

APPENDIX F: Slough Borough Council correspondence including Bevan Brittan letters dated 20th July and 12th September 2018

Buckinghamshire County Council
Planning Department
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Date 20 July 2018
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By e-mail only: c-gcrossley@buckscc.gov.uk

Dear Sirs

Urgent

Re: Thorney Mill Rail Siding, Thorney Mill Road, Iver
Planning Application CM/19/17
Due to be considered by the Development Control Committee on 23 July 2018

We write further to the above. We are instructed by Slough Borough Council ("the Borough Council") in respect of this matter.

We are writing to request that Buckinghamshire County Council ("the County Council") defers their consideration of this planning application.

Our clients were provided with a copy of the officer's report to the Development Control Committee on 18 July 2018. This late circulation has deprived our clients of the opportunity to comment meaningfully or critically on the content of the report, and accordingly consideration of the application should be deferred in the interests of proper administration and in order to ensure that the County Council reaches a reasonable and lawful decision, with the benefit of all relevant information.

In the interim, we can advise the County Council that our clients are not satisfied with the basis of the recommendation, for three reasons in particular.

Status of Certificate

Our client's legal submissions have not been satisfactorily addressed in the body of the report. Paragraph 81 argues that the Development Control Committee should conclude, from a letter indicating interest from other parties in April 2016, that the use of the certificate is not just 'theoretical'. We would submit that a single letter from 2016 does not automatically give rise to that use being other than 'theoretical' and we would invite the County Council to reject this conclusion.

In terms of the likelihood of the fallback being implemented, paragraph 83 describes this only as "a degree of likelihood". The point remains that the applicant is not a railway undertaker. Paragraph 83 does not break down the constituent weights attributed to each point, but we would submit that this point is determinative, and clearly indicates that there is not "a degree of likelihood".

The structure of the officer's report is predicated on the Committee accepting that there is a fallback position, and accordingly accepting that mitigation should be assessed relative to that position. The alternative, suggested by the Borough Council, is not even before Members for consideration; otherwise the County Council are being deprived of relevant and material information which they require in order to come to a reasonable and lawful decision.

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Highway Mitigation

Paragraphs 102-106 suggest that a greatly reduced contribution in respect of the highway network would be sufficient to make the application acceptable in planning terms. This is calculated on the basis that, at paragraph 106, only the batching plant movements are relevant. The Borough Council considers that this approach is inadequate, and has further representations to make in this regard.

Air Quality Mitigation

Paragraph 127 concludes that a lower basis of calculation is considered to meet the requirements of the CIL Regulations and NPPF, and the calculation is predicated on 28 movements rather than 82 movements. The consideration at paragraph 127 does not engage with the content of the Borough Council's request in any way. The Damage Cost element should be prepared in accordance with IAQM guidance; the Borough Council has queries to raise in relation to the County Council's conclusions which have not yet been fully ventilated.

In the interests of fairness, the Borough Council should be allowed the opportunity to fully engage its professional officers and legal advisors and make representations on the topic of the County Council's treatment of the certificate. It is not sufficient to supply a report for the Borough Council's consideration less than three clear working days before convening the Committee, and this prejudices the Borough Council, preventing them from effectively carrying out their role as consultee.

We would ask respectfully that the County Council gives consideration to deferring its decision to enable full and properly detailed discussions with the Borough Council, and to enable the Borough Council an opportunity to make representations on these topics.

If the County Council proceeds to determine the application on 23 July 2018, my clients have indicated that they will be reviewing all legal avenues available to them in consideration of the County Council's conclusion.

Yours faithfully



Bevan Brittan LLP

FAO Cllr Glover
Chair of Development Control Committee
Buckinghamshire County Council
G29, New County Offices, County Hall
Walton Street, Aylesbury
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By Special Delivery

Dear Cllr Glover

Re: Thorney Mill Rail Siding, Thorney Mill Road, Iver
Planning Application CM/19/17
Considered by the Development Control Committee on 23 July 2018

We write further to the above. We are instructed by Slough Borough Council ("the Borough Council") in respect of this matter. A copy of this letter has also been sent to the County Council's Monitoring Officer.

