

**S106 Obligation – CIL Compliance Schedule**

**PINS Reference: PP/P4605/W/20/3250072193**

**Planning Application Reference: 2018/09467/PA**

**193 Camp Hill, Birmingham - Redevelopment of the site to provide 480 no. homes, a hotel (Use Class C1) and flexible business/commercial floorspace of 1,480sqm (Use Classes A1, A2, A3, B1, B2, B8 and D1) in 7 new blocks (A to G) ranging from 3 to 26 storeys, together with car parking, landscaping and associated works**

**Appendices**

Appendix 1 – Extracts from Public Open Space in New Residential Development Supplementary Planning Document (2008) and Updated Costs (2016)

Appendix 2 – BDP Policy TP9 (Adopted 2017)

Appendix 3 – BDP Policy TP47 (adopted 2017)

Appendix 4 – BDP The Vision, Objectives and Strategy (Adopted 2017)

Appendix 5 – Extracts from Birmingham Curzon HS2 Masterplan for Growth (2015)

Appendix 6 –Extracts from the Curzon Investment Plan (2016)

Appendix 7 – R (on the Application of Working Title Films Limited v Westminster City Council v Moxon Street Residential) EWCH 1855 (Admin) 2016

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This CIL Compliance Schedule is submitted with the intention that the obligations identified will form the basis of a S106 Agreement. At the time of submission the local planning authority and the appellants are actively discussing whether this is the most appropriate mechanism of securing their delivery.

1. As acknowledged in the Officers Committee Report (CD 3.1) the development is above the threshold for planning obligations relating to the following:
  - a) Affordable Housing: BDP Policy TP31 states that the City Council will seek 35% affordable homes as a developer contribution on residential developments of 15 dwellings or more. (CD 4.1.13).
  - b) Public Open Space: BDP Policy TP9 states *"In most circumstances, residential schemes of 20 or more dwellings should provide on site public open space and/or children's play provision. However, developer contributions could be used to address the demand from new residents on other types of open space such as allotments and civic spaces."* The calculation included in the committee report comes to an offsite contribution of £1,054,275 (including the cost of a toddlers play area). This was based on formula found in Appendix B of The Public Open Space in New Residential Development SPD, the costs of which were updated in 2016. The Policy and Appendix B from the SPD are included in this document at Appendix 1.
2. During the consultation process requests for obligations were also received from:
  - c) BCC Transportation: As stated in the Officers Committee Report (CD 3.1) *"Given the increase in pedestrian activity from the proposed development it would be beneficial to provide improvements to the surrounding pedestrian network by way of S106 monies towards these improvements. These would include Interconnect wayfinding and improvements to the pedestrian crossing facility of Coventry Road."* There was not the submission of a calculation of costs associated with this request. It was considered that a planning obligation was not necessary to make the development acceptable in planning terms.
  - d) Canals and Rivers Trust: As stated in the Officers Committee Report (CD 3.1) *"Policy GA1.4 indicates a desire to improve pedestrian and cycle connectivity using routes along canals. This is supported by policies TP38, TP39 and TP40. Which require good quality routes and wayfinding. The existence of these routes is not sufficient of themselves and therefore is important that wayfinding is introduced. The planning statement suggests that connections to existing routes will be delivered but it is not clear which routes and what connections and access points these include. A small contribution is therefore sought towards improving the accesses onto the canal towpath at Coventry Road and Lawden Road and providing improved signage at both of these and the installation of some interpretation of the impact of the site on the views from the canal network in the Lawden Road area. We also support opportunities to improve pedestrian crossing opportunities across Bordesley Middleway adjacent to the site."* There was not the submission of a calculation of costs associated with this request. It was considered that a planning obligation was not necessary to make the development acceptable in planning terms.
  - e) BCC Education – Based on the current deficit of school places request a contribution for £25,989.59 towards nursery provision, £668,629.89 towards primary school provision and £719,642.74 towards secondary school provision. Total contribution £1,414,262.22. The request is supported by Policies TP27 (Sustainable Neighbourhoods CD 4.1.10) and TP47 Developer Contributions and Draft Section 106 Policy – Request for Education Contribution (2015) that sets the threshold of at 20 dwellings. All residential development proposals will

be assessed in terms of the pupil yield anticipated for each of the key Education sectors to cover the provision of statutory education between ages of 2 and 18. A contribution is requested if the level of surplus places in primary schools within 2 miles and/or in secondary schools within 3 miles of the proposed development is less than 10% based on current pupil numbers and forecasts for the next 3 years. The basis for the calculation of contributions is the basic need cost multipliers provided by the Department for Education each financial year. These reflect a cost per pupil for building new accommodation and there are separate multipliers for the nursery, primary, secondary and Special phases of education. The multipliers are adjusted by regional factors for each local authority that are taken annually by the DfE from information provided by the Building Cost Information Service.

3. The appellants submitted that a scheme that would meet any or all of the obligations to comply with the BDP Policies would not be financially viable. The appellants demonstrated the lack of viability via the submission of a Financial Viability Assessment (FVA) undertaken by Highgate Land and Development dated November 2018.
4. The financial viability of the proposed development was assessed by adopting the residual method of valuation. This approach is to value the completed development or the gross development value (GDV), which equates to the aggregate sales values of the individual units. Construction costs including plot build costs, infrastructure, professional fees and abnormal costs are thereafter deducted from this GDV. The amount by which the GDV exceeds the total costs equates to a surplus which can be used to support developer's profit.
5. The purchase price of the site was adopted in the first instance as the benchmark land value as the appellants FVA stated there was evidence that other development opportunity sites in Birmingham were trading at prices significantly above this level. The submitted FVA also undertook a sensitivity analysis and an alternative approach in assessing the Existing Use Value plus a premium or incentive (EUV+) to arrive at the site value benchmark, having regard to the advice of the NPPG updated in July 2018.
6. Five different scenarios were tested using the two alternative benchmark land values and rising residential sales values per square foot across the site. The resulting developer's return on GDV ranged from -11.52% to +11.29%, concluding that any planning obligation would be unviable.
7. The appellants FVA was independently assessed on behalf of the local planning authority by Lambert Smith Hampton (LSH) who agreed with the residential method of calculating GDV. LSH undertook their own development appraisal acknowledging that they were content with the majority of appraisal assumptions and utilised the EUV+ approach to arrive at a benchmark land value. Based on their knowledge of the sale of other residential developments located within the City Centre a separate average sales value per square foot was adopted to result in a profit on value GDV of +8.06%, again acknowledging that the development cannot support any obligations.
8. However in accordance with paragraph 64 of the NPPF the appellants offered the provision of 10% discount market affordable homes, equating to 48 units across the site. These units would be provided for sale at the discounted price of 80% of the open market value. In

terms of compliance with CIL Regulation 122 the provision of affordable housing is necessary to deliver a mix of housing to help create a sustainable community and to meet the City's need for affordable housing. This is in accordance with BDP Policies TP30, and TP31 and the Affordable Housing SPD (CD 4.6). It is submitted by the appellants and reiterated by LSH that the predicted profit on value is well below market expectations for a scheme of this nature, and that the proposed development is considered marginal from a viability perspective. Acknowledging that the cost of all relevant policies should not be of a scale that would make a development unviable the level of affordable provision was considered acceptable.

