RE: LAND OFF LOVELLS WAY

ADVICE

Introduction

1. We are asked to advise Halebank Parish Council ("**the Parish Council**") in relation to a potential judicial review of the decision by Halton Borough Council ("**the Council**") dated 20 December 2022 to grant planning permission for development at land at Lovells Way. The permitted development is as follows:

> Proposed storage and distribution unit (B8 use) with ancillary offices (E(g)(i) use), electricity substation, two security gatehouses, vehicle wash, highways infrastructure including accesses, car parking, service and delivery areas and associated other works including ground works, drainage and landscaping

2. The period for issuing a claim expires on 31 January 2023. Give the urgency, this advice focuses on whether there are arguable grounds of challenge and the principal risks to those succeeding.

3. The relevant background facts are set out in the instructions and papers and are not set out here given the time constraints. However, in summary, the application site lies on the north bank of the River Mersey and is situated on land allocated for employment use by the local plan. It sits south of the Greenbelt and is bounded by greenspace to the south and southeast. That greenspace is currently owned by the Council but is included in the application site and would be retained, kept as publicly open space, and used for priority habitat creation.

4. The development approved is substantial would result in a very significant change to this site, including a substantial loss of priority habitats (ponds and reedbeds). The Parish Council has previously set out a number of objections, which are included in the papers.

5. We are asked for our views on the following:

    a) Whether the Council has failed to secure no net biodiversity loss using a non-compliant legal mechanism.

    b) Whether the Council has misapplied the Halton Delivery and Allocations Local Plan in the manner suggested by Mr Richard Gee of Roman Summer.

    c) Whether there is some other identifiable irrationality or materiality ground.

6. The papers include a note from Roman Summer, setting out further potential points to consider.

We are asked for our views on the queries raised in that note.

7. In addition, we are asked for a response to the following queries:

   a) Whether the decision to permit the applicant to take measures off site to secure biodiversity causes issues about the delivery of on-site biodiversity measures.

   b) Whether the s. 106 agreement will properly secure no net less as required by condition 35 and whether it is not CIL compliant on the basis that the off-site land was not definitely deliverable at the point of determination. Concerns are also raised as to the lack of ringfencing of financial contributions.

   c) Whether the Council has failed to properly consider that Policy HE1 provides that financial compensation for habitat loss should be a last resort, noting that the Committee does not appear to have considered this, and that condition 35 does not require a sequential approach to mitigation.

   d) Whether the Council has acted irrationally by considering the ecology issues by reference to reports prepared for a previous permission relating to the stie.

   e) Whether the Council was right to give "very limited" weight to the 3MG Mersey Multimodal Gateway SPD.

   f) Was the late identification of sites for off-site habitat provision and/or the calculation of the commuted sum is material.

   g) Whether there is any potential ground of challenge in respect to highways, noting the reliance on a previous permission which concerned a different permission and different development.

1. Whether the Council has failed to secure no net biodiversity loss using a non-compliant legal mechanism

8. There are two questions here. First, has the Council failed to secure no net biodiversity loss? Second, is the legal mechanism used in relation to biodiversity loss lawful?

a. Has the Council failed to secure no net biodiversity loss?

9. There is no dispute that the development will result in harm to biodiversity. The officers' report ("**OR**") notes at 6.79 that the development will result in the loss of habitats on site generally and priority habitats (reedbeds and ponds) in particular. The applicant proposed to mitigate some of

this loss by on-site landscaping. However, there would still be a net-loss of 45.18 habitat units after development (or 35.05% of habitat units currently on site). That includes a loss of 8.95 units of pond and 31.04 units of reedbed).

10. At the time of writing the OR, the Council's position as to loss of habitats appears to have been as follows:

    a. The Council appears to have accepted that no further mitigation could be provided on site additional to that already proposed by the applicant (OR 6.81).

    b. There were no concrete proposal to effectively compensate for the loss of habitats. Options under investigation "to ensure policy compliance" at the time the OR was written included habitat creation on sites owned by the applicant.

    c. Some sites for habitat creation to compensate for the loss had been provisionally identified. The OR recommended that the principles of that "avoidance/mitigation/compensation" must be agreed by the Council <u>before</u> determination and then secured by a legal agreement.

