

**APPEAL BY TAYLOR WIMPEY UK LTD RE:**

**LAND NORTH OF BARKBY ROAD**

**APP/X2419/W/23/3325902**

**APPELLANT'S OPENING SUBMISSIONS**

**Introduction**

1. The appeal scheme is for up to 195 new homes with all matters reserved except access. It is supported by the LPA. No statutory consultees object. It matches an allocation in the emerging local plan which has already been through examination. In addition, the tilted balance under the Framework is engaged. The application of the tilted balance recently led your fellow inspector to approve a scheme for up to 150 dwellings adjacent to the settlement edge of Queniborough, on a nearby site which is not proposed for allocation.<sup>1</sup> Accordingly, while the planning merits and concerns of members of the public must be assessed adequately at this inquiry, the circumstances offer substantial confidence that this is the right scheme, in the right place, at the right time.

**Background**

2. The procedural history of the proposals is set out in the SOCG.<sup>2</sup> Of note are the following. First, the 17 August 2023 putative reasons for refusal were issued against officer recommendation. They were then withdrawn by delegated authority just over three weeks later, on 12 September 2023. Secondly, on the important question of the quantum of highway contributions, the LPA's position has been led by the County Council. The demand for highway contributions has shrunk from £2, 445, 323 at the time of refusal, to £263, 991 in the final CIL compliance statement. Thirdly, the highway contributions issue is really one of planning judgment rather than technical assessment. The appellant's technical assessment is accepted by the LPA and County. Fourthly, there remain some differences of detail between the parties, and I will explain these towards the end of these submissions.

**Policy Context**

3. See SOCG sections 7 and 8 for the agreed policy context.

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<sup>1</sup> CD 11.01.

<sup>2</sup> Esp. sections 1, 2, 6; appendix A for documents and changes.

4. Within the general requirement to decide the case in accordance with the development plan unless material considerations indicate otherwise, there are two important aspects of approach. First, the tilted balance. Secondly, the emerging local plan.

#### *The tilted balance*

5. The tilted balance is triggered in this case because the policies which are most important for determining the application are out of date.<sup>3</sup> There are two agreed<sup>4</sup> bases for this. First, Charnwood is unable to demonstrate a 5-year supply of deliverable housing sites. Its current statement published in June 2023 giving a supply of 4.27 years.<sup>5</sup>
6. Secondly, “*the policies which are most important for determining the application are out-of-date*”. It is agreed<sup>6</sup> that these policies include saved<sup>7</sup> policies CT/1 (general principles for areas of countryside), CT/2 (development in the countryside) and ST/2 (limits to development). These policies reflect a development strategy from the existing Local Plan<sup>8</sup> which was adopted in 2004 formally ran from 1992-2006. The housing need at that time was c.557 homes a year, but is now 98% higher at 1,105 homes a year.<sup>9</sup> Reflecting these changes, there have been significant levels of development permitted and delivered outside settlement limits over the last 19 years, including over 250 new homes around Syston.<sup>10</sup> The allocation of the appeal site and neighbouring sites HA1 and HA3 in the emerging plan is a reflection of the changes needed to bring local policy up to date. The saved policies “no longer reflect the position on the ground or take account of an up-to-date assessment of need.”<sup>11</sup>
7. Accordingly, this is one of those cases where national policy advises that planning permission should be granted unless any adverse impacts of doing so would “significantly and demonstrably” outweigh the benefits, when assessed against the policies in the Framework overall.

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<sup>3</sup> NPPF, 11.d).

<sup>4</sup> SOCG 9.4.

<sup>5</sup> CD10.02, table p1.

<sup>6</sup> Ward #8.4; Clarke #5.10

<sup>7</sup> Saved from the Charnwood Local Plan 1991-2006 (adopted in 2004)

<sup>8</sup> CD5.01.

<sup>9</sup> Clarke #5.5-5.6.

<sup>10</sup> Clarke #5.8.