9. However acknowledging the loss of employment land resulting from the proposed development whilst simultaneously noting the particular location of the appeal site alongside the Policy aspirations for the Digbeth area the 10% provision is to be evenly split between the provision of affordable housing units and affordable workspace, .i.e. 5% or 24 units of discount market affordable housing units on site together with all of the commercial floorspace (1,480sqm) to be set at a rental level discounted to 50% of open market value in perpetuity.
10. This is on the basis that there is a need for flexible and alternative workspace for social enterprise, as acknowledged in the Commercial Space and Employment Report submitted with the application. Furthermore the provision of workspace is consistent with one of the Vision, Objectives and Strategy of the BDP which seeks to create a prosperous, successful and enterprising economy with benefits felt by all. It is also supported by BDP Policies PG1 (Overall Growth, CD 4.1.5), GA1.1 (City Centre Role and Function, CD 4.1.3) and GA1.3 (The Quarters, CD 4.1.4).
11. The appeal site is located within the Digbeth Quarter where BDP Policy GA1.3 seeks to encourage and maintain the Quarter as a thriving creative and cultural hub. The site also falls within the boundary to The Birmingham Curzon HS2 Masterplan for Growth which seeks to maximise the regeneration and development potential of HS2 in the City Centre including within Digbeth (CD4.4). The Masterplan acknowledges that Digbeth has already established itself as the home of a diverse and dynamic working community of digital and creative businesses and states it, *"..has the ingredients to become one of the most distinctive vibrant creative quarters in Europe with HS2 providing the opportunity to realise future growth."* The key principles of this part of the City Centre include fostering its authentic, distinctive character, growing the creative, media, digital and social enterprises, encouraging links with nearby universities and colleges, creating vibrant and mixed use neighbourhoods and providing a focus for cultural activities. The accompanying Curzon Investment Plan (CD4.5) reiterates the aspirations for the Masterplan area; building on the economic opportunities of the extension to the Midland Metro and unlocking sites delivering the economic impact that will create uplift in business rates and support maximising the growth potential of HS2.
12. With respect to CIL Regulation 122 the provision of 1,480sqm of affordable workspace at a discounted market rent in perpetuity is considered to help mitigate for the loss of employment land in accordance with the City's employment land requirements and to maintain the Digbeth Quarter as a mixed use area of regeneration with growing creative media, digital and social enterprises in accordance with the growth policies highlighted in the BDP together the Curzon Masterplan and Curzon Investment Plan.

13. The benefit of providing additional affordable workspace is considered to compensate for a reduced amount of affordable housing units, no off site open space provision or contribution towards education. As per paragraph 25 of the following High Court decision, this is a planning judgement which the Council is entitled to take,  
*“Matters of weight and of planning judgement are for the decision maker, and the officer and his Council were perfectly entitled to think that the gain in one area made up of the loss in another.”* (R. on the application of Working title Films Ltd v Westminster City Council v Moxon Street Residential, 2016WL07634933, 28/06/2016)
14. The planning obligation also includes a monitoring fee of £1,500 and would be used by the local planning authority to ensure that the planning obligation comes to fruition taking account of market conditions in the future, at the time when the housing units and workspace are delivered.
15. The fee for the affordable housing is to ensure that the units have been completed prior to the occupation of 50% of the open market units, to ensure that they are offered to persons on the Affordable Housing register first and thereafter that the marketing of the Discount Market Sale Units to find a suitable purchaser or tenant is appropriate.
16. The fee for the affordable workspace is to ensure that the marketing strategy, required to be submitted, is fit for purpose in terms of how the workspace is marketed, through what marketing channels and for how long. In addition it will be necessary to review the proposed leasehold terms and to consider whether they are appropriate, whether the proposed service charge is in accordance with RICS code of practice and ultimately whether the workspace has been let at the correct rental discount to start-up businesses and SME tenants as proposed within the S106 Agreement.
17. This is not a routine obligation where a single payment or payments are received by the local planning authority but rather an obligation that requires a process to be reviewed that will incur internal and external costs in the future to ensure that its intended purpose, necessary to make the development acceptable in planning terms is realised.
18. The CIL guidance within the NPPG (CD5.27) states,  
*“Authorities can charge a monitoring fee through section 106 planning obligations, to cover the cost of monitoring and reporting on delivery of that section 106 obligation. Monitoring fees can be used to monitor and report on any type of planning obligation, for the lifetime of that obligation. Monitoring fees should not be sought retrospectively for historic agreements.*  
*Fees could be a fixed percentage of the total value of the section 106 agreement or individual obligation; or could be a fixed monetary amount per agreement obligation (for example, for in-kind contributions). Authorities may decide to set fees using other methods. However, in all cases, monitoring fees must be proportionate and reasonable and reflect the actual cost of monitoring. Authorities could consider setting a cap to ensure that any fees are not excessive.”*

19. To refer to CIL Regulation 122 the provision of affordable housing and affordable commercial workspace is considered to be directly related to the development as both would be provided on site as an integral part of the development.
20. Following the independent assessment of the appellants FVA it is considered that the number of affordable units and the discounts that will be applied to the housing and workspace are such that the obligations would be fair and reasonable.

the **Birmingham** plan  
birmingham's local development framework



## Public open space in new residential development

Supplementary Planning Document

july 2007

 Birmingham City Council

## Appendix: Cost of providing public open space and children's play equipment

Planning applications which include proposals for 20 dwellings or more generate requirements for public open space and/or children's play facilities.

The requirements are in accordance with UDP policy and are based upon a target of 2 hectares of public open space per 1000 population.

Children's play facilities are only required if the development includes 20 or more 'family' dwellings i.e. dwellings with 2 or more bedrooms.

One bedroom dwellings are not regarded as 'family' dwellings and should not be included in determining play area provision.

With certain exceptions 2 bedroom dwellings in the City Centre (defined as the area within the Ring Road), are not regarded as 'family' dwellings, due to the nature of the developments. Please refer to Section 3 of the document for further details.

### On site requirements

As explained in the document, public open space and/or children's play facilities should be provided on site within any new development of 20 or more dwellings.

The public open space requirement is 2 hectares per 1000 population which is 20 sq.m per person. Table 2 in Section 3 sets out the the number of people per dwelling.

On schemes of more than 20 dwellings, a toddlers' play area with a minimum area of 625sq.m. is required, which should provide up to five pieces of play equipment for children from toddler age up to the age of seven.

On schemes of 50 or more dwellings, a junior play area is required with a minimum area of 1225 sq.m. which should provide play equipment for children from toddler age up to the age of twelve. Additional play facilities, including Multi Use Games Areas (MUGA's) and youth shelters may be required on

larger developments depending upon local provision.

Below are the costs currently used for providing different types of children's play areas which are based on tendered rates at current day prices.

The toddler's play area figure below is based on five pieces of equipment. The junior figure is for children up to twelve. If the figures change then the contribution levels will have to be reassessed. The figures are current at March 2006.

Cost of providing a toddlers children's play area = £75,000 (625sq.m)

Cost of providing a junior children's play area = £90,000 (1225 sq.m)

Cost of a MUGA = £35,000 to £80,000

Cost of a Youth shelter = £5,000 to £6,000

Usually, the play facilities are situated within the larger area of public open space generated by the overall development. The area of public open space required is based upon the UDP target resulting from the number of people in the new development.

**Example:** a residential scheme comprising twenty 2 bed and forty 3 or 4 bed dwellings – on site provision.

Using Table 2, Section 3, in the document to determine the total number of people in the new development;

20 No. 2 bed dwellings @ 2 persons per dwelling = 40 people

40 No. 3 and 4 bed dwellings @ 3 persons per dwelling = 120 people

The total number of people is 160.

Using the UDP formula 2 hectares (20,000 sq.m) per 1,000 population = 20 sq.m per person.

