

Town and Country Planning Act 1990 (as amended)

Section 78 Appeal

**PINS reference APP/C3105/W/17/3189611**

**(Cherwell District Council Reference: 15/00837/OUT)**

by

Gallagher Estates, Charles Brown & Simon Digby

Site at

Gavray Drive, Bicester, OX26 6SU (nearest)

**STATEMENT OF CASE**

**of**

**DOMINIC WOODFIELD**

February 2018

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## 1. INTRODUCTION

- 1.1 My name is Dominic Woodfield. I am a professional environmental planning and ecological consultant of 24 years standing, and Managing Director of Bioscan UK Limited, a long-established environmental consultancy held in high regard by both the private and public sector. I am a Chartered Ecologist (CEcol), Chartered Environmentalist (CEnv) and a full member of the Chartered Institute of Ecology and Environmental Management (MCIEEM). The majority of my work is assisting developers such as the appellant with the resolution of policy or legal conflicts with environmental resources, as well as conducting environmental assessments at all scales up to formal SEA, EIA and Habitats Regulations Assessments, including for projects falling within the NSIP regime. I have provided expert ecological evidence to over thirty public inquiries and public examinations, as well as to the High Court, Court of Appeal and First Tier Tribunal. I have delivered presentations on brownfield ecology and wind energy assessments to Inspector Training events held by PINS and have led training workshops and seminars for other bodies, including town planners, companies and to masters students studying Biodiversity at Oxford University.
- 1.2 My familiarity with the issues around this appeal, and the site at Gavray Drive, extends back well over a decade. At all times I have sought to work towards a sensible compromise between development and protection of the rare combination of habitats and species that makes much of this site special, not just scientifically, but to a burgeoning number of local people too. I want to see a sensible resolution of the tension between those two objectives, and I share the Council's obvious frustrations with the appellants' approach to this site. I believe that attitude is the principal reason why the issues in question have not been resolved to the satisfaction of all parties before now.
- 1.3 I invite the Inspector to dismiss this appeal. I have reviewed the appellants' statement of case and it provides no sustainable challenge to the grounds for refusal advanced by the Council. Further it highlights a hitherto overlooked factor that further reinforces the validity of those grounds.
- 1.4 In my reasoning below I have adopted the terms Gavray Drive West (GDW) and Gavray Drive East (GDE) to refer to the two parts of the Bicester 13 allocation site that are separated by the Langford Brook (with GDW being the Appeal Site).

## 2 THE PRINCIPLE OF DEVELOPMENT AND THE BACKGROUND AND POLICY CONTEXT FOR IT

- 2.1 The Bicester 13 allocation site is subject to significant environmental constraints, proper understanding of which has only come to light in the years since 2006. Those environmental constraints are well-documented and I will expand on them at the Inquiry as necessary. Nonetheless, parts of the site are less constrained and the principle of an appropriate quantum of residential development on these lower value areas, balanced with protection of the highly valued environmental resources elsewhere within the allocation site, is indeed an established one. Prior to the adoption of the current Local Plan, the relative apportionment of that balance was a matter of argument, but a broadly accepted framework for delivery is now in place in the form of the site specific Policy Bicester 13.
- 2.2 While the principle of an *appropriate balance* of development on the site is not therefore in dispute<sup>1</sup>, the appellants' case that "the principle of residential development on the whole of Gavray Drive was established" by a consent for 500 homes granted on appeal in 2006 (para 3.8, appellants' SOC) is a mischaracterisation of the position. That 500 unit scheme was quashed by legal challenge on environmental/ecological grounds in 2012, leaving the site with no valid consent, and in the wake of that decision the appellants abandoned the argument for 500 units.
- 2.3 There can be little doubt that this was in clear recognition that the 2006 scheme had been exposed as inherently damaging to nature conservation, and that an up to date assessment of the ecological impacts of that scheme would show it to be unacceptable. Further, with the emergence of the NPPF in 2012, the proposals could no longer be argued to be sustainable and/or in accordance with national policy. The appellants did not seek to challenge the principle of a restricted quantum of development through the course of the Local Plan examination in 2014/2015, nor the 'enabling' function of that development in securing protection and management of the site's biodiversity assets, and they accepted without challenge the reduced allocation of 300 units. I believe it is important to establish this correct context at the outset. Planning at the site is now governed by a changed policy context which recognises the important biodiversity issues at stake.