At a meeting of the County Council's Development Control Committee on 23 July 2018, the County Council resolved to indicate support for the above application. We are writing to request that the County Council does not opt to grant planning permission pursuant to that resolution, and that the County Council either (1) exercises its powers to 'call-in' the decision pursuant to its Constitution, due to procedural errors during the decision-making process or (2) through its Monitoring Officer, fully investigates and reports on said procedural matters described below.

The County Council has committed a number of procedural errors in their consideration of the application, which we list below.

Consideration of weight to be attached to the CLPUD

In the webcast of the meeting, the Planning Officer in discussions for this item states that legal advice has confirmed the weight to be allocated to the Certificate of Lawful Proposed Use dated 25 May 2010 ("the CLPUD") was "substantial".

The Borough Council has been provided with legal advice supplied to the County Council, which concluded that the CLPUD was a material consideration, but this did not specify the weight to be attached to the CLPUD. If there was further legal advice provided on the appropriate weight to be attributed, this has not been circulated to the Borough Council.

Weight is a matter for the Council in the exercise of its planning functions, but in describing said weight as a fixed component of the planning balance as prescribed by legal advice, the Officer misled the Committee causing them to conclude that the matter had effectively been determined for them.

In addition, the Borough Council's representations in relation to the appropriate weight to be attributed to the CLPUD have not been and were not satisfactorily addressed in the Officer Report.

Consideration of the CLPUD generally

At the beginning of the meeting, the Chair suspended the meeting to take legal advice on whether to continue. The Committee as a whole did not have the benefit of that advice, as indeed one Member

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commented during the meeting that she could not understand the Borough Council's position as she did not have the benefit of that legal advice.

The position of the Borough Council in relation to the CLPUD was not clearly described to the County Council either in the content of the Officer Report or at the meeting. In addition, it was not properly explained that the CLPUD is different from a CLEUD, in that it is a certificate of lawfulness for a proposed permitted development use, with accompanying restrictions about who could benefit from the CLPUD.

The discussions which took place during the Committee meeting did not delineate between the CLPUD and a CLEUD, and Members appeared to proceed on the mistaken assumption that any user could benefit from the CLPUD. This error was not corrected at any stage, and our view is that Members have predicated their conclusions in relation to weight and the extent of mitigation on this misunderstanding.

The Borough Council's position on fall-back

The Borough Council's comments and position are not adequately summarised in the Officer Report, and the comments supplied by the Borough Council to date have broadly been ignored.

The consideration of the existence of a fall-back is predicated on the letter from Network Rail dated 22 April 2016. At paragraph 81 the Officer assumes that, from only that evidence, "it is apparent that a railway undertaker could reasonably implement the CLPUD". The report does not go on to say that the Borough Council disputes this, and it does not engage in any way with the points raised as part of that dispute.

Throughout the meeting, there were many references to CLEUDs and general discussion about certificates, which indicates that Members had not been fully briefed as to the status, applicability and relevance of the Certificate.

Accordingly we would say that the Borough Council's view has not been accurately summarised in the Officer Report, and that Members have been deprived of the full facts of the matter. Very detailed legal arguments have been submitted in terms of the position of the CLPUD which are dismissed without mention. In this respect, the Officer Report mislead the County Council.

"Real prospect" of fall-back development

The County Council, in determining the matter, failed to properly identify whether there was a 'real prospect' of the fall-back development being carried out. The Officer Report does not engage with this point, in that it does not analyse the particular comments of Network Rail, or draw Members' attention to the contrary view of the Council.

The Borough Council's position on mitigation measures

The Borough Council's views on mitigation measures and contributions are not properly set out in the Officer Report. This is a major material planning consideration, and is a central part of the necessary balancing exercise.

The extent of the disagreement between the Borough Council and County Council is summarised in the Officer Report as being the quantum of contributions. In terms of highway contributions, it is said that a lower amount "better meets" the requirements, but it is not clear why a higher amount would not. These points are not fully explored or ventilated in the Officer Report, and it is disappointing that the County Council has not taken the opportunity to resolve these differences prior to proceeding.

At the Committee meeting, the mitigation measures were described as 'betterment', based on the fall-back position. There was no explanation of, or discussion of the likelihood of another user benefiting from the CLPUD, and as above we would submit that the Committee mistakenly conflated the position with that of a CLEUD.

Accordingly there has been no explanation as to how officers have reached a 'fall-back' position which amounted to such significant weight that the mitigation required to address those impacts was ultimately a relatively small fraction of that which would otherwise be required.