11. The OR borrows heavily from the views of the Council's ecology advisor, who had provided three responses to the proposal at differing times. In the first two responses, the advisor notes that there will be a net loss of priority habitat, and the applicant needed to provide details of avoidance/mitigation/compensation, which required the Council's approval before the application was determined. It appears that by the time of the 3rd response of the ecology advisor, two sites for off-site habitat creation had been identified (i.e. those referred to in the OR). The response re-iterates that the principles of avoidance/mitigation/compensation must be submitted and agreed. In other words, it appeared that by the time of the third response, the identification of sites for priority habitat replacement represented the extent of the progress. The Council wanted further detail as to what would happen on those sites.

12. In the agenda for the Committee, under the heading "updated information", there are notes from the ecology advisor suggesting that the two sites identified by the applicant for pond and reedbed creation are acceptable compensation for the loss of priority habitat, but that there remained a shortfall of lost priority habitat (0.5ha), which could be dealt with by way of payment of a commuted sum (£200k). The ecology advisor notes that the applicant should provide the Council with further details of the proposal for the offsite locations.

13. The Council appears to have received that detail by the time the application went to Committee. The minutes record that: "A document containing habitat creation principles had since been submitted by the Council and confirmed by the Council's Ecological Advisor as being acceptable.

This document would now be added to plans and supporting documentation list in condition number two". The final item recorded in condition 2 is "Briefing Note – Offsite reedbed creation at Daresbury and Manor Park, Runcorn", and is dated 29/11/22" ("**the Briefing Note**").

14. From the information supplied to the Committee, it appears that officers considered that the proposed mitigation and compensation in relation to priority habitats was acceptable. In the absence of anything to suggest that the proposed compensation would *not* effectively compensate account for the loss of priority habitats in ecology terms (and that is a question for an ecologist), it appears that the proposal before the committee was compliant with DALP Policy HE1 - officers considered that the harm to priority habitats had been appropriately compensated, the compensation primarily consisted of replacement habitat, the off-site locations appear to be located within the Core Biodiversity Area, and financial compensation has been resorted to only in relation to the balance of 0.5ha.

15. Does that mean that there is no net biodiversity loss? That is unclear. The BNG assessment uses a BNG metric to arrive at its figure of lost habitat unites. The ecology advisor appears to have been working in hectares (i.e. they appear to have sought an equivalent amount of pond and reedbeds to that lost). The fact that the pond and reedbed proposals might amount to a replacement in terms of the quantum of loss of priority habitats does not mean that the proposal will result in no net loss of habitat unites on the BNG metric. That metric depends on more than merely size to arrive at the how many units are currently on site and what the replacement habitat will amount to in habitat units. Whether the replacement priority habitats amount to an equivalent number of habitat units lost from the development is a question for an ecologist.

16. However, we note that there does not appear to be a policy requirement of no net biodiversity loss (the no net loss requirement referred to by Mr Gee concerns land functionally linked to the Mersey SEA. Officers appear to have accepted that this site is not functionally linked).

2. Is the mechanism by which habitats/biodiversity mitigation was secured unlawful?

17. The off-site habitat creation and payment of the commuted sum are secured by way of a s. 106 agreement. This is reflected in the Committee's resolution granting the application. This records that the application be granted subject to the applicant entering into a s. 106 agreement with the Council (once the applicant had acquired ownership of the application site) relating to:

> Financial contributions
>
> …
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> Habitat Creation Commuted Sum (for use on sites in the authority of others such as Local Authority/Cheshire Wildlife/Mersey Gateway) – £200,000.

Other Obligations

Pond/reedbed creation on sites within the ownership of the applicant (provisional sites have been identified at Daresbury and Manor Park); along with the submission of appropriate Biodiversity Management Plans".

