

**RE: EMPLOYMENT LAND TO THE NORTH OF MAPLE CROSS
LODGE, MAPLE CROSS, RICKMANSWORTH**

OPENING SUBMISSION OF THE APPELLANT

INTRODUCTION

- 1 This Appeal concerns a proposed development comprising the provision of two new warehouse buildings for employment use (Class E(giii)/B2/B8) with ancillary E(gi) office space and access, parking, landscaping works and associated works. The description of development is as follows (SoCG at 3.1):

Comprehensive redevelopment to provide 2 no. warehouse Class E(giii)/B2/B8 units comprising a total of 16,115 sqm including 1,882 sqm ancillary E(gi) office space, access, landscaping and associated works. [SEP]

- 2 The proposal does not comprise EIA development. This has been confirmed by both the LPA and PINS. The proposal is described in further detail in the SoCG at section 3 (CD 5.24).
- 3 The proposal is supported by the LPA, who consider that planning permission should be granted, subject to the imposition of conditions and a s.106 agreement. There are no issues between the Appellant and the LPA.

BACKGROUND TO THE APPEAL

- 4 This Appeal follows the refusal of a previous application (ref: 19/1179/FUL) (the Refused Application) comprising:

Comprehensive redevelopment to provide 2 no. warehouse Class B1c/B2/B8 units comprising a total of 16,140 sqm including 1,986 sqm ancillary B1a office space, access, landscaping and associated works. [L]
[SEP]

- 5 The Refused Application was refused for 7 reasons on 19th November 2019. An Appeal was heard (by way of an Informal Hearing) between 30th June and 3rd July 2020. The Appeal was determined in a Decision Letter (DL) dated 21st September 2020 (CD 3.9). Having identified 8 Main Issues (DL 7), Inspector Coffey dismissed the Appeal on a single ground. The Inspector identified that there was insufficient evidence to demonstrate (at that stage) that the risk to Public Water Supply (PWS) could be addressed by condition and adequately mitigated (DL 153). Further evidence and analysis was therefore required.
- 6 The Inspector did, however, conclude that the development was acceptable in all other regards. In respect of the other 7 Main Issues, it is agreed that the Inspector concluded that (SoCG at 4.10):
- (i) The principle of development is acceptable and the proposed employment use is supported by planning policies CP6 Core Strategy and SA2 SA DPD (DL 20);
 - (ii) The proposed development would not harm the living conditions of surrounding residents in terms of: [L]
[SEP]
 - (a) noise - in accordance with policy DM9, the NPSE, NPPF and NPPG (DL 41);
 - (b) air quality - in accordance with policy DM9 (DL 53); and
 - (c) traffic, parking and highway safety - in accordance with policies DM9 and DM13 and the NPPF (DL 63).

- (iii) The proposed development would not harm the living conditions of the occupants of 19 Longmore Close and would be of a high standard of design, in accordance with planning policy CP12 (DL 71);
- (iv) There would be an acceptable effect on trees, in accordance with policies DM6 and CP 12(b));
- (v) Subject to agreed mitigation measures, there would not be an adverse effect on the MLNR lakes, either in terms of de-watering or the introduction of contaminants. The quality and quantity of water reaching the lakes would be maintained (DL 89). There would be a biodiversity net gain (BNG) in accordance with planning policies DM6, CP9 and the NPPF (DL 100).
- (vi) The development would not be at risk from flooding or increase the risk of flooding elsewhere, in accordance with policies DM8 and CP 12;
- (vii) There would not be any harm to the significance of any heritage assets (applying s.66 P(LB&CA) Act 1990). There is compliance with policies DM3, CP 10 and the NPPF (DL 111 to 124). [SEP]

7 In addition, the Inspector concluded the appeal scheme would result in significant planning benefits to which “*considerable weight*” should attach, comprising *inter alia* (DL 158):

- The provision of employment floorspace for which there is an up to date identified need (set out in the development plan and SW Herts Economic Study (2018));
- The provision of 292 FTE jobs (operation) and 108 FTE jobs (construction), with 179 indirect FTE jobs (operation) and 98 indirect FTE jobs (construction);

- This is identified as a priority for sustainable development by the Core Strategy;
- Improvements to drainage and flooding on the access road;
- Improvements to the local highway network.