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<sup>1</sup> It is incorrect for the appellant to state that "some third party objectors" believe there should be no development on the Gavray Drive site. I note that the appellant does not name any such third parties. In my experience, all third party objectors to the appeal scheme accept the principle of an appropriate balance between some residential development and the protection and future management of the site's most important environmental assets. The widely held concern is that the appellants are trying to find a way to get round the restrictions of Bicester 13 by engineering a situation where more units are left to be delivered on GDE than is compatible with achieving the policy-compliant balance there.

- 2.4 The appellants' assertion that the designated Local Wildlife Site has increased in extent is similarly incorrect. It has not. It has remained the same size since first designated in the early 00s, but what has changed is that the appellants now recognise that their previous 2006 proposals to build on half or more of the LWS can no longer even begin to be argued to be compliant with prevailing policy.
- 2.5 The present position is set by Policy Bicester 13, which seeks an appropriate balance of development and retained biodiversity and open space assets across the Gavray Drive site. This policy was tested through the Local Plan examination and adoption process, and via subsequent legal challenges. No new challenge to its soundness is advanced by the appellants in the context of this appeal, and nor could it be. That policy requires residential development of 300 units to be achieved alongside 'net biodiversity gain'. A crucial point in considering this appeal is that achieving the latter is not a formality: it requires that detailed consideration be given to design, mitigation and compensation across the whole site, even were only part of it to be developed.

### 3 THE REASONS FOR REFUSAL

- 3.1 The appellants control all of the Bicester 13 allocation site, or at least have done so in the recent past. An apparent change to this position is indicated by Appendix 01 of the appellants' SOC. This shows land in the north of GDE (owned by London and Metropolitan who were a joint applicant in the 2006 scheme) as no longer under their control. This change is a matter of significant import to determining this appeal, and I will return to it later, but for now it is sufficient to note that despite this change, the appellants still control all of the *developable* land on both GDW and GDE (i.e. all the land not prohibited from being developed under the stipulations of Policy Bicester 13).
- 3.2 In all previous applications, the appellants have sought to develop the whole of the land within GDW and GDE as a single entity. In the present case, such an holistic approach would in the first instance simplify the process of testing the proposals for compliance with Bicester 13 and indeed other Local and National planning policies, as well as providing the Council with improved certainty of housing delivery and the timescales of that delivery. In short it would be in the interests of good and proper planning.
- 3.3 The appellants do not offer any explanation as to why they now seek to split the site up and develop GDW first, and GDE later (at some future point which they choose not to define). I believe the reason they seek to do this is tactical – namely a strategy to circumvent or restrict the application of the more protective provisions of Policy Bicester 13 by engineering a situation where a stark future choice has to be made on GDE between achieving a sufficient number of further units to deliver the intended site allocation of 300, and delivering the environmental protections required by the adopted policy. The appellants are presumably gambling on that choice being found in favour of housing, via a future appeal if necessary, and no doubt drawing upon the arguments they seek to rely upon in the present case about the Council's reliance on the 300 figure as part of its current delivery forecasts (para 1.5 of appellants' SoC). I would argue that it is exactly such tactics that are "frustrating the delivery of this development" (to paraphrase the appellants' complaint at para 1.6 of their SOC). The Council will speak for themselves, but I also suspect that recognition of such future problems with GDE was part of what moved the Council's planning committee to use the phrase "inappropriate attempt at piecemeal development" in Reason For Refusal 1 (RFR1), before going on to detail further grounds for refusal.
- 3.4 The appellants' failure to respond positively to the first deferral of the Outline Planning Application (OPA) by the Council in May 2017, and the Committee's request for it to be returned to them with a Management Plan for the land designated as a Local Wildlife Site (LWS) on GDE, and as required by Policy Bicester 13, supports this view. Further it indicates that the Committee was right to be wary of the

‘piecemeal’ approach being proposed by the appellants and to ultimately conclude that it was ‘inappropriate’ in terms of delivery of the relevant policy objectives.

