Application by Oxfordshire County Council for Planning Permission for Construction of Roads and Bridges on land between the A34 Milton Interchange and the B4015 north of Clifton Hampden

Application Ref: APP/U3100/V/23/3326625

Suggested Planning Conditions: Comments by Richard Tamplin on behalf of POETS

1. With due respect, I see no purpose in using the pro-forma method of dealing with this matter because my comments are so fundamental to what has been put forward as "Agreed conditions" by the County Council, that the simplest and clearest way is via this list of comments. It explains why so many of the Suggested Conditions (SCs) fail one or more tests of the NPPF and NPPG for reasons stated, and therefore should not be accepted by the Inspector or the Secretary of State and should not be imposed. Because the underlying purpose of imposing conditions on any application for planning permission is to make acceptable what is presently unacceptable in a submitted application, the unacceptability of 30 of the 37 SCs in this case means that what remains would be an incomplete and unacceptable application. I now explain why so many SCs are unacceptable.
2. The acceptability of a suggested planning condition is a matter of law and judgment, the latter being guided by policy and guidance. The main legal powers in a case to be determined by the Secretary of State are in Sections 77, 79, 179 and Schedule 6 of the 1990 Town and Country Planning Act 1990, as amended. Present policy and guidance are contained in the NPPF, paragraph 55, and the NPPG, "Use of planning conditions".
3. Firstly, two SCs, Nos 25 and 36, are unlawful, because they seek to circumvent the requirements of the EIA Regulations 2017. SC 25 contravenes Regulation 4(2), which requires that the Environmental

Statement accompanying the planning application must identify, describe and assess five factors in terms of the effects of HIF1, in terms of direct and indirect effects. Regulation 18(3) requires similar treatment in terms of six factors.

4. SC 25 requires assessments of carbon emissions "to support carbon reductions" and "proposals for continual improvement". This all but admits that no assessment of carbon emissions has been made to date. If that is so, the SC has no purpose, is superfluous and unnecessary; accordingly, it should be omitted from any permission. But in my view SC 25 confirms that no assessment of carbon emissions has been made, not only from the construction phase of HIF1, but also from its operational phase. For reasons given in the judgment in *Holohan* (Appendix B, Proof), this absence of an environmental assessment contravenes Regulations 4(2) and 18(3), renders the ES invalid and triggers the requirement of Regulation 3 that, in the absence of an ES, planning permission for the accompanying planning application must be refused. Similar conclusions to SC36 because that relies on SC25 and so falls with it.

5. The unacceptable unlawful nature of SCs 25 and 36 is exacerbated by the application being proposed by the Local Authority for development partly on its own land and that permission is subject to a decision of the same Local Authority. The potential conflict of interest, which this dual role of one Local Authority creates, is overcome by the provisions of the Town and Country Planning General Regulations 1992. Regulation 10, requires a separation of powers between the County Council's dual role as both promoter of the scheme as Highway Authority and regulation by the County Council as Local Planning Authority (LPA). But in this case, the County Council is insisting that it is an indivisible corporate body, almost suggesting that there is no need for any separation in any actions it takes on HIF1 between those separate functions. Accordingly, approval of the subsequent matters they require to be submitted will be a series of decisions which anyone attempting to discover will find difficult, if not impossible.

6. For these reasons, SCs 25 and 36 are not only unlawful, but also unreasonable and hence conflict with test 6, reasonable in all other respects, of NPPG paragraph 003 Reference ID: 21a-003-20190723.

7. Some 24 of the SCs are also pre-commencement conditions, that is, they claim to prevent the development going ahead before certain specified actions or proposals are devised, submitted to the LPA, and implemented. This number of pre-commencement conditions alone suggests that the application is so deficient in its present form, that it should not be granted planning permission. It also means that unless and until implementation of every one of the 24 SCs has taken place, no work at all to construct HIF1 may take place. This plainly leads to blight on the amenity of anyone who may be affected by the development in any way being unable to know if or when the development might commence, which would fail the test of reasonability. The advice in NPPG on the use of pre-commencement conditions is that if they say 'no development shall take place until' or 'prior to any works starting on site' they should only be used where there is clear justification and so fundamental to the development that it would otherwise be necessary to refuse the whole permission. (NPPG Para 007 Reference ID: 21a-007-20180615)

8. The 24 SCs I consider contrary to this guidance follow, together with comments where they raise other objections. SC 3 is, firstly, unlawful because it requires additional information on biodiversity implying that the effects already studied in the Appropriate Assessment of HIF1 are not sufficient, which would be contrary to the Habitats Regulations 2017 and Rulings 1 and 2 of the ECJ in *Holohan*. It is also so extensive in its apparent requirements as to be unreasonable, yet at the same time imprecise, for example, in those parts concerning Noise, Vibration & Dust and Landscape and Trees. The SC also fails the important test of necessity, because most of the measures it claims to control through subsequent approval should have been done during the two years during which this application has been before the LPA. These measures include, for example, identification of biodiversity protection zones, identifying what measures are required to avoid or reduce impacts on river species and habitats, and even specifying construction working hours and locations throughout the year. The failure of this SC alone to address these and others show that the entire application is fundamentally incomplete, imprecise, unable to be assessed in almost every reasonable manner and test and, in accordance with the advice of the NPPG, that the whole application should be refused for this reason alone.

