council initially considered that, had it been in a position to determine the application, it would have refused it for five reasons which may be broadly summarised as follows:
 - a. A failure to meet the requirements of Policy Bicester 1 in relation to the requirement to achieve a carbon zero scheme as defined in that policy;
 - b. A failure to meet the requirements of Policy Bicester 1 and BSC3 in relation to providing as much affordable housing as it is viable to provide;
 - c. Causing the unacceptable, and unnecessary, loss of street trees on Charlotte Avenue via highways works;
 - d. Failing to demonstrate an absence of a severe transport effect given failures in highways modelling; and
 - e. A failure to fully mitigate adverse impacts on infrastructure including education, strategic highways and others.

3. However, by the time the inquiry opened, the Appellant had provided additional assurances and evidence which allowed the Council to remove all five putative reasons for refusal. The Council's updated case will be explained below.
4. As set out in opening, it is relevant to note the history of the Site and its allocation in policy Bicester 1 of the Local Plan. The Site is allocated by that policy and as such the principle of housing development on the Site is acceptable. However, the detail is particularly important given the stringent requirements of Bicester 1 and its roots in the Government's Eco Town policy¹. That policy designated four Eco Towns, including NW Bicester as being subject to "*a range of minimum standards which are more challenging and stretching than would normally be required for new development*"². Eco Towns are variously described within the PPS as "*exemplars*" and "*a showcase for sustainable living*".
5. The PPS directly informs the contents of Bicester 1 and one can trace the requirements through from the PPS to the wording of that policy. For example, ET 9.1(c) refers to real time energy monitoring and real time public transport information, ET 9.1(d) sets a threshold of 30% affordable housing and achieving overall zero carbon features throughout the document. These matters are all copied directly across to Bicester 1, as with other elements of the PPS, essentially elevating the contents of the PPS to the status of development plan policy.
6. The allocation is based upon the PPS and both are clear - this is not about achieving "standard" development, they both intend to create a "*new zero carbon mixed use development*" and this means something more here than on any other site outside a designated eco town. This "something more" is given life by the very specific definition within a footnote to the Local Plan being "*...over a year the net carbon dioxide emissions from all energy use within the buildings on the eco-town development as a whole are zero or below*".
7. The requirement is therefore to achieve something more than would be achieved by compliance with policies which, in the words of the PPS would "*normally be required for new development*". In this instance, that means creating something more than would be achieved by compliance with ESD1-5 which apply to all development in the District and do not incorporate this particular definition of "zero carbon".

¹ PPS1 CD 8.3.9

² Ibid at para 3

8. Further, that “something more” is a requirement to calculate with some precision the emissions and savings of carbon and demonstrate year by year that the resulting “carbon budget” is zero.
9. The very specific requirements of Bicester 1 underpin the Council’s scrutiny of this application and its approach throughout the application and appeal processes.

Viability

10. It makes sense to address viability at the outset as, at the time of the Appellant’s Statement of Case, it was strongly suggested³ that the requirements of Bicester 1 which would make this development that “something more” could not be viably achieved on this site – the Appellant’s case was essentially that anything more than compliance with ESD1-5 could not viably be met and nor could the site deliver 30% affordable housing. This was an argument which, at the date of the Committee meeting, the Council did not buy.
11. Since that date a significant body of additional work has been undertaken on behalf of both the Council and the Appellant to (a) establish the “pot” of funds available to be spent on site by undertaking an updated detailed analysis of the build costs along with (b) an updated analysis of the sales values before inputting this into a detailed viability appraisal and then (c) determining how funds should be allocated in order to achieve as many of the requirements of Bicester 1 as is possible.
12. In relation to (a) Mr Tarbet undertook an updated and detailed analysis of build costs which was eventually agreed by the Appellant. His analysis was not referred to during the inquiry because it was not in dispute. However, it is an important factor in how and why the Council’s case has evolved and shouldn’t be overlooked.
13. At the point of the Committee’s resolution, it had not been established to the Council’s satisfaction that the scheme was so unviable that it could not go further towards meeting the requirements of Bicester 1. At this time, the Appellant’s viability evidence considered three possible scenarios ranging from a traditional build to a TZC scheme which essentially presented

³ And indeed echos of this were found in Mr Riggall’s oral evidence to the inquiry with repeated references to viability being considered together with the requirements for True Carbon Zero

the Council with a choice of having either TZC or 30% affordable housing but not both⁴. The costs associated with building TZC buildings were therefore a significant area of concern.