18. Further, condition 35 provides that no development may commence until a s. 106 agreement has been made and which "contains obligations in relation to:

…

III. Mitigation/compensation for the loss of breeding bird habitat

IV. Pond/reedbed creation (including appropriate biodiversity management plans).

19. In our view, the decision to use a s. 106 agreement and use of condition to prevent commencement of development until that agreement is completed discloses no illegality. That is a conventional approach.

20. However, in our opinion it is arguable that the implementation of the s. 106 by officers is unlawful on the basis that it exceeds what was authorised by members in their resolution, and/or it is irrational. It is necessary to set out how the s. 106 secured by the Council operates.

21. The relevant obligation is set out in Schedule 1 of the s. 106. Rather than requiring the owner to provide the offsite mitigation as approved by the Council in the document dated 29/11/22 coupled with the commuted sum of £200,000 for the shortfall, the owner is given the choice of how to mitigate/compensate for the loss of habitat:

4.1 To deliver habitat units required to offset the loss of priority habitat on the Land resulting from the Development by either:

(a) providing offsite habitat on the Additional Land being not less than 1.09 hectares and providing a commuted sum to the Council in respect of the remaining deficit of lost priority habitat in the sum of £200,000; or (b) providing either

(i) offsite habitat on the Additional Land; or

(ii) a commuted sum to the Council in respect of the lost priority habitat on the Land; or

(iii) a blended combination of both paragraph 5.1(b)(i) and (ii) above [sic, this must be a reference to 4.1(b)(i) and (ii)].

as proposed by the First Owner in writing to the Council and approved by the Council (such approval not to be unreasonably withheld or delayed) being at least equal in value to the habit units achieved under paragraph 5.1(a) [sic, 4.1(a)] of Schedule 1 above".

22. The first part – 4.1(a) – appears to reflect what was agreed by offices so that the development complied with Policy HE1. 4.1(a) also appears to reflect the Committee's resolution, which

specified that the s. 106 contain obligations in respect to payment of £200,000 and off-site pond and reedbed creation.

23. 4.1(b), however, appears to depart from the resolution. By paragraph 4.1(b), the applicant is given the choice of how they mitigate habitat loss. Providing that what is provided is at least "equal in value to the habitat units achieved under paragraph 5.1(a) [4.1(a)], it appears that the Applicant could depart entirely from what was approved by the Committee. They could, for instance, reduce the amount of off-site habitat provided, and increase the commuted sum. There appears to be nothing in 4.1 which would prevent the owner from reducing the off-site provision to zero and off-setting habitat loss entirely by way of compensation. Conversely, they could increase the offsite provision on the identified sites such that the commuted sum is reduced.

24. In our opinion, there are two grounds on which it may be argued that the s. 106 is unlawful such that the planning permission should be quashed.

25. First, in our view it is arguable that was agreed by officers in the s. 106 exceeds what was authorised by the Committee in its resolution such that the 106 is ultra vires. The resolution authorises the application subject to a s. 106 agreement providing for obligations as to payment of a "Habitat Creation Commuted Sum" for use on specific sites and in the specific sum of £200,000", and for "pond/reedbed creation on sites within the ownership of the applicant".

26. The Committee had been advised that the development was acceptable with the off-site priority habitat provision proposed by the applicant in the Briefing Note, coupled with the payment of a specified commuted sum in respect to the remaining loss of habitat units. It is notable that the resolution refers specifically to the agreed sum, and to off-site habitat creation. In our opinion it is arguable that the Committee authorised a s. 106 agreement which required the applicant specifically (and only) provide the ponds and reedbeds on the specified sites and, payment of £200,000. As such, it is arguable that by entering into an agreement which entitles the applicant to take an entirely different approach to habitat loss, officers have departed from the Committee's resolution. If the s. 106 is unlawful, the corollary is that it can be argued that the permission ought to be quashed.

27. An argument to this effect was attempted (unsuccessfully) in *R. (on the application of Flynn) v Southwark LBC* [2021] EWCA Civ 827. The claimant argued that the committee's resolution granting planning permission subject to a s. 106 required a specific approach to affordable housing provision. The Court of Appeal disagreed, noting that the resolution requiring an "appropriate legal agreement" conferred a broad authority on officers and did not require a specific obligations to be included in that agreement.