9. For the same reason, I do not propose to consider each of the other 23 pre-commencement conditions, because despite difference in failure to follow the advice of the NPPG, it would serve no purpose because, having read those conditions, I am sure that such an exercise would simply reinforcing my conclusion on the unacceptability of SC 3. Hence, for example, SC 5 shows that the existing and final levels and contours of (so it appears in the absence of evidence to the contrary) the entire site are not known. It follows that any visual assessment of the scheme impossible in terms of any effects of its proposed height compared to the existing landform and levels. This leads to a similar conclusion to that on SC 3, that the application is incomplete and should not be granted permission.

10. As the then appointed Inspector raised at the Case Management Conference, it is impossible to understand how the design of one of the biggest structures of the application, the Science Bridge, can be controlled by condition, now attempted by SC 8 (i), when its form and layout are unknown and hence unable to be assessed in visual or any other measure, in the absence of landform details, only available at some unknown date and whether this would be in advance of those precise landform details. Nor would the requirements of National Rail in terms of the design of the Science Bridge be known. In this case SC 8 and SC 5 are plainly imprecise, and unenforceable, and demonstrate another example of failure to follow the NPPG advice.

11. In terms of SC 11 similar considerations apply because the requirements for approved documentation are all matters which, during the past two years during which the application was before the County Council, could and should have been devised, submitted and approved. This failure applies not only to SC 11, but also to SCs 12, 13 and 14 in relation to assessment of biodiversity. Once again, I consider that these SCs implicitly admit a failure to carry out a Habitats Regulations Appropriate Assessment, as in SC 3, rendering those SCs and the application itself unlawful for *Holohan* reasons (see Proof Appendix 4.

12. SC 16 is imprecise in requiring which part of a development is to be affected by the requirement of no further development, which term is itself imprecise; its relationship with SC 15 renders both SCs contrary to the guidance of the NPPG, including its inclusion in SC 15 of a pre-

commencement condition. Conditions 17, 18 and 19 are once more pre-commencement conditions also contrary to the NPPG. SCs 20, 21, and 22 are also pre-commencement conditions leading to my conclusion that they are contrary to the NPPG. SC 23 and 24 are in the same situation in terms of their pre-commencement terms, the latter being astounding in that the precise location of Veteran Trees and trees subject to TPOs have not been assessed during the County Council's jurisdiction for promoting and assessing the application, and my conclusions on SCs 29 and 30 are similar concerning the policy encouragement for pre-development archaeological investigation. SC 26 is also a pre-commencement contrary to the NPPG.

13. I turn next to SCs 27 and 28 relating to restoration and aftercare schemes for the Sutton Courtenay Landfill Site and the Bridge Farm Quarry. The former is currently subject to a condition requiring it to cease operating by 2030, but an application has been submitted by its owners to extend its life to 2050. Both sites are in separate ownerships, and not subject to control of the County Council, other than through minerals and waste legislation as applied by the County its role as both LPA and Waste Regulation Authority. There is no evidence that the County Council have control over those sites, other than in those roles, so they are potentially unlawful by being unenforceable. The effects of those SCs could also fetter the LPA itself in determining the application to extend the life of the Sutton Courtenay Landfill site, which would in itself render SC 27 unlawful. Accordingly those SCs should be omitted from any permission for the HIF1 application.

14. SCs 32 and 33 are pre-commencement conditions contrary to the advice in the NPPG, as are SCs 35 and 37, and are unacceptable for that reason. SC 34 is unacceptable for that reason also, but it is contrary to the principles set out in *Wheatcroft*, as explained in Annexe E: "Can a called-in planning application be amended?" of the guidance published by PINS, "Called-in planning applications: procedural guide". This advises that the Courts have judged that, where a change is proposed to an application, and in my view, this would be the effect on this application if permission was to be granted subject to SC 34, the main, but not the only, test to be applied by the decision taker as to whether to accept the proposed change, is whether the effect of the proposed change would

be to deprive anyone who should have been consulted of the right to be consulted.

15. No doubt those giving evidence from Appleford are likely to have views on this matter. In this case, the effects of this condition if imposed would affect many occupiers of property in Appleford around the proposed viaduct west of the village itself. In my view, this would result in a material risk that occupiers who would be affected could be deprived of consultation because of the form of this SC if it was imposed on a permission. Hence SC 34 is imprecise, invalid and unreasonable for uncertainty. It should not be permitted to stand in the event of permission.

Conclusions

16. My conclusions are that, of all the SCs, only Nos 1,2, 6, 10, 17, 20 and 31 accord with the law, and/or with the guidance on the use of planning conditions in the NPPG. The effect of my conclusions on the submitted 37 SCs would be to emasculate the application itself. What would remain would be unacceptable, and that is my view of the application in any event.

Richard Tamplin

23 January 2024