8 However, the Inspector was “*not persuaded that sufficient evidence has been submitted to demonstrate that the risk to the public water supply could be adequately mitigated*” (DL 153). Therefore, on this basis alone, the appeal was dismissed.

9 It is agreed (SoCG at 4.12) that the previous appeal decision is a material consideration of significant weight. This is because:

- (i) There should be consistency in administrative decision-making (*North Wilts DC v SoSE* [1992] JPL 955);
- (ii) The NPPG is clear that it is unreasonable conduct to persist in objections to a scheme (or to elements of a scheme) which an Inspector has previously indicated to be acceptable (TS at 6.18). ^[SEP]

10 The sole remaining reason for refusal was based on an objection from Affinity Water (AW), the statutory water undertaker responsible for the supply of drinking water which is safe and of an acceptable quality (WIA 1991 and the Water Supply (Water Quality) Regs 2016). ^[SEP]

11 The Appellant, therefore, undertook an extensive programme of engagement with AW and the EA, together with the LPA prior to the submission of the planning application. Such an approach is consistent with best practice in Ch. 4 NPPF. At the time of the application, there was no outstanding objection from AW. The residual issue had been addressed, to the satisfaction of the relevant statutory undertaker.

THE APPLICATION^[1]_[SEP]

12 The Application was submitted to Three Rivers District Council (the LPA) on 5th March 2021. The Council validated the Application on 5th March 2021. The statutory determination period was due to expire on 4th June 2021. However, notwithstanding that the PWS issue had been addressed, the LPA sought multiple extensions of time until 29th October 2021.

^[1]_[SEP]

13 The Application was taken to the Planning Committee on 21st October 2021, with a recommendation for approval. At this point:

- The scope and methodology of the hydrogeological assessments had been agreed between Hannah Fraser, AW, the EA and LPA Officers;
- All hydrogeological assessments had been prepared by independent technical experts;
- The assessments had been undertaken in accordance with the agreed scope and methodologies and critically peer reviewed by technical experts from AW and the EA;
- Further evidence and assessments had been provided where requested;
- Resulting in an agreed position (between the Appellant, LPA Officers, AW and the EA) that the hydrological and hydrogeological impact would be negligible and acceptable, subject to conditions;
- There was agreement that the relevant statutory and planning policy requirements had been met, in the light of concerns raised by *inter alia* the Maple Cross Conservation Society.

14 Members nonetheless resolved to defer the determination of the application. The sole issue was claimed concern over the hydrological impact on the Maple Lodge nature reserve (MLNR). The approved

minutes cite the reason for the deferral being (SoCG at 1.4): [L] [SEP]

“for the Council to instruct their own expert hydrologist or similar to review the application on the grounds that Members are not satisfied that the risks of development to the Maple Lodge Nature Reserve had been fully understood and the suggested conditions would meet the requirements.” [L] [SEP] (Emphasis added)

- 15 The Appellant appealed against non-determination. It is agreed (SoCG at 1.5) that at the time of the appeal, there was no outstanding request for further information from the Council regarding hydrological/hydrogeological assessments from the applicant. [L] [SEP]

THE POSITION OF THE LPA

- 16 In order to allay the concerns of Members and to specifically address the concerns of the Maple Lodge Conservation Society, the LPA commissioned another independent audit of all the submitted hydrogeological evidence. McCloy were Instructed *inter alia* to review the site investigations, method statements, conclusions, recommendations and outcomes (see CD 2.1.26 and HF at 2.2.76). In the light of this comprehensive technical review, the agreed position with the LPA is as follows (SoCG at 6.55 *et seq*):