<sup>11</sup> Clarke #5.10.

### *The emerging plan*

8. The appeal site is a proposed allocation HA3 under policy DS3 of the emerging plan.<sup>12</sup> This forms part of a package of allocations HA1-HA6 around Syston, which is now designated as part of the Leicester Urban Area. Substantial growth is proposed there, with some 1,425 new homes expected to be delivered by the site and its neighbours (HA1 – 960; HA2 – 270). The plan has already undergone examination. The post-examination consultation requested by the inspectors on certain additional material concluded on 8 November 2023. Consultation on main modifications will follow. Adoption of the plan is expected in March 2024.<sup>13</sup> Nothing in the inspectors' letter of May 2023 regarding the next steps indicates any intention to remove the Syston allocations, a step which if proposed, the inspectors would surely have alerted the LPA to at this late stage in the process.
9. Therefore, although at the time of writing their evidence both planning witnesses were suitably measured in their assessment of weight to be given to the emerging plan because of the potential for modifications to the DS3 allocations,<sup>14</sup> the evidence indicates that the *principle* of housing development on the appeal site is very likely to be endorsed, irrespective of any potential modifications to the details of emerging policy.

### **General Planning Issues**

10. The assessment of the general planning issues has been thorough, and their successful treatment is reflected in the proposed development, the conditions and the s106 obligations proposed. Below I address some general issues, before moving on to the specific matters that have attracted the greatest attention between the parties during the preparation of the appeal.

### *Sustainability of the appeal site's location*

11. Syston lies due north of Leicester, adjacent to and due north of Thurmaston. The appeal site and its fellow cluster of emerging allocations lie to the south-east of Syston, close to Thurmaston. The relationship is shown helpfully in the emerging plan key diagram.<sup>15</sup> In emerging policy terms, Syston is now located within the Leicester Urban Area under the emerging plan. It is ranked as an Urban Settlement above the smaller service centres in the settlement hierarchy.<sup>16</sup>

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<sup>12</sup> CD7.01, p33.

<sup>13</sup> Ward #5.2-5.5.

<sup>14</sup> Ward #5.3: significant weight only at the MM stage, and to those policies which do not require modification; Clarke #6.32 (limited weight at this stage).

<sup>15</sup> CD7.01, p23.

<sup>16</sup> CD7.01, pp24-25, setting out the Regeneration and Locational strategy of the emerging plan.

12. The parties agree that the site lies in close proximity to a range and choice of local facilities and services within Syston. The relevant services are listed in the SOCG,<sup>17</sup> their location and accessibility are assessed in the appellant's highway evidence,<sup>18</sup> and shown on a plan in that evidence.<sup>19</sup> The site performs well in relation to pedestrian and cycle links to Syston, and public transport accessibility between Leicester and Melton Mowbray. Opportunities to enhance accessibility are being taken through the use of a travel plan, the provision of bus tickets and public transport information packs (or their funding), and a contribution to sustainable travel improvements.<sup>20</sup> The treatment of funding by the appellant under the s106 obligations is explained later.

### *Heritage and archaeology*

13. It is agreed that there are no designated heritage assets impacted by the proposals.<sup>21</sup> The application was accompanied by an archaeological and heritage assessment,<sup>22</sup> which considered designated and non-designation heritage assets and reached the same conclusion. All assets are remote from the site.<sup>23</sup> Heritage was considered favourably in the officer's report apart from the need for further archaeological investigations.<sup>24</sup>

14. Archaeology has therefore been the subject of further consideration since then, which resulted in an evaluation report and a final report, the latter following physical investigations on the site.<sup>25</sup> The physical investigations involved 33 trenches<sup>26</sup> being dug, of which only two revealed artefacts, which were of Romano-British origin.<sup>27</sup> These two trenches are close to each other, and are recommended as the site for excavations and recording prior to construction.<sup>28</sup> A planning condition is proposed to that effect.<sup>29</sup>

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<sup>17</sup> SOCG #9.20.