160 x 20sq.m = 3200 sqm of public open space generated



This area would be accommodated within the development and would include a junior play area, as there are more than 50 'family' dwellings.

### Off site requirements

As explained in the document, there will be certain situations where it will not be possible to provide new public open space on site. Therefore, through Planning Agreements, the requirement is secured as a monetary contribution in lieu of on-site provision. The City Council uses the contribution to improve existing public open space, including new or improved play facilities. These improvements are usually carried out in the same ward as the development site.

The off-site contribution is calculated as follows:-

1. Use Table 2 to determine the number of people in the proposed development.
2. Use the UDP target formula to calculate the area of public open space generated - 20sq.m per person.
3. Determine which type of play area is appropriate depending upon the number of 'family' dwellings proposed, and subtract the appropriate area from the public open space generated, i.e. 625 sqm for toddlers' play or 1225 sqm for junior play.
4. Multiply the remaining area by £40 per sqm and add the cost of the appropriate play area i.e. £75,000 for toddlers' play and £90,000 for junior play, to give the overall off-site contribution.

The figures are those currently used for the cost of laying out public open space and for the supply and installation of play areas. All of the figures have been prepared by the City Council's Quantity Surveyors and are reviewed on a regular basis to reflect current tendered rates.

**Example:** a residential scheme comprising twenty 2 bed and forty 3 or 4 bed dwellings - off site provision.

Using Table 2, Section 3, in the document to determine the total number of people in the new development;

20 No. 2 bed dwellings @ 2 persons per dwelling = 40 people

40 No. 3 and 4 bed dwellings @ 3 persons per dwelling = 120 people

The total number of people is 160.

Using the UDP formula 2 hectares (20,000 sq.m) per 1,000 population = 20 sq.m per person.

160 x 20sq.m = 3200 sqm of public open space generated. There would be a requirement to provide for a junior play area, as there are more than 50 'family' dwellings. Therefore the actual contribution would be:-

3200 sq.m - 1225 sq.m = 1975 sq.m x £40 per sq.m = £79,000 + the cost of providing the Junior play area £90,000. The total contribution would be £169,000.

### Appendix 1 - Updated Costs (2016)

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Provision of a commuted sum in accordance with the calculation of off-site requirements set out in Appendix B of the Public Open Space in New Residential Development Supplementary Planning Document (July 2007) save that the input costs are updated in accordance with the following table:

Type	Previous cost	Updated Cost (since 2016) per sq.m
Provision of new or compensation for loss of public open space	£40 sq.m	<b>£65 sq.m</b>
Provision of new or compensation for loss of other open space or playing field	£20 sq.m	<b>£25 sq.m</b>
Toddler's play area	£75,000	<b>£90,000</b>
Junior play area	£90,000	<b>£105,000</b>
MUGA	£45,000 to £95,000	<b>£45,000 to £95,000</b>
Youth shelter	£7,500	<b>£7,500</b>

## Open space, playing fields and allotments

### Introduction

**6.50** Open space encompasses a wide range of spaces, not just traditional parks and gardens, grassed areas and woods but also cemeteries, allotments and civic spaces. All are important in providing recreational, health and other benefits for Birmingham residents and others who work in or visit the City.

### Why we have taken this approach

**6.51** Given Birmingham's built up character and with an increasing population and pressure for development, opportunities to create new areas of open space are limited within the existing urban area. Further development pressures on the City's open space resource will be carefully considered.

**6.52** The main emphasis is on quality and accessibility; ensuring that people have access to good facilities and sufficient recreational space. Therefore accessibility and quality will inform the assessment of how much public open space provision is required.

**6.53** In response to the need for assessments the City Council undertook a survey of demand which was published in 2004 which included 5,000 households, 4,000 within the City and 1,000 just outside. This together with work on the Parks Strategy has formed a background to the approach set in Policy TP9.

**6.54** The City Council maintains records of provision for public open space, public and private playing fields expressed in hectares (ha) per 1,000 population by ward. A minimum 2 ha per 1,000 population standard is a simple, initial indicator of adequacy of provision. It serves to identify where there are supply problems. The use of up to date assessments of need provides more subtle information, reflecting quality and accessibility issues as well as quantity.

### Policy TP9 Open space, playing fields and allotments

Planning permission will not normally be granted for development on open space except where:

- It can be shown by an up to date assessment of need that the open space is surplus taking account of a minimum standard of 2 ha per 1,000 population and the accessibility and quality criteria listed below.
- The lost site will be replaced by a similar piece of open space, at least as accessible and of similar quality and size.
- Where an area of open space is underused, as it has inherent problems such as poor site surveillance, physical quality or layout, which cannot be realistically dealt with, then in this case proposals that would result in the loss of a small part of a larger area of open space will be considered if compensation measures would result in significant improvements to the quality and recreational value of the remaining area.
- The development is for alternative sport or recreational provision, the benefits of which clearly outweigh the loss.

Playing fields will be protected and will only be considered for development where they are either shown to be surplus for playing field use, taking account of the minimum standard of 1.2 ha per 1000 population, through a robust and up to date assessment and are not required to meet other open space deficiencies, or alternative provision is provided which is of equivalent quality, accessibility and size.

### Provision of public open space

Public open space should aim to be provided throughout Birmingham in line with the following standards:

- All residents should have access within 400m, (5 to 10 minutes walk) to an area of publically accessible open space which should have grass and trees and be at least 0.2 ha in size. Similarly, there should be children's play facilities within 400m of all residents.
- Within 1km (15 to 20 minutes walk) of all residents there should be an area of publically accessible open space of at least 2 ha in size. This should have paths, seating, bins, trees and landscape features. It should be capable of accommodating differing and potentially conflicting recreational activities without problem e.g. space for football and for those who want to sit and relax.
- Within 3km of all residents there should be access to a publically accessible park which has a wide range of facilities and features which may include water features, children's play facilities, cafés and formal landscaping. These spaces should be capable of holding local, or in some instances national events. These sites should be more than 2 ha in size and should also have good access for public transport and for walkers and cyclists. Some of these parks will have additional facilities and will be of a size which allows them to be used for major events and celebrations. It will be a priority to ensure that these parks have good access by public transport and adequate car parking.

New developments, particularly residential, will place additional demand upon all types of open space and children's play areas. New residents, visitors to Birmingham and people working within the City all place

*continued...*

varying demands upon open space. In new residential developments provision of new public open space will be required broadly in line with the standard of 2 ha per 1000 population. In most circumstances, residential schemes of 20 or more dwellings should provide on site public open space and/or children's play provision. However, developer contributions could be used to address the demand from new residents on other types of open space such as allotments and civic spaces.

Further detail on the implementation of these requirements is provided in the Public Open Space in New Residential Development SPD.

The emphasis will be on good quality, accessible public open space that people want to use and feel safe to use. There should be well maintained paths, hard and soft landscape elements, bins, seats and other appropriate site furniture and the needs of people with disabilities should be taken into account.

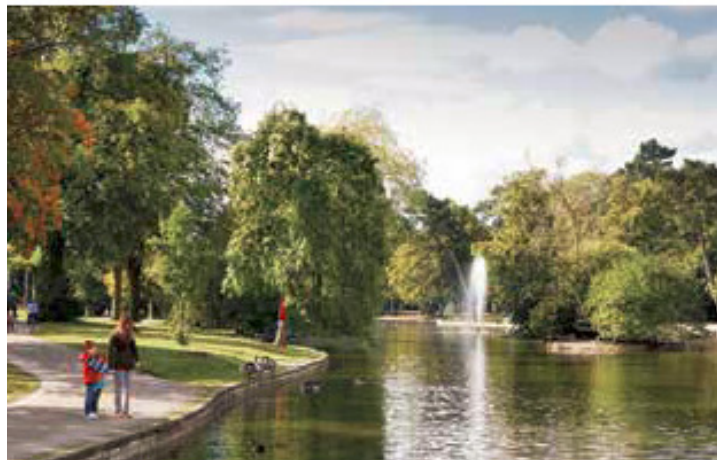
**Allotments**

Provision of allotments should relate directly to demand in the area. Where there is a shortage of provision then consideration will be given to using other surplus open space land for allotments.