28. Succeeding on this ground would likely turn on a matter of interpretation: what did the Committee authorise by its resolution, and does the agreement completed by officers exceed that?

29. The approach to construing resolutions of planning committees was recently set out by the Court of Appeal in *Flynn*:

> As with "public documents" of various kinds, an objective and realistic approach should be taken to understanding a planning committee's decision as recorded in the minutes of the meeting at which it was made. Familiar principles of construction apply (see Fordham's "Judicial Review Handbook" (seventh edition), at paragraph 16.4.6, "Interpretation a question for the Court: other instruments/public documents"). The court will look for the members' intention as it appears from the words of the resolution. To grasp the meaning and effect of a committee's resolution to grant planning permission, one must read it in a straightforward way, keeping in mind the relevant context. Part of the context may be an officer's report recommending the grant of planning permission, and it can generally be assumed that if the members have accepted such a recommendation they will have done so following the officer's advice (see Palmer v Herefordshire Council [2016] EWCA Civ 1061, [2017] 1 W.L.R. 411, at paragraph 7; and Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314, [2019] P.T.S.R. 1452, at paragraph 42(2)). This does not mean, however, that the officer's report, or any part of it, is automatically incorporated into the members' resolution. Express words would be needed for that.

30. In our view, a vires challenge will only succeed if the Court is satisfied that the words of the resolution disclose an intention the part of members that the s. 106 should only include an obligation that reflects the agreement with the applicant (i.e. that the specified off-site mitigation would be provided, coupled with a commuted sum of £200,000).

31. In our opinion, there is a real risk that the Court will consider that the Committee was not prescribing the content or form of the s. 106. The Council would probably rely on the fact that the resolution says that the agreement must "relate to" a commuted sum of £200,000, and pond/reedbed creation on sites held by the applicant. That, it could be argued, does not go so far as saying the agreement "must" only contain an obligation to provide habitat creation and the commuted sum as agreed by officers and the applicant prior to determination, and nothing else.
If that is right, it can be argued that the s. 106 does provide obligations which "relate to" the provision of a commuted sum and habitat creation. The fact that the applicant can propose an alternative approach as to how much off-site mitigation is provided relative to a commuted sum does not mean that the obligations do not "relate to" the payment of a commuted sum and provision of off-site habitat. In other words, the fact that members resolved that the s. 106 agreement must "relate to" habitat creation and a commuted sum does not mean that they were prescribing detailed terms.

32. In our view there is some force in that argument. While the Parish Council can point to the agreement that the applicant would provide off-site creation per the Briefing Note and pay a commuted sum, the point which is very difficult to overcome is that the Committee did not explicitly provide in its resolution that the s. 106 must reflect that in the agreement. It merely says it must contain obligations "relating to" habitat creation and payment of £200,000. As was observed in *Flynn*, if the Committee wanted its resolution to be tied to some part of the OR or the subsequent Briefing Note,

> "it could easily have done so, either by reference, identifying individual sections or paragraphs of the report, or by quoting the relevant text. It could have picked out elements of the officer's advice as laying down parameters for the negotiation of the section 106 agreement or indicating how its main provisions were to be formulated. But it did not. There is no indication that the report was intended by the members to be part of the "instrument of delegation"" [47].

33. What the Council did do which is of note is that the Briefing Note was specified in condition 2 of the Decision Notice (i.e. it is listed as an approved plan, and the development must be carried out in accordance with those plans). That is odd as the off-site provision does not form part of "the development" approved by the Committee – that is development on the application site. However, this could be relied upon as context to support the argument that the Committee's view was that the development must be carried out in accordance with the agreed approach, and that it was not authorising a s. 106 in the terms secured by officers.

34. The second ground concerning the s. 106 is that, in our opinion, it is arguable that the Council acted irrationally in enabling the applicant through the s. 106 to elect how the development would achieve policy compliance after the grant of permission. Officers worked with the applicant to agree a distinct outcome which would ensure that the replacement priority habitat rendered the development compliant with Policy HE1. Moreover, Policy HE1 appears to prioritise avoidance or mitigation over payment of compensation. That is arguably reflected in officers' agreement with the applicant: the bulk of the measures concern off-site provision rather than financial compensation.