<sup>18</sup> Tucker #4.1.4-4.4.10.

<sup>19</sup> Tucker fig 1, pdf p27.

<sup>20</sup> Tucker #4.4.1ff.

<sup>21</sup> SOCG #9.18.

<sup>22</sup> CD1.11.

<sup>23</sup> CD1.11, plan EDP1, pdf p41.

<sup>24</sup> CD4.01, #9.29, 9.61-9.68.

<sup>25</sup> CD2.19 and 2.20.

<sup>26</sup> Trenches shown on figs. 2-4 of the Final Report, CD2.20, pdf p56-58.

<sup>27</sup> CD2.20, sections 10 and 11, pdf p19-20.

<sup>28</sup> CD2.20, section 10; fig. fig 10, pdf p64.

<sup>29</sup> Condition 12, Ward p20.

### *Landscape and visual impact; arboricultural impact*

15. The site does not lie within any valued landscape designation nor any other national or local landscape policy of constraint. It is agreed that the overall impacts on landscape character will be minor to moderate, with the effects being localized in character. Site topography, existing vegetation, landscaping and the site's context adjacent to the existing urban edge of the Syston all contribute to reduce visual and landscape impacts.<sup>30</sup> The landscape and visual appraisal<sup>31</sup> accompanying the planning application contains an assessment<sup>32</sup> taking into account agreed<sup>33</sup> representative viewpoints.<sup>34</sup> The appraisal informed the landscape strategy for the site.<sup>35</sup> The overall conclusions of the assessment were that the proposed development would merge into the modern and recently extended eastern urban edge of Syston, and reduce the impact of the urban edge on the countryside, by conserving and enhancing existing trees and hedgerows where possible<sup>36</sup>, and introducing substantial new planting within landscape buffers around the edges of the site.<sup>37</sup>

### *Biodiversity and Ecology*

16. The site has been the subject of several ecological appraisals over the last decade.<sup>38</sup> There are no statutory or non-statutory designations within the site and none affected by the development.<sup>39</sup> There was limited evidence of protected species or species of interest.<sup>40</sup> Overall, the ecological appraisal<sup>41</sup> submitted with the application found that the site was generally of low intrinsic ecological value,<sup>42</sup> with the consequence that the development has limited impacts but ample scope for enhancements. The BDNG assessment identified potential for significant enhancement.<sup>43</sup> A Mitigation Strategy has been proposed.<sup>44</sup> Overall it was concluded that the scheme would comply with all relevant planning policy requirements.<sup>45</sup>

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<sup>30</sup> See generally SCG #9.22-9.26.

<sup>31</sup> CD1.19

<sup>32</sup> DC1.19, section 6.

<sup>33</sup> SOCG #9.26.

<sup>34</sup> CD1.19, pdf p96ff.

<sup>35</sup> Illustrated on drawing edp4685\_d032a, CD 1.19, pdf p83 and explained at #5.8-5.14.

<sup>36</sup> See CD1.109, arboricultural assessment: 14 cat B and C trees on site, of which 3 cat C trees are to be particularly removed. 4 of 5 cat U trees are to be removed for arboricultural reasons.

<sup>37</sup> CD1.19, #7.9.

<sup>38</sup> Recorded at CD1.07, #S4: surveys in 2012, 2014, 2018 and 2021.

<sup>39</sup> CD1.07, #3.7.

<sup>40</sup> CD1.07, #3.11-3.52.

<sup>41</sup> CD1.07.

<sup>42</sup> At S5.

<sup>43</sup> #4.13.

<sup>44</sup> At section 4.