6.55 It is agreed that Affinity Water has no objection to the proposed development, and whilst they state that a “risk to public water supply still remains”, as the Statutory Undertaker, they have confirmed (31/03/2021, CD2.1.8) that the risks to public water supply can be managed by the imposition of planning conditions. [L] [SEP]

6.56 It is agreed that the proposed development’s effect on the groundwater and Maple Lodge Nature Reserve can be managed and appropriately mitigated by planning conditions. [L] [SEP]

6.57 It is therefore agreed that, subject to conditions, there would be no adverse impact on the quality of local groundwater and that the quantity and quality of groundwater resource is protected from pollution in respect of the public water supply in accordance with Development Management

Policies DM8 and DM9 and that subject to conditions, there would be no adverse impact on the Maple Lodge Nature Reserve. [L]
[SEP]

17 Further, there is (now) no disagreement over the wording of any conditions. In particular, agreement has been reached on the wording of groundwater monitoring conditions (C7) and noise (C20 and C37). This has been confirmed by the LPA in correspondence (CD 2.1.27).

18 It follows that, subject to the agreed conditions and a s.106 agreement, there is no issue between the Appellant and the LPA, after a very detailed and critical assessment of all aspects of this proposal. The LPA and the Inspector are exercising equivalent decision-making functions. Both seek to regulate the use of land in the public interest, applying s.38(6) P&CPA 2004. The Appellant could have withdrawn the Appeal and re-submitted the application. The result would be the grant of a conditional consent. The Appellant submits that this consensus of professional and technical agreement should be afforded very significant weight in the determination of this Appeal.

STATUTORY TEST

19 Section 70(2) T&CPA 1990 and s.38(6) P&CPA 2004 require this Appeal to be determined in accordance with the development plan, unless material considerations indicate otherwise. The development plan comprises:

- (i) The Three Rivers Core Strategy 2011-2026 (2011);
- (ii) Development Management DPD (2013); and
- (iii) Site Allocations DPD (2014).

THE PRINCIPLE OF DEVELOPMENT

20 The adopted policies map (2014) identifies the site as being located within an Employment Area (site allocation SA2 E(d)). Policy SA2 allocates and

safeguards the site for business, industrial, storage and distribution uses (classes B1c¹, B2 and B2).

- 21 The principle of the development is therefore in accordance with the development plan. The policy is consistent with the NPPF. It is up to date. This is, therefore, a site which is going to be developed for employment uses. No party argues the contrary or seeks to contest the allocation.
- 22 The South West Herts Employment Land Update (2010) formed the evidence base for the SA DPD. It identified a shortfall in the supply of employment land of 13,000 to 14,000 sqm (or 3.5ha) of industrial and warehousing floorspace to 2026. The ELU (2010) recommended the allocation of this 3.4ha site to deliver this requirement to 2026. It was the sole site which the LPA could identify. It follows that if the need is to be met by 2026, to comply with the statutory development plan, consent should be granted *without delay*.
- 23 This proposal is, therefore, consistent with an allocation in an up to date development plan. It is needed (now) to meet the objectively assessed need for employment floorspace. It should, therefore, be granted *without delay* (NPPF 11). The alternative is for greenfield Green Belt land to be developed. Such an outcome is the antithesis of the plan-led system and national/local policy on Green Belt.
- 24 The need remains acute. TRDC is progressing a Local Plan up to 2032. Whilst the Plan is at an early stage (Reg 18 consultation between 11th June 2021 and 20th August 2021), the site remains as an employment allocation, on the basis of the South West Herts Economic Study Update (2019) which identifies a deficit in industrial floorspace of 39,945 sqm (~10ha).

¹ Now E(g)(iii)

Further, the LPA's AMRs demonstrate a net loss of 2,449sqm industrial floorspace (2019-2021), with a net loss of 2,305 sqm within allocated employment areas. The uncontested evidence demonstrates that: (i) the need for more employment floorspace is acute and rising; and (ii) the capacity to meet such an objectively assessed need is constrained. Whilst the *policy* of the emerging plan can be afforded limited weight, the uncontested *technical evidence* which underpins it can be afforded significant weight.