35. The s. 106 runs roughshod over the approach to mitigation which was authorised by the Committee. The owner is entitled under the s. 106, subject to the council's approval – which must not unreasonably be withheld – to discharge its obligations as to habitat creation in a fundamentally different way to what was considered acceptable by the ecology advisor and the Committee (i.e. they could simply pay one, larger commuted sum and not provide any replacement habitat). That undermines what was sought and agreed by the Council. In our opinion it is arguable that it was irrational for the Council to reach an acceptable and specific

policycompliant outcome but then afford the applicant the opportunity to vary that through the terms of the s. 106.

36. The principal risk to that argument succeeding is whether the inclusion of an option as to varying the mitigation approach actually reaches the high standard of irrationality. In our view it could be argued that it was rational for the Council to provide a mechanism for in the s. 106 whereby the provision of off-site habitat relative to a commuted sum could be adjusted with the agreement of the Council. That, it can be argued, is both rational and pragmatic: if for some reason off-site habitat could not be provided as thought, an alternative is available: payment of a greater commuted sum. Moreover, the Council has control over whether such an alternative approach is acceptable by paragraph 4.1(b). In those circumstances, the Council could maintain that the decision does not reach the threshold of *Wednesbury* unreasonableness.

37. As such, while we consider these potential grounds concerning the s. 106 agreement to be arguable, unfortunately we consider the prospects of success to be low.

2. Did the OR misapply HALP?

38. Mr Gee queries whether the OR erred by suggesting that the provision of a significant amount of car parking and ponds on land falling within a Strategic Employment Location was policy compliant. Mr Gee takes issue with the suggestion in the OR that the proposal falls within a use authorised by policy as it is car parking and ponds which fall in the SEL, and those uses do not fall within. However, Mr Gee also notes that the overwhelming majority of the site does fall within a use approved by policy. It seems to me that this latter point is key: the car parking is not the proposal. The car parking in the SEL serves what overwhelmingly a policy-compliant use and is ancillary to that use. As such, we do not see that the OR erred by suggesting that the proposal is for a policy-compliant use.

39. We are also asked for our views on other points raised by Mr Gee. Mr Gee queries whether the OR failed to apply the sequential approach suggested by the ecology advisor (i.e. that in relation to habitat loss, on-site habitat creation be prioritised, followed by off-site creation and then payment of a commuted sum in the last instance). Mr Gee points out that the OR noted that only "provisional sites" had been identified at the time of the OR such that the sequential approach had not been followed. We do not consider that to be departing from the ecology officer's comments. It is simply a reflection that sites had not been agreed at the time of writing the OR. By the time the proposal went to Committee, the sites had been identified and agreed. Those sites accommodate the majority of the habitat loss. In our view that follows the ecology advisor's comments.

40. Mr Gee also questions whether there is potential to challenge the decision on the basis that the OR was relying on provisional sites. We do not see any legal error in this approach. The OR made clear that, prior to determination, the applicant must give detail of how off-site mitigation is to work.

41. Finally, Mr Gee queries whether it was really the case that further on-site provision could not have been supplied. Again, we do not see that this discloses any error of law. The proposal was for development of the entirety of the site, save the existing green space on the south and south east of the site. The Council was required to determine that proposal. In doing so it was entitled to accept the applicant's contention that no further on-site habitat creation was possible. In the absence of any obvious error in the landscaping proposals, this point is really a collateral attack on the merits of the proposal itself, and that is not something that can be challenged by way of judicial review.

3. Are there other grounds of challenge?

42. In our view there are two further potential grounds of challenge. The first concerns the conclusion that an appropriate assessment under the Habitat Regulations was not necessary. The second concerns the OR's advice that the proposal was policy compliant in respect to priority habitats.

a. Failure to comply with Habitats Regulations

43. In our view it is arguable that the Council has failed to lawfully discharge its duty under reg. 63 of the Conservation of Habitats and Species Regulations 2017.