14. An updated proposed cost plan was provided by the Appellant at the end of March i.e. some considerable time *after* the submission of the appeal and after the committee meeting. Following the submission of this additional information, the costs were reviewed by Mr Tarbet and the Appellant's advisors later agreed to Mr Tarbet's assessment of construction costs, this agreement being formalised in a statement of common ground in May (CD10.4).
15. The build costs of a TCZ scheme are critical to an assessment of viability and the updated evidence upon which the Appellant now relies was not provided until after the committee meeting and after the submission of the appeal.
16. The wider viability of the scheme, as it is now proposed, was therefore only capable of being subject to detailed scrutiny by Mr Fell and Mr Simkin after late March 2023. Further, the inputs into the s.106 agreement were only finally agreed by the Appellant on the day immediately before the inquiry was due to open. The final inputs into a viability appraisal were therefore not available until this time.
17. However, in the lead up to the inquiry it became clear that if TCZ was to be achieved there was a significant shortfall in the viability of the scheme and Mr Simkin accepted that that there remained a significant viability gap even if no affordable housing was provided. As such, the Appellant's, now firm, offer of 10% affordable housing represented a significant benefit of the proposal. However, given the importance of affordable housing both to the Local Plan in the form of Bicester 1 and BSC3, and to the PPS, it is necessary to ensure that any opportunity to achieve closer to, or up to 30% is taken.
18. Accordingly, it is necessary and reasonable to include a viability review mechanism within the s.106 agreement to ensure that any reduction in build costs or increase in sales values where by this greater element of surplus can be captured and applied towards providing additional affordable units on site up to a cap of 30% of the development. The Appellant has agreed the principle of this approach and Schedule 7 of the proposed planning obligation addresses this.

⁴ See summary in NS PoE para 2.14 to 2.15. A 10% "without prejudice" offer was made but was subject to negotiation.

True Zero Carbon and Bicester 1

19. It remains the case that the submitted Outline Energy Strategy⁵ fails to adequately demonstrate a sufficient commitment to achieve zero carbon development as required by the PPS and policy Bicester 1.
20. The Appellant's Statement of Case and Outline Energy Strategy both failed to give an unambiguous assurance that the requirements of Bicester 1 would be met in this regard. The Appellant's SoC refers to viability evidence within the first sentence of its section dealing with zero carbon⁶ and the strong indication is that the Appellant was aiming at the wrong target of ESD1-5 rather than the more stringent requirements of Bicester 1 and the SPD.
21. As such, any permission which only secured compliance with the Outline Energy Statement would not be a consent in line with the requirements of Bicester 1. There would be material conflict with the requirements of the development plan. In Mr Webster's view, given the importance of zero carbon to the allocation as a whole, this failing should result in permission being refused unless it is addressed by some other means.
22. However, it should be noted that reason for refusal 1 which concerned a failure to achieve true zero carbon was accompanied by an annotation which stated "*Note to Appellant: This reason for refusal is capable of being addressed*".
23. In this light, the Appellant and the Council have agreed a suitably worded condition to rectify the matter and ensure that appropriate detail and certainty is imported into the outline permission. The proposed wording includes an express tie to the requirements of Bicester 1 and the SPD which is necessary to ensure the condition and thereby the development properly reflects the requirements of the development plan. It also specifies minimum requirements for the future submission of a Zero Carbon Strategy and ensures that a detailed carbon balance is created for the scheme and, if it fails to reach 'zero' in terms of the amount of carbon generated for the development, the developer is required to submit a further strategy explaining how zero carbon will be reached by utilising other measures. That scheme can include measures to be taken on or off-site, albeit always with a view to the underlying policy for the allocation and its roots in the eco town principles.