Allotment land will only be released for development where it can be shown that the site is not required to satisfy the demand for allotments in the area, or equivalent alternative provision will be made available. Where it is demonstrated that an allotment site is surplus then the first consideration should be whether it can be used as other open space where there are deficiencies. If this land is not required for other open space use then it can be considered for development. Planning permission for the development of allotments will not be granted simply because the site has fallen out of use and become derelict. Every effort should be made to improve allotment provision in areas of deficiency when the opportunity arises.

**Implementation**

	Local/ National Funding	Partnerships	CPO	CIL/ Section 106	Planning Management
Policy TP9	✓	✓		✓	✓



Cannon Hill Park

**6.55** The City Council has a Playing Pitch Strategy. This shows a significant short-fall of natural turf and artificial grass pitches.

**6.56** Allotments play an important role in recreation and sustainability and form part of the green infrastructure network. There has been renewed interest in allotments and a diversification of users. Assessing need is more straightforward as waiting lists and vacant plots provide barometers of demand and supply. Where there is a demonstrated shortage of provision then the possibility of creating new provision by using surplus open space land can be considered.

**6.57** For the purposes of the BDP the following definitions apply:

- **Open space** is all open land of recreational or public value, including playing fields, which primarily consists of natural elements such as trees, grass and water. It may or may not have free public access. It may or may not be used or held by the City Council for recreational purposes.
- **Public open space** is open space, including playing fields, owned by the City Council or to which there is a public right of access, used by the public primarily for recreation purposes. It does not include private or education playing fields, nor does it include municipal or private golf courses, cemeteries, or open areas within housing estates which substitute for private gardens.

## Developer contributions

### Introduction

**10.11** Development will be expected to provide or make a contribution to the cost of providing what is necessary to support the new development.

### Why we have taken this approach

**10.12** These contributions will be sought in line with Circular 05/2005, Community Infrastructure Levy regulations or successor regulations/guidance. The City Council will, where appropriate, seek to secure site specific measures through planning obligations. The nature and scale of any planning obligations sought will be related to the form of development and its potential impact on the site and surrounding area. Infrastructure and mitigation measures will be provided in a timely manner to support the objectives of the Local Plan, and will ensure any new developments will provide the infrastructure, facilities, amenities and other planning benefits which are necessary to support and serve the development, and to offset any consequential planning loss to the local area which may result from the development. Developer contributions in the form of the Community Infrastructure Levy will contribute towards strategic infrastructure to support the overall development in the BDP.

**10.13** Planning Obligations - such obligations under Section 106 of the Town and Country Planning Act 1990 (as amended) will continue to be used as a mechanism to make development proposals acceptable in planning terms, that would not otherwise be acceptable. Section 106 agreements will continue to be used to secure affordable housing, and on site public open space in residential development, ensure the development or use of land occurs in specific ways; and require specified operations or activities to be carried out.

**10.14** Community Infrastructure Levy - the Community Infrastructure Levy (CIL) came into force in April 2010 and allows local authorities in England and Wales to raise funds from developers undertaking new building projects in their area. The CIL is a set levy based upon the type of use and floorspace proposed and provides a standardised method for calculating contributions. The money can be used to fund a wide range of infrastructure that is needed as a result of development. This includes new or safer road schemes, flood defences, schools, hospitals and other health and social care facilities, park improvements, green spaces and leisure centres. The City Council adopted CIL in 2016 to support the delivery of the sustainable growth agenda set out in the BDP.

### Inward investment

**10.15** Alongside securing funding for infrastructure the ability to attract private sector investment will be central to the overall success of the BDP. The City Council will continue to take a proactive and constructive approach to potential local, national and international investors. There are likely to be particular challenges in achieving this with the pace of recovery of the national economy a key issue but one directly outside the City Council's control. The City Council will however continue to work actively in promoting Birmingham and the opportunities on offer, for example, through the Big City Plan and the Area Investment Prospectuses, to ensure that the City is best placed to take advantage of improved economic conditions whenever they arrive. Securing the EZ status and promoting the Economic Zones will provide a focus for economic activity and help target inward investment.

### Partnership working

**10.16** While the City Council has a key role to play in delivering the policies and proposals responsibility does not rest solely with the City Council and it will require the combined efforts and investment of a range of partners.

**10.17** The successful implementation will require a wide range of organisations to work together. The City Council will have a vital role in coordinating the actions and activities of these partners be they in the private, public or third sector.

**10.18** The LEP will have a central role in supporting the delivery of the overall growth agenda for Birmingham. Local Enterprise Partnerships are led by businesses and local authorities across natural economic areas. They provide the vision, knowledge and strategic leadership required to drive sustainable private sector growth and job creation in their areas. The LEP for the Greater

### Policy TP47 Developer contributions

Development will be expected to provide, or contribute towards the provision of:

- Measures to directly mitigate its impact and make it acceptable in planning terms.
- Physical, social and green infrastructure to meet the needs associated with the development.

### Implementation

	Local/ National Funding	Partnerships	CPO	CIL/ Section 106	Planning Management	Other Local Plan/ SPD/Regeneration Framework
Policy TP47	✓	✓		✓	✓	✓

Birmingham and Solihull area was formed in 2010 and is a business-led initiative with local authority, the business community and educational providers represented. Those local authorities covered by the LEP are Birmingham City Council, Bromsgrove District Council, Cannock Chase District Council, East Staffordshire Borough Council, Lichfield District Council, Redditch Borough Council, Solihull Metropolitan Borough Council, Tamworth Borough Council and Wyre Forest District Council.

**Duty to Co-operate**

**10.19** The Duty to Co-operate is a requirement of the Localism Act 2011 and is designed to ensure that all bodies involved in planning work together on strategic issues that are greater than local significance. The duty is particularly important and challenging for a major city like Birmingham where its influence spreads far beyond its administrative boundaries. It is also challenging to those authorities surrounding Birmingham especially in relation to the accommodation of growth that cannot be met within the City's administrative boundary.

**10.20** In relation to the local authority dimension of the Duty to Co-operate the City Council works collaboratively through the West Midlands Joint Committee (which brings together the seven districts in the West Midlands metropolitan area), The LEP and West Midlands Planning Officers Group. In addition to these groups the City Council works on a bi-lateral basis with all adjoining local authorities not only on the challenges faced by Birmingham but also in relation to the emerging plans in those adjoining areas.

**10.21** The co-operation through the LEP has been particularly important. A Spatial Plan for Recovery and Growth is being progressed for the LEP area. This has included the joint commissioning of technical studies to inform the long term scale and distribution of growth. The

intention of these studies is to sit alongside the progress being made by the current round of development plans - including the BDP - but also to help inform subsequent updating of plans.

**10.22** This collaborative working has also been taken forward in bi-lateral discussions with adjoining authorities where there are strong connections with Birmingham including the Black Country and North Warwickshire.

**Use of City Council powers**

**10.23** The City Council has a range of powers that are available to help support delivery. This will not just be confined to those of the planning system but also the housing, education and highway functions it provides.