44. Reg. 63 provides that:

> "63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
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> (a)is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b)is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives."

45. The local council is "the competent authority" for this purpose.

46. The Council was supplied with a screening report to determine whether the development was likely to result in significant effects on protected sites. Under reg. 63, if the development was likely to result in significant effects on protected sites, an appropriate assessment was necessary. The screening report considers potential impacts on protected sites from the development. In

every case the conclusion is that the effect is certain not occur. In two instances – increased public access and contamination – effects are ruled out on the basis that mitigation measures will prevent

those outcomes. That appears to be reflected at 6.78 of the OR where it is noted that when "embedded mitigation" is taken into account, there are no likely significant effects on protected sites.

47. In our view that approach is liable to challenge. The CJEU has established that mitigation measures should not be taken into account when determining whether a proposal is likely to have significant effects on protected sites. To take into account mitigation measures at that stage "presupposes that it is likely that the site is affected significantly and that, consequently, such an [appropriate] assessment should be carried out": *People Over Wind v Coillte Teoranta* (C323/17) [2018] P.T.S.R. 1668, [35].

48. As such, the Council's approach *prima facie* appears to be wrong: it recognises two potential harmful effects on protected sites, but concludes that an appropriate assessment of the effects is not necessary on the basis that mitigation will reduce the effects.

49. However, while that approach appears to be unlawful, it does not follow that it will lead to a quashing order. It is permissible for the court to conclude that, had an appropriate assessment not erroneously been screened out and an appropriate assessment proceeded, the outcome would have been the same. In those circumstances, the court may chose not to quash the permission (see *Canterbury City Council v Secretary of State* [2019] J.P.L. 1321). That discretion exists as matter of statute (s. 31(2A) of the Senior Courts Act 1981), but also emerges from the jurisprudence of the CJEU. There is debate about whether the test articulated by the CJEU is of a higher standard to s. 31 – i.e. whether the outcome would inevitably have been the same (*Gemeinde Altrip v Land Rheinland-Pfalz (Vertreter des Bundesinteresses beim Bundesverwaltungsgericht intervening)* (Case C-72/12) [2014] PTSR 311), or whether it must merely be shown that it is "highly likely" that the outcome would not have been substantially different.

50. That distinction is not significant for present purposes. As the Court of Appeal has recently noted, while there may be a slight difference in those tests, in determining what the outcome would have been had an appropriate assessment been undertaken ultimately falls to be determined by the same factors: "what matters in each case is the seriousness of the failure or breach, and whether or not that failure deprived the public of a proper opportunity to comment upon and object to the proposals, and thereby caused prejudice": *R (Hudson) v Royal Borough of Windsor and Maidenhead and others* [2021] EWCA Civ 592 at [79].

51. In our view there is a real prospect of the Council discharging that burden. It is difficult for the Council to argue that the breach was not serious. Plainly it is – the appropriate assessment is an important mechanism to assess the effects of development and properly discharge the reg. 63 duty. However, in our view it is difficult to identify prejudice to any party.

52. Natural England were consulted and expressed no objection. An ecology officer considered the proposal on three occasions, agreed with the screening report, and invited the Council to adopt it. It does not appear that the lack of appropriate assessment did not prevent any member of the public from commenting on the recreational or contamination impacts of the development.

53. Moreover, mitigation can be taken into account when conducting an appropriate assessment and concluding whether the proposal would adversely affect the integrity of the protected site. It can therefore be argued that had an appropriate assessment been carried out, it would have been concluded at that stage that, because of the mitigation measures, the contamination and recreational effects would not harm the integrity of the site. That is the same conclusion that was reached at the screening stage. It can therefore be argued that, had the error not occurred, the outcome would have been the same.

54. As such, despite what appears to be an error of law on the part of the Council, in our view the Council has a good chance of successfully resisting a quashing order being made on the basis of that error. We therefore consider the Parish Council's prospects of success under this ground as being very low.

b. Was the OR was misleading in its advice that the development complies with policy?

55. We have considered whether there are grounds to challenge the decision on the basis that the OR was materially misleading in its advice to Members as to policy compliance.