25 Further, such OAN evidence is independently supported and corroborated by the Appellant's market analysis (TS App 10). This allocated site is very well located within a short drive of the M25, without passing through residential areas. It is ideally located for employment development in the Western Corridor where demand is significant.

26 It follows that the allocation is up to date. Indeed, the need is significantly greater now than in 2014. Further, the development is strongly supported by *inter alia* NPPF 81-83, which give significant weight to the need to support economic growth, creating the conditions in which businesses can invest, expand and adapt, allowing areas to build on their strengths. The NPPF requires decisions to address the specific locational requirements of different sectors, making specific provision for storage and distribution operations at a variety of scales and in suitably accessible locations. The proposal is strongly supported by the NPPF and PPG.

RESIDUAL ISSUES

27 It is in the light of this agreed position that the residual issues raised by local residents should be considered. It is difficult, in the light of the agreement of the LPA, to characterise them as Main Issues. The LPA has considered all of their concerns and dismissed them.

HYDROGEOLOGICAL IMPACT TO MLNR

- 28 It is common ground (*supra*) that there will be no material impact to the quality or quantity of the groundwater in the MLNR. That is the position of the Appellant, AW, the EA, the LPA (McCloy) and the previous Inspector. There has been no material change since the last decision. On the contrary, the consensus of professional evidence has confirmed the decision.
- 29 Mr Pursall persists in his (lay) concern that further assessment is necessary. He requires “actual readings” from the groundwater in the MLNR, between the MLNR and the site and in the stream. In the absence of such readings, he asserts there is uncertainty of impact to the MLNR and the Mid-Chilterns Chalk groundwater body, such that there is conflict with the Water Framework Directive (WFD) and the Water Environment (Water Framework Directive) Regs 2017 (the 2017 Regs).
- 30 However, the uncontested evidence of Hannah Fraser (endorsed by fellow hydrogeologists) is that the total reduction in flow through the piling zone is a mere 20m³/d. Such a small flow of groundwater would not be derogated from the lakes but would follow a marginally different flowpath to the MLNR² around the piled zone, through the permeable RTD secondary aquifer. The impact to the quality and quantity of the groundwater at the MLNR is therefore negligible. No further assessment is required to reach that conclusion.
- 31 Even making the unrealistic assumption that the flow of 20m³/d is *removed* from the aquifer, the impact on groundwater levels will be negligible. The 7mm reduction at the piling zone is within daily fluctuations. The effect is undetectable 10m from the piling zone (3mm).

² At those times of the year when the groundwater flows in that direction

There is no material impact beyond 100m (1-2mm), even assuming the groundwater vanishes.

- 32 As the EA have concluded, there is no need for any further assessment of the impact of the proposal on the vast groundwater body. If there is no impact within 10m of the piing zone, there can be no impact on the status of the groundwater body, not least because there is no impact to any monitoring location. There is no conflict with the WFD nor the Regs. The proposal complies with policy and no further assessment is required.

BIODIVERSITY

- 33 There is no statutory nor policy requirement (currently) for there to be a measurable BNG (10% or another figure) using a biodiversity metric. Whilst the EA 2021 has received Royal Assent (Nov 2021), it is not in force. There is a requirement for secondary legislation to be drafted and passed. A Biodiversity Metric (BM) must be published, along with policy and guidance. Consultation on such matters is currently ongoing.
- 34 Extant national policy simply requires there to be a biodiversity net gain. In the absence of final policy/guidance/metric information, decision makers are provided with a considerable measure of discretion on considering whether such a BNG has been demonstrated. Reliance must be placed on professional judgments.
- 35 In this case, the LPA's specialist ecological adviser (Hertfordshire Ecology (HE)) has undertaken an appraisal using the Defra Metric 2.0. The LPA considers that their request for an off-site contribution of £142,800 would deliver a 10% BNG. Mr Dodds considers the figure should be £425,098. The dispute does not have any consequence for the ultimate decision because the (agreed) s.106 planning agreement provides for either figure (depending on the Inspector's decision).