**10.24** Compulsory Purchase Powers are an important tool for local authorities and other public bodies to assemble land to help deliver social and economic change. The City Council has a strong track record in utilising these powers to support urban regeneration schemes and the delivery of infrastructure and will continue to apply these powers where the acquisition of land is necessary to enable comprehensive schemes that deliver economic, social and/or environmental benefits.

**10.25** The City Council has extensive landholdings within Birmingham and will seek to use these to take forward the strategy, whether through development promotion or through the protection and improvement of environmental assets.

**10.26** The preparation of more detailed plans to guide delivery in areas of change has proved to be successful in the past and will continue. Wherever possible the City Council will aim to make use of SPDs, AAPs, Neighbourhood Development Plans and regeneration frameworks to provide local and site specific policy and promote

a comprehensive approach to development initiatives. The Development Planning and Development Management roles of the City Council will remain an important delivery mechanism.

**Infrastructure Delivery Plan and Site Delivery Plan**

**10.27** The BDP is supported by an Infrastructure Delivery Plan (IDP) and Site Delivery Plan which provide detail of the infrastructure necessary to enable growth to occur and delivery issues in relation to key proposals. The City Council will keep these documents under review to measure progress and ensure funding, initiatives and action are targeted.

**10.28** Combining all these mechanisms with the policies and proposals set out in the BDP will enable the successful delivery of the vision for an enterprising, prosperous, innovative and green City.

# The vision, objectives and strategy

## The vision - Birmingham in 2031

**3.1** By 2031 Birmingham will be renowned as an enterprising, innovative and green City that has delivered sustainable growth meeting the needs of its population and strengthening its global competitiveness.

**3.2** We will plan to ensure Birmingham's residents will be experiencing a high quality of life, living within attractive and well designed sustainable neighbourhoods. The choice and affordability of housing will be meeting the needs of all and local jobs and services will be accessible by a range of sustainable transport choices.

**3.3** The City's economy will be strong and prosperous, built around a diverse base of economic activities and supported by a skilled workforce. The City Centre will have expanded, accommodating major

new prime office developments and a series of exciting destinations boosting the cultural, leisure and retail offer. The network of thriving local centres will reflect the diversity of the City and the needs of local people.

**3.4** The historic environment and the sense of place of localities throughout the City will have been enhanced. The City will have achieved high sustainability credentials with resilient, adaptive environments with all new developments built to high standards of design.

## Objectives

**3.5** To deliver the vision of Birmingham in 2031 and ensure that future development meets the aspirations for the City the objectives of the BDP are:

- To develop Birmingham as a City of sustainable neighbourhoods that are safe, diverse and inclusive with locally distinctive character.
- To make provision for a significant increase in the City's population.
- To create a prosperous, successful and enterprising economy with benefits felt by all.
- To promote Birmingham's national and international role.
- To provide high quality connections throughout the City and with other places including encouraging the increased use of public transport, walking and cycling.
- To create a more sustainable City that minimises its carbon footprint and waste, and promotes brownfield regeneration while allowing the City to grow.
- To strengthen Birmingham's quality institutions and role as a learning City and extend the education infrastructure securing significant school places.
- To encourage better health and well-being through the provision of new and existing recreation, sport and leisure facilities linked to good quality public open space.



Proposals for Paradise Circus

- To protect and enhance the City's heritage assets and historic environment.
- To conserve and enhance Birmingham's natural environments, allowing biodiversity and wildlife to flourish.
- To ensure that the City has the infrastructure in place to support its future growth and prosperity.

## The strategy

**3.6** To meet Birmingham's future needs and achieve the vision, we will need to provide for significant new growth in the most sustainable way, ensuring that the development of new homes is matched by the provision of opportunities for new employment, accessible local services and a high quality environment.

**3.7** Developing Birmingham's international role will be an important part of its economic success, attracting inward investment and visitors, and supporting the delivery of the growth agenda. Building on previous plans the approach will continue to be to promote urban regeneration, and to encourage investment and improvement within the city wherever possible. However the growth pressures facing the city are such that some development will be necessary outside the limits of the existing urban area.



Longbridge

### The environment and sustainability

**3.8** The City's future growth will be pursued in the most sustainable way; reducing the City's carbon footprint and creating resilient and adaptive environments. New development will need to be built to the highest sustainability standards, helping to generate wider benefits in terms of the quality of the environment and carbon reduction, be energy efficient, using renewable resources, and minimising the production of waste. The built environment will need to be resilient to the potential impacts of climate change with flood plains protected from inappropriate development and the sustainable management of the City's watercourses promoted.

**3.9** All future development will need to be supported by suitable social and green infrastructure and set within environments that reflect the character and history of the City. Across the City all development must be well-designed, accessible and safe including for people with disabilities. Schools, health care facilities, shops and other services need to be available in accessible locations along with parks, sports facilities and well-maintained local public open space, forming part of a wider 'green infrastructure network' threading through the City and linking to the open countryside beyond. The canal network will continue to be promoted as a vital asset for the City, supporting movement, environmental and biodiversity quality and as the setting for development.



**3.10** The historic environment will be central to shaping the City's future. Heritage assets will be valued and conserved as part of the delivery of distinctive places. Equally, biodiversity and geodiversity will be critical components in delivering a high quality of life. Birmingham's wide variety of natural environments will be protected and enhanced in line with the principles of the Birmingham and Black Country Nature Improvement Area and taking account of the Arden and Cannock Chase and Cank Wood National Character Areas identified by Natural England. New opportunities for wildlife and biodiversity will be encouraged as part of new and existing development.

#### **Economy and network of centres**

**3.11** The continued revitalisation and modernisation of the City's economy will be central to the growth agenda ensuring that jobs and prosperity are generated for current and future residents.

**3.12** A continuous supply of land and full range of premises will be made available for all forms of employment development, including for the growth and modernisation of existing companies, the establishment of new businesses and to attract investment from both within the UK and internationally.

**3.13** The City's Core Employment Areas will play an important role in accommodating the requirements of a wide range of economic sectors. These Core Employment Areas provide the City's main employment opportunities and include the Regional Investment Sites and other high quality areas such as The Hub, Witton and Bromford. To meet the City's need for a flexible supply of high quality sites, to accommodate economic development and investment, some development will need to take place on land removed from the Green Belt. The site at Peddimore will provide the City with much needed employment land of the right size and type for major investors.

**3.14** Particular emphasis will be placed on ensuring that sites are available to support the economic sectors important to the City's economic growth. These include business, financial and professional services, creative and digital media, life sciences, food and drink, ITEC, logistics and advanced manufacturing.

**3.15** Clustering these high growth sectors in specific locations will play a vital role in attracting investment and enabling growth. Six Economic Zones have been created to provide the clustering of economic activity within high quality business environments that are supported by the right infrastructure.

**3.16** The Economic Zones are an Advanced Manufacturing Hub at the East Aston Regional Investment Site, ITEC Park at the Longbridge Regional Investment Site, Life Sciences Campus around the Queen Elizabeth Hospital and Birmingham University Campus, Environmental District at Tyseley, Food Hub at the former IMI site at Witton and The City Centre Enterprise Zone (EZ). The EZ, covering 26 sites in the City Centre, will play a key role in delivering high quality office accommodation for growth in business, financial and professional services, and supporting digital media and creative industries.

**3.17** Outside of the core employment areas other land in employment use will continue to be protected and the provision of accommodation for small and medium enterprises (SMEs) will be supported. Marginal industrial land of poor quality that no longer meets the requirements of the market or business needs may be promoted for redevelopment to alternative uses.