56. As noted, at the time the OR was written, there was uncertainty as to how the loss of priority habitat could be addressed. Provisional sites had been suggested, but nothing more. This is recorded at 6.81 of the OR (emphasis added):

> "Options currently being explored to ensure policy compliance by achieving no net biodiversity loss is pond/reedbed creation on sites at Daresbury and Manor Park within the ownership of the applicant and habitat creation on site in the ownership of the local authority/Cheshire Wildlife Trust/Mersey Gateway. The principles of appropriate avoidance/mitigation/compensation for Priority Habitat are required to be agreed with the Council prior to determination and then secured by a legal agreement."

57. As the OR correctly records, there was no policy compliance at the date of the OR, and that needed to de dealt with before determination of the application. However, at 6.93 the OR notes:

> The applicant has undertaken the necessary ecological surveys to accompany the application to understand the site's ecology and potential impacts on it. The proposal would result in the loss of habitat to the proposed built development. The creation of new semi-natural habitat as well as habitat enhancement of retained habitat areas will mitigate some of the loss. Offsite compensation is required to mitigate the habitat losses on site and achieve no net biodiversity loss. No significant harm would result for both priority species and protected species as a result of the embedded mitigation within the proposed development. 6.94
>
> It is considered that the proposals accord with the development plan having particular regard to DALP Policies CS(R)20 Natural and Historic Environment, CS(R)21 Green Infrastructure, HE1 Natural Environment and Nature Conservation, HE4 Greenspace and Green Infrastructure, and HE5 Trees and Landscaping

58. The OR repeats the point that the proposals are in accordance with the development plan at 8.9.

59. In our view the advice that the proposal complied with the development plan was misleading. As the OR itself indicated to members at 6.81, there was no policy compliance at the date of writing the report – merely options being explored to ensure compliance. That was because the applicant had not yet given details for habitat mitigation. In order for the Parish Council to have the decision quashed on the basis that the OR misled the Committee, the Parish Council must show that but for the misleading advice, the Committee's decision would or might have been different: *Mansell v Tonbridge and Malling BC* [2019] P.T.S.R. 1452 at [42]. In short, the erroneous advice must be materially misleading.

60. In our opinion the Council has a good chance of rebutting this ground on the basis that the advice was not materially misleading. While the OR may have been misleading by suggesting policy compliance when there was not, by the time application went before the Committee, there was an agreed approach to mitigation that appears to be policy compliant (i.e. combination of on an off site replacement, coupled with the commuted sum). As such, the effect of the advice was not to approve a proposal which was not policy compliant on the misunderstanding that it was. Rather, the misleading advice appears to have been correct by the time the Committee considered the application. The misleading advice was therefore no longer misleading at that date. It is difficult to argue that the misleading advice made a difference when, at the time of determination, it was not misleading.

61. We therefore do not consider this ground to be arguable.

Response to other queries raised in the instructions

a. Whether the decision to permit the applicant to take measures off-site to secure biodiversity causes issues about the delivery of on-site biodiversity.

62. There is nothing in our instructions to suggest that this might be the case. The on-site measures form part of the landscaping masterplan. By condition 2 the development must carried out in accordance with those plans. That condition and those plans are unrelated to what must be secured off-site.

b. Whether the s. 106 agreement was not CIL compliant on the basis that the land was not definitely deliverable at the point of determination. Concerns are also raised as to the lack of ringfencing of financial contributions.

63. We do not read condition 35 as requiring no net loss. Condition 35 merely prevents development from commencing until a s. 106 has been entered into which contains, among other things, obligations in relation to pond/reedbed creation. We are not sure what is meant by the land being considered "definitely deliverable" at the point of determination. As set out above, while at the date the OR was written the potential sites were only potentials, by the time the application went to committee there was a concrete proposal concerning two off-site locations. In our view that is not contrary to reg. 122: in particular, the s. 106 was necessary to make the development acceptable in planning terms by providing off-site habitats and a commuted sum. We do not consider that because at OR stage the potential sites had not been confirmed there is any breach of reg. 122. We also do not see the lack of ringfencing as a viable ground of challenge.

c. Whether the Council has failed to properly consider that Policy HE1 provides that financial compensation for habitat loss should be a last resort, noting that the Committee does not appear to have considered this, and that condition 35 does not require a sequential approach to mitigation.