36 However, for the avoidance of doubt, the Appellant considers the Rule 6 Party evidence to be demonstrably flawed, based on an erroneous interpretation of policy and employing assumptions which are inconsistent with the evidence. In particular, Lowland Meadow is not a habitat recorded on the site, which does not comprise a priority habitat. The Appellant therefore considers the LPA figure to be more robust but recognises that the contribution would fall further, should the latest Defra 3.0 metric be employed. This shows the danger of seeking to be prescriptive about requiring a measurable net gain, in advance of the correct approach being enshrined in secondary legislation, policy, guidance and an agreed BM. The site is an allocated employment site with low ecological interest. If consent is granted, there will be a BNG and compliance with national and local policy.

37 There has also been a sighting of a Forester Moth. The Appellant has undertaken significant fieldwork on this site over a number of years. Indeed, multiple parties have undertaken multiple surveys of this site over 3 decades. A Forester Moth has never been identified, save on a single occasion. Subsequent surveys have failed to corroborate the sighting of the solitary moth. The Appellant considers that survey evidence can only be a snapshot in time. Greater weight must be attached to the unanimity of survey evidence undertaken by competent ecologists over a significant period of time, which demonstrate that the Forester Moth is not present on the site.

38 Further or alternatively, this is an allocated employment site. Any employment development to meet the identified need would have the claimed impact on the Moth. Further, even if consent is refused (for reasons the Appellant cannot conceive), there would be no future for the Moth. Without maintenance, the site will become less favourable for the Moth, as the sward becomes dominated by more aggressive grasses or

affected by scrub invasion, which is already evident to the western and southern borders. More realistically, the owner will resume the pre-lockdown mowing regime, which would remove any value in the habitat to the Moth. There is nothing to stop such habitat being removed in any event. Mitigation can, however, be provided as part of the s.106 off-site works, as agreed with the LPA and HE. Indeed, it is the grant of consent which in fact provides the best chance of providing suitable habitat for the Forester Moth. There has been, therefore, compliance with s.40 and 41 NERC Act and national and local policy.

NOISE

39 There can be no reasonable basis for the imposition of an hours of operation condition (C37), given a separate policy to secure noise limits which preserve residential amenity. This is agreed with the LPA (CD 2.1.27). Further, it would prevent internal operations which would have no noise impact. Such a condition would unnecessarily fetter the ability of the site to meet the identified need and demand (TS App 10).

40 The dispute therefore centres on the appropriate noise limits to be imposed in C20. The LPA has reviewed the submitted evidence and concluded that the Appellant's noise limits conform with policy and acoustic guidance (CD 2.1.27):

Having had the opportunity of considering the respective noise proofs of evidence on noise (RSK CD6.1.10 and Cass Allen CD6.2.5) the Council has concluded that the Appellant's requirement of not exceeding 5dB above the background or 45 dB(A) day / 40 dB(A) night whichever is the higher, meets the NPPF2021: tests. BS 4142 (section 11) (CD4.34) embraces the use of absolute noise levels (CD2.4.7: paragraphs 2.5-2.9) and the wording of the standard demonstrates "that a rating level equal to the background does not constitute an adverse impact, simply low impact. It is a rating level 5 dB above background which is an indication of adverse impact and is therefore concurrent with the definition of a LOAEL" (CD2.4.7: 2.10 -12). The Council has concluded that draft

condition C20 applying this test would accord with Policy DM9 and the guidance in the NPPF 2021 and the PPG.

- 41 The Appellant agrees. Whilst one can understand local residents wanting to secure background noise levels, this is not the approach of national or local policy and/or associated technical evidence.

CONCLUSION

- 42 The Appellant therefore submits that planning permission should be granted *without delay* subject to conditions and the s.106 planning obligation.

GILES CANNOCK QC

Kings Chambers

26th April 2022