**3.18** The provision of land and premises is only part of creating a prosperous economy and the City will need a skilled and competitive workforce now and in the future. The role of the Universities, education establishments and

other providers will be central to ensuring the workforce is equipped to drive the economy.

**3.19** A thriving network of centres will be central to delivering new office and retail development and other services to support communities throughout the City. The priority will be to promote retail and office development within the defined centres and resist development that would undermine the strength of the network.

**3.20** This network comprises:

- The City Centre, which will continue to be strengthened as a centre for financial and business services, and as a destination for shopping, business tourism and major cultural events with world class conference facilities and venues. Five wider areas of change will deliver the growth to strengthen the role of the City Centre, investing in new high quality buildings and public spaces and creating new vibrant destinations. This growth will be coupled with a focus on promoting the distinctive character of the Quarters. The success of the City Centre will be central in promoting the international profile of the City and attracting investment and visitors.
- Sutton Coldfield Town Centre as a sub-regional centre is capable of accommodating significant additional comparison retail floorspace and some office space.
- Perry Barr, Selly Oak and Meadway as district growth centres accommodating both retail and office uses at lower levels to the City Centre and sub-regional centre.
- A network of some 70 other district and neighbourhood centres accommodating more limited levels of growth supporting local needs.

Appendix 5 – Extracts from Birmingham Curzon HS2 Masterplan for Growth (2015)



Birmingham Curzon **HS2**  
Masterplan for growth

July 2015



# Foreword

## Birmingham is HS2 ready

The arrival of HS2 to Birmingham will provide a catalyst for regeneration and growth unparalleled in recent times. A completely new terminus station will place the City at a gateway to both the UK and European high-speed rail network.

Birmingham is ready to capitalise on the opportunities that HS2 will bring; with our Big City Plan's vision of a growing City Centre and a wide range of investment and development opportunities.

Through the Birmingham Curzon Masterplan we are establishing the City's aims to create a world-class station that is wired into our unique offer - the location, enterprise and skills, people and spirit of Birmingham.

This Masterplan maximises the regeneration and development potential of HS2 in the City Centre, in particular the Eastside, Digbeth and eastern side of the City Centre Core. These areas alone can provide:

- 36,000 (net) jobs.
- 4,000 new homes.

- 600,000sq.m employment space.
- £1.4bn economic uplift.

Progress has already been made in the implementation of the Masterplan proposals through the establishment of the Curzon Regeneration Company. £30m of funding has already been secured towards infrastructure provision to deliver the proposals within the Growth Strategy developed by the Greater Birmingham and Solihull Local Enterprise Partnership (GBSLEP). The plans for the extension of the Midland Metro into Digbeth have also moved a step closer with £41.5m of funding already secured. Further funding through the recently announced extension of the City Centre Enterprise Zone will be secured to bring forward the complete Curzon Investment Package and so realise the significant growth potential of the whole area.

HS2 holds the key to unlocking the potential - we are ready to maximise the benefits.

**Sir Albert Bore**  
Leader  
Birmingham City Council

**Councillor Tahir Ali**  
Cabinet Member for Development, Transport and the Economy  
Birmingham City Council

## Places for growth • Creative

Digbeth has the ingredients to become one of the most distinctive vibrant creative quarters in Europe with HS2 providing the opportunity to realise future growth. Birmingham Curzon station will need to deliver high quality direct connections into Digbeth to unlock the areas huge potential.

### Key principles

- Well connected with attractive walking, cycling and public transport routes.
- Fostering the authentic, distinctive character and history of Digbeth, breathing new life and activity into heritage assets and historic environments which are complemented by exciting new uses and buildings.
- New, well connected open spaces and destinations.
- Growing the creative, media, digital and social enterprises and encouraging links with nearby universities and colleges.
- A vibrant mixed-use neighbourhood that enlivens the area 24/7 with a range of distinctive retail and leisure uses reflecting the arts and creative industries as a tourist and visitor destination.
- Creation of a high quality sustainable residential neighbourhood focused around the canals.
- A focus for cultural activities - growing the arts and live music scenes.
- A focus for innovative public art.

The arrival of HS2 will place Digbeth on the doorstep of a nationally significant transport hub opening up the area for major investment and improvement. A spectrum of business space, residential opportunities and exciting new open spaces will be unlocked through a sequence of spaces and connections.

Digbeth has already established itself as the home of a diverse and dynamic working community of digital and creative businesses. The area's distinctive 19th Century industrial urban character, much of it a conservation area that includes a number of listed buildings and archaeological remains has been utilised by these businesses with the Custard Factory and Fazeley Studios key focal points. HS2 provides the opportunity for this economic activity to grow and prosper, utilising and enhancing the areas unique environment, historic significance and existing strengths.

[birmingham.curzon.masterplan](#) / places for growth

The creative and digital industries will be a central driver for the local economy and support graduate retention in Birmingham. In order to create a vibrant and attractive area the economic activity will need to be complemented by new educational uses, independent retailing, artist's space, alternative nightlife, hotels, residential development and student accommodation. As a result Digbeth will see major growth in employment, resident and visitor numbers.

Digbeth has several Enterprise Zone sites which will boost opportunities for new development and strengthen the areas economic activity.

The Warwick Bar and the Digbeth, Deritend and Bordesley High Streets Conservation Areas cover much of the area. Development within these areas will include both sensitive refurbishment and innovative, quality new-build with an emphasis on retaining and developing the unique character, heritage assets and experience that sets Digbeth apart from other areas of the City.

- View from Fazeley Street Bridge looking towards Typhoo Wharf





Curzon Investment plan

June 2016

# Curzon Investment Strategy

As a key site within the HS2 network, Birmingham Curzon will become a focal point for transformation, development and economic growth.

The Curzon Masterplan establishes how the arrival of HS2 can be maximised and the growth and regeneration opportunities around the terminus station unlocked. Covering 141 hectares of the City Centre, with the area centred on the station, the strategy of the masterplan is:

- For the delivery of an integrated world class station. In order to deliver successful regeneration and act as catalysts for growth, the station must become a destination in its own right, and open up connections to the wider area. This will include its immediate surroundings as a place that enables activity and movement of people.

- A series of big moves to achieve this integration and support wider growth and regeneration. The big moves include:

- Station design to create a landmark building and arrival experience.
- Creation of a high quality setting for the station with public squares and spaces to create an attractive destination, open up surroundings, improve access and create conditions for growth. This includes:

**Paternoster Place** - connecting into the Digbeth Creative Quarter by bridging the west coast mainline.

**Curzon Promenade and Curzon Square** - creating the station in the park and providing a setting for the original Curzon Station building (Grade I listed building).

**Station Square and Moor Street Queensway** - first point of arrival and connecting, via a high quality space and environment, the city centre office and retail core with the station.

**Midland Metro Tram** - connecting the station with the wider city centre network and continuing the line into Digbeth. This will be the first phase of the eastern extension that will see the line go out through East Birmingham and north Solihull to UK Central and the Airport.

- Wider network of public transport and public realm improvements promoting walking and cycling to integrate the station and surroundings into the wider city centre and beyond. This will play a central role in creating an attractive environment for business, workers, residents and visitors with the quality of the environment directly linked to key investment decisions.
- To unlock opportunities for development linking into the wider city centre growth agenda set out in the Big City Plan.

### Growth opportunities

The masterplan focuses on utilising HS2 as a catalyst for growth across the Curzon area, enhancing the city centre's existing assets and supporting new development. These growth opportunities include:

**Expanding The Central Business District** - home to the largest centre for the business, professional and financial services outside London with over 40,000 employees and 500 businesses. The plans for Curzon will see the district expand.