- 3.5 The Local Wildlife Site adjoins the Appeal Site, is readily accessible from it, and stands to suffer from an increase in uncontrolled recreational use once the 180 units are built. Evidence provided by the appellants themselves, in the form of their Environmental Statement, predicts ‘significant’ net harm to the LWS from increased and uncontrolled recreational pressure generated by the appeal proposals<sup>2</sup>. Further evidence of likely significant harm has been provided by others (e.g. Berkshire Buckinghamshire and Oxfordshire Wildlife Trust objection letter to CDC of 26 April 2017). In that context, the planning committee’s request that this harm be addressed by a management plan was hardly unreasonable, having regard to national and local policy. That stands to reason even without regard to the fact that appellants are required to deliver such a plan in conjunction with any future phase in any event, as required by Policy Bicester 13. Again, I cannot speak for the Council but having been present at the relevant meetings, I believe it is quite possible that permission for the appeal proposals would not have been refused had the appellants responded positively to the Committee’s direction in May 2017. For their own part, the appellants give no rational or reasoned argument in their Statement of Case for why they refused to commit to such a management plan; they merely offer an argument that they did not want to and believe they did not have to. In evidence I will explore other reasons given in other correspondence surrounding the OPA, which I consider to be material to understanding the planning case now pursued by the appellants in this appeal.
- 3.6 Ultimately, rather than advancing a reasoned case, the appellants appear to seek to confound the clear requirement for a management plan to include the LWS under Bicester Policy 13 with the management plan that is offered for the open space within the appeal site (GDW). The management plan for the undeveloped parts of GDW that the appellants propose, pursuant to an offered condition is quite simply beside the point. The issue is that in the absence of a management plan for the undeveloped parts of the adjoining GDE, and its sensitive Local Wildlife Site (which Bicester 13 stipulates should be protected and managed), the appeal proposals would result in net negative impacts on that same adjoining land, land that is part of the same development allocation, controlled by the appellants and which falls to be considered under Policy Bicester 13.
- 3.7 Even if “no net loss” were achieved on GDW, the result of the appeal proposals would nonetheless be net loss over the wider allocation site. This would not accord

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<sup>2</sup> The appellants’ Environmental Statement, para 9.5.17, states: "*It is considered that during the post-completion stage of the Proposed Development Gavray Drive Meadows LWS is at risk of potential adverse effect as a result of increased recreational pressure resulting from increased housing provision. Increased recreational pressure has the potential to damage and degrade valuable ground flora and trees through trampling and littering, and disturb associated fauna occurring within the LWS including birds, great crested newts and reptiles. The effects of increased recreational pressure as discussed above are considered to have been partially inherently mitigated through the open space provision shown on the submitted Parameter Plan. The resulting effect is considered to be minor adverse (permanent) and of significance at the local level*"

with Policy Bicester 13, nor indeed Local Plan policies ESD10 and ESD11, nor national policy enshrined within the NPPF.



#### **4 NON-COMPLIANCE WITH THE “NO NET LOSS” (NPPF) AND “NET GAIN” (POLICY BICESTER 13/ESD11) TESTS**

- 4.1 On the specific policy test of delivery of no net biodiversity loss (per the NPPF) and net gain (as required by Policy Bicester 13 and through Policy ESD 11), the appellants have sought and continue to seek to rely upon two Biodiversity Impact Assessments (BIAs) that they provided to the Council in support of the OPA.
- 4.2 These contain outputs from a spreadsheet tool known as a Biodiversity Impact Calculator, the particular version in question being one adapted for use in Warwickshire from a model first published by Defra. I have a great deal of familiarity with these systems. The appellants provided copies of separate spreadsheet outputs from their use of this calculator for GDW (seeking to demonstrate no net loss/net gain for the appeal proposals in isolation) and for GDE (seeking to demonstrate that net gain would still be achievable over the whole site with build out of the remainder in a future phase). Contra-evidence as to the reliability of these outputs was provided to the Council by myself and others, including BBOWT<sup>3</sup>. Without even needing to engage with the intricacies of that technical debate, both Biodiversity Impact Assessments can readily be shown to have significant flaws that undermine their credibility and the weight that can be placed upon them in deciding whether the appeal proposals deliver, or alternatively compromise, the directly applicable policy objectives of ‘net biodiversity gain’.
- 4.3 Firstly, the BIA submitted by the appellants for GDW (the Appeal Site) does not account for any negative impacts on the adjoining Local Wildlife Site or indeed the equivalent and overlapping parts of the Conservation Target Area. This is despite the calculator having a facility allowing such effects to be accounted for, and despite the appellant’s EIA stating that negative impacts would occur (and would be significant). The claim of no net loss/net gain for the appeal proposals (in isolation) that is made by the appellant on the back of this BIA output, and the stated position of ‘satisfaction’ of the Council’s ecologist (as referenced in the quote from the officer’s report at para 3.10 of the appellants’ SOC) is thereby shown to be open to question and/or challenge, even without having to consider the accuracy of that assessment further. I would propose to elaborate on this in greater detail in witness evidence and submissions if it would help the inquiry.
- 4.4 Secondly, the BIA for GDE relies on a commitment to enhance the area the appellants indicate would be kept free of built development in that remaining part of the site, in order to deliver the no net loss/net gain result indicated in the calculator spreadsheet. That the whole of the undeveloped part of GDE is relied upon in the calculator is plain from the area figures. Yet the appellant now indicates, by means of the map at