Other procedural points

The Officer stated to the Committee that the Borough Council's request for a deferral had been considered and legal advice had been taken, and that the Officer Report did address the issues raised by the Borough Council. This is simply, and factually, incorrect. In addition, the points raised in the aforementioned letter on behalf of the Borough Council have not been properly engaged with or considered.

The Borough Council has been denied the opportunity to respond in any adequate or substantial way to the new points raised in the Officer Report. The Officer Report had the benefit of substantial new information which the Borough Council had not had the benefit of (particularly the WYG response and the PDE consulting representations), but nevertheless the County Council opted to proceed to Committee in any event. If the Borough Council had sight of those representations, it would have responded again.

In addition, the Officer has compounded the procedural errors in the consideration of this application by insisting to the Committee that the Officer Report did address the issues raised by the Borough Council. The Officer misled the Committee into believing that the report had addressed the Borough Council's concerns. At the very least, this could not be true due to the letter written on behalf of the Borough Council confirming that they had further concerns, issued after the publication of the report.

It is clear that Members were aware of the general nature of the Borough Council's objections, but in reality the substance of those objections had not been placed before Members. Accordingly the Officer Report was misleading, and has led to Members reaching conclusions on the basis of limited information.

We would be grateful if you could review this matter, and if the County Council could review its decision and engage with our clients properly and fully with a view to addressing their concerns in respect of mitigation.

We would also ask that the Monitoring Officer investigates this matter, and if necessary, gives consideration to exercising its statutory power to prepare a report to the County Council in circumstances where a decision reached by the County Council would be unlawful or constitute maladministration.

We would be grateful for a response to this letter within 7 days, confirming the County Council's position. In the absence of a response, or if the County Council is not prepared to take immediate action to rectify the defects in the decision-making process as outlined above, the Borough Council will give consideration to all legal options available to it including (if necessary) an application seeking redress by way of judicial review.

Yours sincerely

Bevan Brittan

Bevan Brittan LLP

From: [Armstrong Martin](#)
To: [Crossley, Gemma](#)
Thorney Mill Committee Report + contribution towards low emission strategy
Subject: 19 October 2018 14:45:17
Date: [Damage costs Thorney Mill Sidings.docx](#)
Attachments: [A104676 Thorney Mill Comments Damage Cost AQ 4jul18.pdf](#)

Dear Gemma

Further to the letter from the Chair of Buckinghamshire County Council's Planning Committee Slough BC would like to place before you the following comments summarising our views on the weight that should reasonably be attached to the CLPUD and the methodology adopted for the calculation of mitigation in respect of air quality.

Weight attached to the CLPUD

Slough BC has forwarded the separate legal opinions as to why no, or very little, weight should be attached to the existence of the CLPUD. In essence the main points are as follows:

- The CLPUD is not a CLEUD and simply restates the fact that railway undertakers benefit from permitted development rights for specified development. The applicant is not a railway undertaker, the land is not therefore operational land and the development proposed is not that permitted under permitted development rights. Therefore the applicant is in no way able to benefit from the lawful use described in the Certificate.
- A fall-back position only exists where there is a 'realistic prospect' of the permitted development right being exercised. In this case the railway undertaker has ceased its use and vacated the site. There is no 'realistic prospect' of that user returning to the site and it has been marketed commercially. In that open market the site was more attractive to a user that was not a railway operator. Neither the applicant nor the determining authority has interrogated any evidence provided by the applicant to demonstrate that there is a 'realistic prospect' of a different user who is a railway operator outbidding the current prospective (non-railway undertaker) such that it can be demonstrated that there is a realistic prospect of a railway undertaker resuming operations and it being able to be properly claimed that there is a fall-back position. It is established planning caselaw stemming from **R v SSE, Ex Parte Ahern (London) Ltd** [1998] Env. LR. 189 and reinforced recently in the in the Court of Appeal in **Mansell v Tonbridge & Malling BC** [2017] EWCA Civ. 1314 that *"For a fall-back suggestion to be relevant there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement."*
- If the prospect of a railway undertaker resuming a railway undertaking on the land is less than realistic then it will be 'Wednesbury unreasonable' for a determining authority to attach any weight to that prospect and any decision to do would be vulnerable to challenge.
- The degree of probability of the use being resumed will, or at least may, be a material consideration, to be weighed by the decision- maker. Although the assessment of the probability and the weight to be attached to it in the overall planning judgment are matters for the decision-maker, it is reasonable to expect that the degree of weight to be attached to the fall-back position is proportional to the prospect of the fall-back position being realised.
- In this case the HGV movements that would dictate the level of contributions are stated to be 82 but have been discounted down to 28 as a result of the perceived likelihood of the fallback position. Therefore 54 of the 82, or 66% (two thirds) of the HGV movements have been discounted, This would indicate a 66% prospect of the railway undertaking use being