This will include the redevelopment of major strategic sites such as Martineau Galleries.

**The Digbeth Creative Quarter** - home to leading digital media, tech and creative companies the quarter is set to expand significantly on the back of the arrival of HS2. Through the Curzon Masterplan there are clear proposals to integrate into the wider city centre and neighbouring Knowledge Hub.

**The Knowledge Hub** - focused to the north of the HS2 station this area is home to over 20,000 students and a number of leading educational establishments including Aston University, Birmingham City University and the national college for High Speed Rail. Bringing together the research and innovation capabilities, it will provide an international leader supporting economic growth across a range of sectors.

**Residential Communities** - creating new neighbourhoods across the Curzon area enhancing the city living offer and providing places that complement the commercial, leisure and cultural activity including homes for the future workforce.

Realising this vision, by building on its principles and setting the framework for an investment programme, will help deliver a number of economic benefits:

- 600,000sq.m of employment floorspace.
- Over 4,000 new homes creating additional local expenditure of £41m per year.
- 36,000 net new jobs by 2056 creating GVA per annum of £1.4bn.

# The Queen on the application of Working Title Films Limited v Westminster City Council v Moxon Street Residential (Luxembourg) Sarl



Positive/Neutral Judicial Consideration

**Court**

Queen's Bench Division (Administrative Court)

**Judgment Date**

22 July 2016

Case No: CO/962/2016

High Court of Justice Queen's Bench Division Planning Court

**[2016] EWHC 1855 (Admin), 2016 WL 07634933**

Before : Mr Justice Gilbart

Date: 22/07/2016

Hearing dates: 28th June 2016

**Representation**

Alexander Booth QC and Rebecca Clutton (instructed by K and L Gates LLP , Solicitors of London) for the Claimant.

Saira Kabir Sheikh QC and Charles Streeten (instructed by Tri Borough Shared Legal Services ) for the Defendant.

Russell Harris QC and Richard Turney (instructed by Linklaters LLP , Solicitors of London) for the Interested Party.

**Judgment**

Gilbart J :

LIST OF ACRONYMS USED IN THIS JUDGEMENT	
WCC	Westminster City Council (Defendant)
WTF	Working Title Films Ltd (Claimant)
MSR	Moxon Street Residential etc (Interested Party)

<i>TCPA 1990</i>	Town and Country Planning Act 1990
<i>PCPA 2004</i>	Planning and Compulsory Purchase Act 2004
<i>CILR 2010</i>	Community Infrastructure Levy Regulations 2010

(a) Introduction

1. This matter concerns a challenge by a neighbouring occupier (WTF) to a grant of planning permission by the Defendant WCC on 12th January 2016 to the Interested Party MSR for

”the erection of a building including excavation works to provide three basement storeys and six above ground storeys for mixed use purposes including up to 79 residential units, retail shops, restaurants, multi-purpose community hall, community space, cycle and car parking, servicing, landscaping, plant and other works”

on a site known as the Moxon Street car park in Marylebone.

2. The application for permission to apply for judicial review was refused by Hickinbottom J on 20th April 2016. On a renewal application to Ouseley J on 12th May 2016, a “rolled up” hearing was ordered.

(b) the proposed development, the objections and the Planning Officer’s Report

3. That site is a single level car park owned by the Council, which site had been cleared of buildings in a slum clearance programme in 1966. It had been kept for educational use as a school, but is no longer required for that purpose. Part of the site is used on Sundays for a Farmer’s Market for 30-40 stalls. A Planning Brief had been prepared by WCC in 2009. That Brief proposed a largely educational use. Also regarded as suitable uses alongside education were social and community uses, small scale leisure to serve local residents and workers, and a retained Farmers Market. The Brief also encouraged housing use, including affordable housing. At that time it had been earmarked as a suitable location for an Adult Education project, but that proposal has since been abandoned.

4. The scheme now proposed departed from the Planning Brief to some degree. It contained no educational provision, but was for the provision of a single new building with four street frontages, from which would rise four storeys with two more above them set back, and two basement levels. All of the floors above ground level would be used for residential purposes (a mix of market and affordable housing), while the ground floor and the first basement level would accommodate shops and community uses, including a community hall which on Sundays would form the central part of a Farmers Market in combination with parts of the surrounding streets. Car parking would be provided in the basement.

5. The scheme made provision, within the 79 units, for 25 units of affordable housing, defined in the related s 106 agreement as “subsidised housing that will be available to persons who could not afford to rent or buy houses generally available on the open market.”

6. The scheme attracted some support and some objections. The objections included an objection from the Howard De Walden Estate which is the freeholder of much of the adjoining land. While generally supportive of the scheme, the estate submitted that the scheme did not contain enough affordable housing. It also raised concerns about massing, design and the effects on daylight, which are not relevant to the issue before the Court. They included objection to the provision of retail units and restaurants, and concerns about the way in which the Farmers’ Market was to be accommodated.

7. WTF objected by its solicitors. It noted that its clients were the lessees of a building on Aybrook Street. After reciting the success of WTF as a film company and taking the trouble to list some of the very well known people with whom it dealt, it turned to its actual concerns. It adopted the objections of the Howard de



Walden Estate, but without identifying the objections in question.. It went on to complain of what it called “gross over development” and raised concerns about the effects of noise and vibration on meetings and editing, and about the effect of the scheme on the townscape of the area. However, it accepted the principle of the redevelopment of the site. Its objections were concerned with the way in which it was to be achieved. It is to be noted that none of those objections figure in the case it put before this Court at the hearing before me.

8. There was a lengthy and thorough Planning Officer’s report, which recommended approval. It addressed the full range of policies in the Development Plan and in national policy which were germane to the proposal, and all the points of objection. It is unnecessary to recite most of them, because the issues now relevant to this challenge can be shortly stated.

9. In the report, it referred to the issue of the Farmers’ Market. WCC was also to consider a separate proposal closing Aybrook Street and other streets, for the purpose of holding a Farmers’ Market, which would result in the Farmers’ Market being accommodated partly within the community hall in the scheme, and partly within those highways. It had received a great deal of public support. Having identified this proposal the report went on

” As previously mentioned there is no specific policy requirement to provide the market (although it is an aspiration of the planning brief) and so the solution proposed is considered to be an imaginative way to retain the facility and at the same time achieve a wider community benefit in the form of a multi-purpose hall available for other community groups outside of market days. The hall would be leased at a peppercorn rent to the City Council who would manage it, thereby ensuring its continued availability for market use. The City Council would facilitate a programme for using the space which would be licensed for cultural, enterprise and arts events, funded by the rents received but run on a not for profit basis.”

It went on to identify WCC City Plan Policy S 34 as encouraging such a proposal.

10. There were other elements of social and community use provided in the development: a space which could be used for a doctor’s surgery and a space for a health club. Neither require further comment here.

11. The report also dealt with the question of affordable housing. UDP policy H4 and City Plan Policy S16 sought provision of affordable housing within large residential developments. WCC’s informal policy (i.e. not derived from the Development Plan) was that 35% of the residential floorspace provided should be provided in the form of affordable housing. The Planning Officer’s report stated:

”the proposed scheme provides 3411 m2 of affordable housing which is 27% of the total residential floorspace. The applicant’s argument for providing less than the policy compliant amount is that the scheme also provides an amount of social and community provision which is in excess of that required by planning policy but which is provided in order to meet more of the other aspirations of the planning brief. In particular a community hall is being ...included which is being given to the City Council as a peppercorn rent and which will secure the continuation of the farmer’s Market as well as providing for other community purposes. It is accepted that the social and community provision of this site is exceptionally high.....and in normal circumstances the provision of a GPs surgery and a health club would be sufficient provision, and that the community hall is therefore an added benefit.