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<sup>3</sup> BBOWT objection letter to CDC of 26 April 2017.

Appendix 01 to its Statement of Case, that it no longer controls the entirety of GDE. The management of land outside the control of the appellant cannot be assumed. If the portion of land it no longer controls is removed from the BIA calculation for GDE, I calculate that the corrected output becomes a clear net loss, even were the rest to remain unchanged (i.e. disregarding that there are grave concerns about the accuracy of the input parameters in any event)<sup>4</sup>. No weight can therefore be placed on the appellants' BIA for Gavray Drive East as evidence that the net biodiversity gain required by the policy can or would still be achieved if the appeal proposals are granted. Indeed it places it further beyond dispute that the appeal proposals would compromise that policy objective being realised. The crucial relevance of this change in control over the land at GDE appears to have been overlooked by all parties including the Council. Yet it provides a further reason to support the Council's concerns that they are presently "*unable to satisfactorily determine whether the proposals would enable development across the whole of the site to properly meet the overall objectives and requirements of Policy Bicester 13*" as stated in their RFR1.

- 4.5 I note that the Council do not state that a phased approach to development of an allocated site is inherently unacceptable, but they quite rightly must be satisfied that the wider-ranging policy objectives pertaining to that site, and to the development plan more generally, are not stymied by a piecemeal, or phased, approach that kicks associated policy requirements down the road and eventually leaves too much to be delivered in too little space. The principle of ensuring decisions taken in the immediacy do not set up future unresolvable legal or policy conflicts is well established in case law, particularly in the field of ecology (e.g. *Hardy*). The Council were thus absolutely right to refuse this application, and further, it is not unreasonable for them to highlight in the process of refusal that a more holistic approach to the development of this site is in the interests of good and proper planning, and a more appropriate means to satisfy them that delivery of critical aspects of the Bicester 13 are not going to be squeezed out, deliberately or otherwise, by approval of the appeal proposals.

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<sup>4</sup> In the course of preparing my Statement of Case, I made a request to the appellants via the appeal case officer for maps that can be properly related to the BIA calculators, in the interests of absolute clarity on the inputs used by their ecological consultants, and so that this point can be elucidated for the benefit of the Inspector. However to date the requested clarifications have not been provided.

## 5 CONCLUSIONS

- 5.1 A clear framework for achieving a sustainable balance of development on the allocated site comprising GDW and GDE is set out by Policy Bicester 13. The appeal proposals for GDW a) do not comply with this on their own terms and b) compromise the ability for the policy objectives to be realised in any future phase for GDE. They are thus clearly in conflict with not only the spirit and the detail of Policy Bicester 13, but also with other relevant Local Plan Policies and the NPPF. The appeal proposals do not represent sustainable development and therefore the presumptions sought to be relied upon by the appellants do not apply. The appeal should be dismissed and, if it is, it is to be hoped that this will discourage the appellants from further attempts to circumvent or whittle away the environmental restrictions of Policy Bicester 13, and, rather, to respond positively to the framework it sets out in line with the plan-led approach.
- 5.2 For the avoidance of doubt, I would like to reserve the right to amend, expand upon or add to this SOC in the light of any further submissions from the Appellant, Council or other interested parties.