⁵ CD 1.18

⁶ CD para 5.4(iii)

24. The Council is of the view that subject to the imposition of this condition requiring additional details, the development would be in compliance with the development plan in this regard. The condition is therefore necessary to make the development acceptable, is reasonable and proportionate.
25. It is also necessary to include the relevant schedule in the s.106 agreement which provides for the “what if” scenario in case, despite the strategy, zero carbon has not in fact been achieved. The s.106 agreement provides for a performance review to be undertaken which should identify whether the built development has in fact achieved zero carbon, and, if not, the developer is required to provide a strategy for remedying this situation. As a last resort, the developer may offset any emissions if the Council is satisfied that this cannot be achieved on site. In line with ESD2, allowable solutions / offsetting should be at the bottom of the hierarchy and a last resort.

Highways

26. The Council’s opening submissions on highway matters remain intact and are set out below with additional detail for completeness. Two matters arise under this heading:
27. *First*, based upon the information available at the start of the Appeal, the Appellant was proposing works to Charlotte Avenue which, based upon the Council’s arboricultural evidence⁷, would result in the loss of the existing street trees. Such trees having been planted as a key part of the existing Exemplar development and in line with the Government's encouragement for tree lined streets in the NPPF.
28. However, in the week preceding the inquiry the Appellant provided an assurance via a revised indicative plan⁸ and terms within the s.106 agreement that any highways scheme in relation to Charlotte Avenue would not cause such damage. It is a matter agreed between Mr Moss and Mr Kirby that a scheme can be designed which would adequately mitigate the highways impacts whilst retaining the street trees. In particular, the indicative plan shows a priority shuttle working system retaining the existing kerb lines and leaving the tree root protection zones within the footway unaffected.

⁷ Appendix CDC2 to PoE of Thomas Webster CD 5.15 p.27 onwards

⁸ Reference 4600-1100-T-080-A at Appendix 5 to Updated Planning SoCG IQ7 p.123

29. As such, the Council was satisfied that it could withdraw this part of the reason for refusal on the basis of the agreed terms within the planning obligation.
30. *Second*, the Appellant’s transport modelling is based upon 40% of residents using cars and 60% travelling by other means. Mr Kirby describes this target as “aspirational” and that in order to achieve it “*there must be an improved provision for other modes*” this, it appears, is based upon OCC’s aspiration for a bus through the site at a frequency of every 10 minutes⁹ which in turn is based upon receipt of contributions from 2600 dwellings i.e. it will not be in place by 2031, the build out year for this scheme. At first glance, this is something of a significant problem and there is no sensitivity testing within the TA to establish the scale of that problem and whether or not it would lead to a severe impact if the 40% target wasn’t achieved.
31. However, in the week before the inquiry, Mr Kirby supplied sensitivity testing which demonstrated that in a scenario where the split was 50% rather than 40% car use, the effect was an exceedance of capacity, namely the PICADY analysis which resulted in a Ratio of Flow to Capacity (RFC) of 91%. Although this just sits above the recommended upper limit, it still remains below the absolute limit of 100% and the forecast delays, which are a maximum of 90 seconds in any event, only affect one arm of one junction in the AM peak (that being traffic from Charlotte Avenue seeking to join the B4100). It does not affect traffic making a through journey on the B4100, and, at its highest, such delays only last for part of the peak period. Further, given this effect is at the edge of the network, Mr Moss’s view is that there is no knock-on effect to other links or junctions, not least because there are no other links or junctions on the development to be affected. Mr Moss’s view is therefore that this has demonstrated an absence of severe impact even if the aspirations of the TA are not achieved in full by 2031. Accordingly, this reason for refusal has also been withdrawn based upon this additional evidence.

Section 106

32. The Council is of the view that all elements within the planning obligation satisfy the tests within CIL Regulation 122. Notably, the Appellant no longer raises any challenge to any of the obligations and the parties are agreed that these should be imposed.