<sup>45</sup> At #5.4

17. The BDNG assessment was updated to take account of changes to the access arrangements required by the provision of visibility splays. This resulted in the removal of the western section of the southern boundary hedgerow, and required the re-positioning of the footway along Barkby Road. A native species-rich hedgerow to replace the lost hedgerow to the north of the repositioned footpath is being created in its place. The changes are shown on plans within the October 2022 Technical Note.<sup>46</sup> The Note assesses the BDNG potential of the scheme taking account of this change. It concludes that the amended layout is still capable of yielding a net gain of +14.94% habitat units and +48.18% linear units.
18. The level of potential enhancement is agreed<sup>47</sup>, and condition 5 of the proposed conditions will secure the proposed mitigation and a requirement for a BDNG assessment of at least 10%. The draft s106 agreement contains trigger points requiring the approved scheme to be implemented before occupation of 70% of the new homes, and to be completed before more than 70% of the new homes are occupied.<sup>48</sup>

#### *Flood risk and drainage*

19. The site lies in zone 1 for fluvial flooding, but has been assessed as being at high risk from pluvial flooding without mitigation. There are no other material flood risk sources.<sup>49</sup> A mitigation strategy accompanied the application, informed by hydraulic modelling. The mitigation comprises the provision of flood storage capacity within the site, containment of the site catchment area, ensuring external land levels are generally 150mm below ground floor levels, and designing surface levels to ensure that flows are directed away from dwellings.<sup>50</sup> Proposed conditions 12, 18-20 and 24 are designed to secure what is needed.

#### *Other*

20. There are no concerns in relation to air quality or land contamination.<sup>51</sup> There is a technical breach of minerals policy in the adopted development plan, but the principle of acceptable housing

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<sup>46</sup> CD2.03, pdf p5 and plan EDP1, p14.

<sup>47</sup> SCG #9.30.

<sup>48</sup> Draft s106 agreement schedule 2, pt7.

<sup>49</sup> CD2.04 FRA, summary at #4.7.

<sup>50</sup> CD2.04, section 5.4 (management principles), 7.3 (mitigation measures); plans showing indicative drainage strategy at pdf p61-62.

<sup>51</sup> SOCG #9.34-9.36. Conditions are proposed to address land contamination and for ground gas mitigation, remediation, monitoring and maintenance.

development on this site outweighing any minerals policy issues has been established through the plan process. The minerals planning authority raise no objection.<sup>52</sup>

### **Specific matters for attention**

21. This section addresses those matters which have been the subject of more intense discussion between the main parties in preparation for the appeal.

#### *Highways and transport*

22. The appeal scheme proposes a priority junction from Barkby Road with a right turn lane into the site.<sup>53</sup> The access will provide visibility splays of 120m to the west, and 75m to the east. It has been subject to a Stage 1 Safety Audit, which confirmed no significant concerns. It is common ground between the main parties and the highway authority that the proposed access arrangements are safe.<sup>54</sup> The safeguarding of land provided by the proposed unilateral obligation to facilitate the joint access arrangements with allocation HA1 is addressed later.

23. The appellant has acknowledged from the outset that it is appropriate to make a contribution towards improving sustainable travel from the site. To that end it proposed a contribution to improve sustainable transport, based on increasing the frequency of the 100 bus serviced for five years from the completion of the 50<sup>th</sup> dwelling.<sup>55</sup> The main parties and the highway authority (which operates the contract for the 100 bus and is privy to the commercial details of its operation) have agreed the global sum of £450,000 to meet that cost, and agreed that the appeal site should make a 43.7% contribution towards this total (£196, 650), being its proportionate split with site HA2 (it is agreed that site HA1 will need to make its own bespoke contributions to bus services given its size).

24. The traffic generation of the scheme and its mitigation have been subject to extensive discourse between the main parties and the highway authority. The methodology and results of the appellant's technical assessment of the scheme's impact on the road network is agreed. There has never been any alternative technical assessment produced by any party.<sup>56</sup> Using TRICS, the traffic generated by the proposals is estimated as +90 and +85 two-way movements in the AM and PM peak respectively,

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<sup>52</sup> Clarke #5.70-5.72; 9.36-9.38.

<sup>53</sup> Shown on Access Plan 20060-02 Rev F.