64. On a fair reading, we think the OR does bring this to the Committee's attention. At paragraph 6.80 it is expressly recorded that compensation is a "last resort". Moreover, in our view the approach proposed to Committee did reflect the sequential approach: on site provision formed the bulk of habitat replacement, followed by off-site habitat creation followed by compensation in respect to the balance.

d. Was it irrational to rely on documents prepared in relation to a previous permission when approaching ecology?

65. The only report which appears to have been re-used without modification is the Great Crested Newt Surveys. All other reports in Appendix 7 have been updated or re-done (i.e. the site was resurveyed for Japanese Knotweed, a new bat survey was undertaken, and the ecology assessment has been revised with the stated intention of ensuring that it assesses the impact of the proposal on the site). However, it appears that the Council's ecologist required new analysis of the newt

presence. The applicant subsequently undertook this and submitted an "eDNA" analysis of the ponds on site to explore whether Great Crested Newts were present (which found that they were not: eDNA Sampling Report. May 2022. Brooks Ecological report reference: SI-5864-02).

66. It therefore appears that the analysis before the Council had been updated. In the absence of anything to suggest that the updated reports are flawed, we consider it to be very unlikely that the reliance on the updated reports was unlawful.

e. Was the OR right to give "very limited weight" to the 3MG Mersey Multi Modal Gateway?

67. This is a matter of planning judgment. We do not consider that affording limited weight to an old SPD in respect of policies which since been superseded discloses an error of law.

f. Was the timing of the Briefing Note and calculation of commuted sum material?

68. We do not see that the submission of the Briefing Note after the OR is legally problematic. It is the Committee that made the decision. The OR made clear that further details need to be provided to the Committee before determination. That was done in the form of the Briefing Note which confirmed the two sites at which replacement habitats would occur, and the principles on which those habitats would be created. The Committee was also informed of the £200,000 payment in respect to the balance of habitat lost.

69. What is problematic, in our opinion, is the fact that the OR advised members that the proposal <u>was</u> policy compliant at the time when that Briefing Note had not been submitted. That is dealt with above.

70. Similarly, we do not consider that the calculation of the commuted sum presents a ground of challenge. There is nothing in the background papers we have which supports the view that the Council had improper motives. The manner in which the commuted sum is calculated is set out in the information to officers. In the absence of anything to suggest that the figures set out there are wrong, or that there is guidance or relevant material which should have been taken into account when calculating that figure, it is unlikely that the Council's approach to calculation was unlawful.

71. As to timing. Again, we do not see that the submission of this information after the OR but before the Committee meeting is material. The OR is designed to assist the Committee. The fact that the explanation of the calculation was submitted after the OR but before the meeting does not, in our opinion, amount to an error of law.

g. Whether there is any potential ground of challenge in respect to highways, noting the reliance on a previous permission which concerned a different permission and different development.

72. We do not see that there is. On a fair reading of the report we do not agree that the Council has relied on the previous permission in assessing transport. The OR at 6.151 simply notes that this proposal represents an increase on the existing consented development. Knowsley MBC do not object on the basis that there is an existing consent. However, the transport impact of the development appear to have been assessed by reference to an assessment undertaken for the purposes of assessing the proposal. We do not see that as the Council "relying" on the previous permission for highways purposes.

Conclusion

73. In conclusion, we consider that there are two grounds of challenge which are arguable:

    a) That the s. 106 agreement is ultra vires and/or irrational.

    b) The Council erred in concluding that no appropriate assessment was necessary on the basis that mitigation measures prevent there being any likely significant effects on protected sites.

74. Unfortunately, for the reasons set out above, we consider the prospects of success to be poor.

75. If we can be of any further assistance please do not hesitate to contact us.

JENNY WIGLEY KC

HARLEY RONAN

Landmark Chambers

28 January 2023