resumed. Based on the very limited and un-interrogated evidence submitted in support of the application it would seem Wednesbury unreasonable to attach this level of weight to a fall-back position on such a flimsy basis. There is a legal prerogative to ensure that the harmful impacts of development are mitigated to ensure that a decision to grant permission will be lawful. Bucks CC own legal advice accepts that “... *the CLPUD may in some respects be ‘theoretical’ in that there is currently no known railway undertaker willing to develop the Application Site pursuant to the CLPUD* 1 As defined by Article 2(1) of the Order and s.329 Highways Act 1980 as “persons authorised by any enactment to carry on a railway undertaking”. ...”.

- The CLPUD is merely a certification that another landowner, a railway undertaker, would be able to develop the land in that way should they occupy the land in the future. This is simply saying that permitted development rights exist for railway undertakers on the land were one to use it for operational purposes. That is saying no more than permitted development rights have not been removed by Article IV Direction.
- In this respect, the CLPUD is not a fall-back use and not a material planning consideration in the determination of the Applicant’s Application. To the extent that it is, we consider it would be *Wednesbury* unreasonable to treat the harm arising from the use in the CLPUD as the baseline against which to judge this Application given the only “*theoretical*” possibility of that coming to pass. If the determining authority do treat it as a material consideration, it should carry no weight.

Calculation of air quality mitigation

Without prejudice to the case put forward above on the weight attached to the CLPUD, there are serious concerns about the mitigation calculation methodology adopted by the applicant and accepted by the Council.

Looking solely at the impact from 28 lorries a day rather than the 82 that would be considered if no weight was attached to the CLPUD we have a number of concerns. These could have been addressed earlier but In terms of the process, Bucks CC did not disclose the damage cost calculations for the scheme until Friday 20th July with the application going to committee on Monday 23rd July. This information should have been disclosed earlier and SBC comments considered.

In terms of the calculations carried out by the scheme consultants, the main point is that that there are significant errors in the way that the damage cost calculation has been carried out. It would appear that there has been a deliberate attempt to use erroneous data and manipulate the calculation to achieve a favourable outcome for the applicant.

These errors include:

- use of the ‘transport average’ damage costs provided by the IGCB (DEFRA). This is the lowest priced category for transport and isn’t appropriate for schemes that will service developments within the M25. The ‘outer London’ category should be used

[The consultants have form on this. They had already tried using the ‘industry’ and ‘outer conurbation (not London)’ category. The industry category is the lowest priced damage cost -

transport costs are much higher, particularly with proximity to London]

- 2015 damage cost prices haven't been uplifted to 2018, 2019, 2020, 2021 and 2022

- a fixed emission rate has been used for all years 2018 to 2022. Emission rates for NOx and PM should have been calculated for each of the specified years

We have re-calculated the damage costs, following HMRC guidance and make the damage costs for 28 vehicles as **£63,782** (and not £21,336 as stated). Using the same emission rates as the scheme consultant the damage costs come to **£69,355. In the committee report, the damage costs are lowered again to £19,193.30**

Should the 82 vehicles per day be considered, the damage costs would be in the region of £190,000

Please see the calculations attached. I have also attached the applicants calculations for convenience. An additional issue to consider is that the contribution from the scheme is to be paid in instalments over 3 years. This will not allow SBC to put mitigation in place from the outset and would be unacceptable

We will advise if a representative from Slough BC is to attend the committee meeting when the application comes back before it.

Best regards

Martin Armstrong
Area Team Leader
Planning & Transport
Regeneration
Slough Borough Council

Website: www.slough.gov.uk

Central Government are raising planning application fees from 17th January 2018. Please see the following link for more details

<https://www.slough.gov.uk/planning-and-building-control/make-a-planning-application.aspx>



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