<sup>54</sup> Tucker #.5.2-5.4; SOCG #9.12

<sup>55</sup> Giving a total of six years: Tucker #4.4.9.

<sup>56</sup> Tucker #2.9; #6.3.2.

but the assessment was carried out using higher figures of 102 (AM) and 123 (PM), based on traffic counts undertaken at nearby St. Paul's drive.<sup>57</sup>

25. The assessment resulted in three junctions being identified as being of concern to the local highway authority. These three junctions were High Street/ Melton Road/ Barkby Road; Goodes Lane/ Melton Road; and Fosse High Street.<sup>58</sup> Mitigation has never been sought in relation to the first junction since its constrained function is appropriate; but contributions to signals at the Melton Road junction and physical works to the Fosse High Street junction were sought.<sup>59</sup>

26. In fact, however, the results of the assessment showed that each junction was approaching capacity by 2027 with the development, and forecast to be over capacity by 2037.<sup>60</sup> The overall impact of the scheme itself was not severe. Hence the TA concluded that "The assessments do not identify any issues with regard to junction operation and on this basis there are no specific off-site highway mitigation measures required."<sup>61</sup> This remains the appellant's position in its statement of case.<sup>62</sup>

27. The LPA does not appear to dispute that if the appeal proposal is assessed on its own merits, this is indeed the position. The issue is whether the proposals should be assessed cumulatively with the other allocations in the emerging plan.<sup>63</sup> The question of cumulative impact assessment with the emerging allocations was addressed by the appellant in DTA's March 2023 note, and an assessment was undertaken on a without prejudice basis.<sup>64</sup> It showed the junctions within capacity in 2027, and over-capacity in 2037, due to the impact of the other development, not the appeal scheme.

28. Following further discussions between the parties, the position reached by the Appellant is that it accepts that a proportionate contribution to the works in question can be judged CIL compliant for

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<sup>57</sup> CD1.15, the TA, section 5. Distribution was predicted using census journey to work data: *ibid*.

<sup>58</sup> Helpfully indicated on figure SJT2, Tucker pdf p27.

<sup>59</sup> Summarised, illustrated and costed at CD2.18.

<sup>60</sup> All summarized at Tucker #6.3.1-6.3.4 and table at appendix SJTA, Tucker pdf p30.

<sup>61</sup> CD1.15, #7.6.

<sup>62</sup> CD9.01, #10.30.

<sup>63</sup> CD9.07, #2.12.

<sup>64</sup> CD2.15, #2.1.4.

the reasons given by the highway authority in its CIL compliance statement.<sup>65</sup> The total cost of the works totals £430, 510<sup>66</sup> of which the appeal site would make a proportionate contribution of 13.9%, or £58, 840 (being its share of homes from HA1, the appeal site and HA2). A contribution of £7,500 is also agreed to cover the cost of a TRO to remove some of the lightly used car parking spaces at the High Street/ Melton Rd/ Barkby Road junction. This is to ensure that flows are not blocked by right turning traffic waiting in the carriageway.<sup>67</sup>

29. The total contribution for these measures is £263, 991.<sup>68</sup> However, there is some nuance in the way in which these contributions are addressed under the draft planning obligations. The Appellant acknowledges that despite the agreement reached, the question of compliance with CIL reg 122 is a matter for you, upon which you must reach a judgment. It is therefore possible that you will take a different view to the parties. The obligations seek to accommodate this possibility.

30. To that end, the draft agreement proposes a payment of £263, 991 by way of a Local Highways Mitigation Contribution. If you conclude that the pooling of proportionate contributions in this way is *not* CIL compliant given the agreed impacts of the appeal scheme alone, the “blue pencil” clause<sup>69</sup> in the s106 agreement would render the obligation ineffective. However, since the junction works contribution is combined with the sustainable travel contribution, the latter would also fall away. To protect against this eventuality, the unilateral obligation would still provide the appeal site’s share of the sustainable travel contribution (£196,650) in full.<sup>70</sup> This nuance arises because the authorities would not agree to the sums being separately addressed in the s106 agreement.