⁹ MK rebuttal para 2.7-6

33. At the inquiry, the Inspector requested additional assurance that the obligation relating to the forward funding of primary school places at Gaggle Brook School met the requirements of CIL Regulation 122 and more generally fell within the powers open to a decision-maker to take it into account when granting planning permission.
34. At the outset, it is worth noting that any decision that forward funding of infrastructure *as a matter of principle* falls outside s.106 would not be supported by any wording within the relevant legislation or any decided case. Nor is this the case pursued by any party to the appeal. In short, there is no legal basis for a decision that forward funding, as a matter of law, could *never* fulfil the CIL tests. Moreover, the effects of doing so would be to remove the ability of authorities up and down the country to provide infrastructure at the point at which it is needed.
35. Here, that would have meant delaying the build of the primary school until after enough houses had been built to populate a whole school. Until that point, the children of the first phases would have needed to be bussed to alternative schools elsewhere at considerable cost and inconvenience. This is clearly not what would be intended by any party and further, in relation to forward funding of schools in particular, this is expressly supported by the DfE guidance which envisages this precise mechanism.
36. On the facts of this case, the Inspector can be satisfied that the obligation is necessary, directly related to the development and fairly and reasonably related in scale and kind:
- a. As a matter of policy, it should be uncontroversial that the creation of additional homes generates additional school age children within a particular area, placing an increased burden on the LEA. The principle and the pupil place ratios used in this case have not been subject to any challenge. Policies INF1 and Bicester 1 both refer to the need to create sufficient school provision *on site* to meet projected needs. The masterplan within the SPD envisages the locations of this provision including up to four primary schools (see p.57).
 - b. In relation to scale, the number of pupils generated by the scheme is therefore agreed. It is also agreed that these places need to be found somewhere. 91 already exist at the Gaggle Brook school and in normal circumstances the developer would be able to take advantage of those places and only contribute to creating capacity which didn't already exist. However, those places only exist because of the particular funding mechanism used by OCC and District Council in this instance.

- c. The Council obtained Eco Town funding to assist with the development of the whole allocation. It is needed for that purpose and if it is not available, then the allocation will suffer or the Council will have a black hole in its funding. The Council made a decision to apply this money to forward fund primary school places via a funding agreement between OCC and the Council. That agreement specified that the funding was to be spent by OCC on building a primary school but, crucially, it was to be recovered in full by OCC via developer contributions sought from phases of the NW Bicester allocation and repaid in full to the Council. Had that not been the basis of the agreement, the money may not have changed hands and the places would not exist.
- d. The “funding gap” as referred to by the High Court in R (on the application of the University Hospitals of Leicester NHS Trust) v Harborough District Council [2023] EWHC 263 (Admin) is therefore very easy to identify here as it relates to funds which have already been spent. The sum is a defined sum and is exactly related to the scale of providing the 91 places which this development will benefit from. Had that not occurred, an additional sum would be required to pay for the creation of those places.

37. Overall, there is no reason why as a matter of law forward funding is incompatible with the CIL tests, or at least there is no current legal basis for such a conclusion. Instead, the application of the CIL tests is a matter of judgement for the decision maker. Here, the background is that there is no dispute between the parties that those tests are met. There is ample policy support for the requirement to provide school places and indeed express policy support from the DfE for the mechanism used in this instance. The quantum has been carefully calculated and based upon the number of places required by the development. Simply because they already exist does not mean that the development has not created the need for them. They are not places which would exist in any event, they exist solely because of the demands created by this development it is simply that the development was anticipated and a funding arrangement was entered into to ensure their delivery ahead of time. However, a critical component of this mechanism was that the funds would be recouped via s.106 agreements. If this does not occur, there would be a funding gap in the Council’s budget relating to the Eco Town.

Conclusions

38. The Council’s concerns, resulting in the five putative reasons for refusal, have been withdrawn on the basis that the Appellant has now provided further evidence and assurances. These were

not presented, nor available for consideration, at the date of the Committee meeting. Such assurances are only secured through the precise wording of the conditions and planning obligations, the detail of which has been arrived at following thorough debate and negotiations between the Appellant and Council.

39. As a result, the Council invites the Inspector to allow the appeal and grant permission in favour of a scheme which is now in line with an up to date set of policies and, most importantly, Policy Bicester 1 of the Local Plan.

STEPHANIE HALL
SHEMUEL SHEIKH

Kings Chambers
Manchester | Birmingham | Leeds

16th June 2023