*Relationship with delivery of allocation HA1: the deed of dedication and “Hillside” planning condition*

31. The other reason for the unilateral obligation relates to the safeguarding of land to facilitate a future shared access arrangement with allocation HA1 to the south. For the appeal site and HA1 to co-exist, a roundabout access serving both sites would need to be provided on land partly within the appeal site. The land take for this is indicated illustratively on the updated Concept Masterplan and also on plan 2 of the unilateral undertaking.<sup>71</sup> The LPA and highway authority consider it important for the

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<sup>65</sup> CD9.06; agreement recorded in the update SOCG, #11.2.

<sup>66</sup> CD2.18, para 29, page 336.

<sup>67</sup> Explained in CD2.18, section 2.2

<sup>68</sup> £58, 840 + £7, 500 (both para 28) + £196, 650 (para 23)

<sup>69</sup> Cl. 5.

<sup>70</sup> See cl5: if the Local Highways Mitigation Contribution is judged not reasonably required, the Local Sustainable Travel Mitigation Contribution of £196, 650 will be paid.

<sup>71</sup> CD8.03 Concept Masterplan; CD 9.14 (UU).

proper planning of the area that delivery of HA1 is not prejudiced by a future inability to secure provision of the roundabout access. To this end, the unilateral obligation provides a requirement that the owners of the appeal site safeguard the land required, submit a plan showing the extent of such land for approval by the highway authority, and then include such land within the S38 or s278 agreement for the access to the appeal site.<sup>72</sup>

32. Charnwood accepts that “the LPA must be assured that the lands in the emerging allocation are not blighted in the event that a change of ownership or control arises at some later date” and hence its evidence welcomes the offer of a planning obligation to protect the opportunity for the future roundabout junction.<sup>73</sup> Nevertheless, the parties have been unable to agree that this provision should be made in the s106 agreement. Hence its inclusion in the unilateral obligation.

33. There is one further point of detail. In the light of the Hillside<sup>74</sup> decision on the compatibility of planning permissions, the appellant has proposed a planning condition making it expressly clear that the appeal permission is intended to be compatible with a future roundabout access to serve the site and HA1. The Hillside case decides that a later permission on the same land as an earlier permission may render the earlier permission no longer operable, where the development authorized by it is physically impossible to deliver because of the later permission (see [72]). However, subsequent permissions may be compatible with earlier permissions as a matter of interpretation of the permissions themselves (see [74], [78]). It follows that the use of a condition on the face of a planning permission to remove a risk of incompatibility, and ensure compatibility is appropriate and necessary. It is the only sure way of putting the matter beyond doubt.

#### *Health care contribution*

34. Although the parties had agreed that the health care contribution was CIL compliant, there has been a material change in circumstances since that agreement was reached. The change is your colleague’s appeal decision already referred to. In that case, the inspector found that the healthcare contribution had not been adequately justified.<sup>75</sup> This was principally because the formula employed by the local integrated care board, who appeared, were represented, and gave evidence at that inquiry, was not fit for purpose (DL para 36). The same formula has been used to justify the

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<sup>72</sup> Unilateral undertaking, schedule 2, part 2.

<sup>73</sup> Ward, #3.4-3.5.

<sup>74</sup> Hillside Parks Ltd v Snowdonia National Park [2022] UKSC 30.

<sup>75</sup> Paragraphs 33-37 and 42

contribution in this case. The Appellant has raised the decision with the LPA (who were a party to that appeal) and their formal response is awaited.

35. Having set the scene, I return to the simple point: that despite the small differences between the principal parties, we all agree that the appeal should be allowed, subject to conditions and the necessary planning obligations. We invite you to conclude the same.

**JAMES PEREIRA KC**

FTB

14 NOVEMBER 2023