It is also considered that the provision of a public car park only 20 spaces short of its current capacity when the planning brief only required ‘some pay and display’ replacement spaces is also an added benefit to the continued wellbeing of the District Centre.

It is therefore accepted that the level of social and community uses and public car parking significantly enhances the development.

The applicant’s submitted viability study states that the full amount of affordable housing cannot be achieved because of the cost of providing the community hall and replacement public car parking. For economic viability reasons these would have to be removed from the scheme in order to achieve 35% affordable housing. The applicant’s viability study has been reviewed by an independent consultant appointed by the City Council who agrees with these conclusions. It is considered that in these circumstances it is more beneficial for the scheme to provide the community hall and replacement car public car park balanced against a reduced amount of affordable housing in order to provide a better overall development.”

12. The Report also addressed the issue of planning obligations. Having referred to the [CILR 2010](#) , it said that

”For reasons outlined elsewhere in this report, a 106 legal agreement will be required to secure the following:

- Provision of 25 affordable housing units on the site and control of rental levels attached thereto.
- The provision of the proposed community hall to the City Council at a peppercorn rent”

(Only those provisions of relevance to the claim are included)

(c) the planning permission and the s 106 agreement

13. The permission granted was subject to 35 conditions. Many of them were protective of the interests of neighbouring or nearby occupiers (for example those relating to the control of demolition operations, internal storage of waste, parking provision and noise). Another required the provision of at least 75 residential units, but no more than 79.

14. There was also an agreement under [s 106 TCPA 1990](#) whereby MSR entered into various obligations. They included

i) an obligation not to occupy more than 50% of the market housing units (i.e. the 54 units which were not affordable housing units) until the 25 affordable housing units had been completed, made ready for occupation, and transferred into the ownership of a Registered Provider approved by the WCC Director of Housing;

ii) an obligation to lease the community hall within the scheme to WCC at a peppercorn rent in accordance with the ‘Community hall specification,’ and other reasonable terms to be agreed. The community hall was to be provided, fitted out, prior to first occupation of a residential unit, and leased for 125 years for “social and community use” which was defined as “ the provision of social and community facilities to serve the needs of local communities and others provided by the City Council or a local service provider or which are funded by a government department or a public body or voluntary sector with in Class D1 and/or Class D2 of the [Town and Country Planning \(Use Classes\) Order 1987](#) .” That specification also identified the degree of fitting out required for handover.

15. For completeness, the relevant Use Classes in the [Town and Country Planning \(Use Classes\) Order 1987](#) are:

”Class D1. Non-residential institutions

Any use not including a residential use —

(a) for the provision of any medical or health services except the use of premises attached to the residence of the consultant or practioner,

(b) as a crèche, day nursery or day centre,

(c) for the provision of education,

(d) for the display of works of art (otherwise than for sale or hire),

(e) as a museum,

- (f) as a public library or public reading room,
- (g) as a public hall or exhibition hall,
- (h) for, or in connection with, public worship or religious instruction.

Class D2. Assembly and leisure

Use as —

- (a) a cinema,
- (b) a concert hall,
- (c) a bingo hall or casino,
- (d) a dance hall,
- (e) a swimming bath, skating rink, gymnasium or area for other indoor or outdoor sports or recreations, not involving motorised vehicles or firearms.”

(d) the challenge by WTF

16. That grant of permission is now challenged by WTF. Although five grounds were originally advanced, only one ground was maintained before me, which was not included in the original Claim, but first appeared in the Claimant’s Reply to the Summary Grounds of Resistance of the Defendant WCC. That is an allegation that the provisions of the s 106 agreement recited at paragraph 14(ii) above were in breach of [Regulation 122 of the CILR 2010](#) , on the basis that it was not necessary to provide the Community Hall to make the development acceptable in planning terms.

17. Mr Booth accepted that there was nothing objectionable as such in the community hall being let to WCC at a peppercorn rent, nor to its being used for uses within Classes D1 or D2. His objection related simply to his contention that WCC should not have taken into account the benefits achieved through the s 106 agreement. When asked what it was that his clients now objected to about the development, it was that (1) WTF had an interest as a good resident of the City in seeing the maximisation of affordable housing and (2) that it had a fundamental objection to the community hall being capable of being used by WCC to generate revenue. He submitted that the hall need not be used for a Farmer’s Market, but could be used for any purpose within Use Classes D1 and D2, and be a source of revenue to the Council. When asked why it was that that was objectionable from a planning point of view, Mr Booth informed the court that it was objectionable, because it might be let to anyone, giving the example of a film show for Russian oligarchs.

(e) Discussion

18. I heard very short submissions from Ms Kabir Sheikh QC for WCC (which I stopped when I had no need to hear from her further) and none from Mr Russell Harris QC, because I did not consider that this claim called for any reply.

19. I shall start by saying something of the provenance of [Regulation 122 of CILR 2010](#) . It reads

- (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
- (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

- a) necessary to make the development acceptable in planning terms;
- b) directly related to the development; and
- c) fairly and reasonably related in scale and kind to the development.”

20. The test of necessity in [Regulation 122\(2\)](#) (a) was originally not a test in law of the materiality of a planning obligation. Indeed that was the reason why the challenge failed in *R v Plymouth City Council ex p Plymouth and S Devon Co-op Society Ltd* [1993] 67 P and CR 78 . It was a test of policy, and not a test in law – see Hoffman LJ in Plymouth at page 90, and Lord Keith in *Tesco Stores v Environment Secretary* [1995] 1 WLR 759 at 769 D-770 A, Lord Hoffman at p 777 B-C, 780 A-781C. The tests in (b) and (c) in [Regulation 122](#) also go wider than the law did before its enactment. The test of materiality in law was hitherto that to be material, the provisions in a 106 obligation (a) had to have a planning purpose, (b) be related to the permitted development and (c) not be *Wednesbury* unreasonable (see Russell LJ in Plymouth at p 82 and Hoffman LJ at p 87). It follows that there are now tests in law which to some degree were not tests of law before their enactment. While I agree with him that the effect of [Regulation 122](#) was drawn from previous Circulars, I respectfully disagree with Bean J in *Welcome Break Group and Others v Stroud DC and Gloucestershire Gateway Ltd* [2012] EWHC 140 at paragraphs 49 and 50 where he treats the ratio of the *Tesco* case on the issue of necessity as still holding good. It is clear that the question of what is “necessary” is now a test in law, which it was not beforehand.

21. I refer also to the decision of the Court of Appeal in *R(Hampton Bishop PC) v Herefordshire Council* [2014] EWCA Civ 878 at [46] where Richards LJ said

” [Regulation 122](#) can be seen in part as a codification of principles developed in the case law.”

22. That is undoubtedly true. However in *Oxfordshire CC v SSCLG and others* [2015] EWHC 186 (Admin) that was cited incorrectly at [22] as

” [Regulation 122](#) can be seen *as part of* a codification of principles developed in the case law.”

With respect, that is what it was not. It is in part, but it includes matters which were drawn from previous tests of policy, which had been expressly rejected by the Courts as tests in law of materiality.

23. I therefore turn to apply the tests in law found in [Regulation 122](#) . One must remember that the Community Hall was proposed in the application, and neither its provision, nor use, nor management are matters unrelated to the development in question. It is not suggested by Mr Booth that use of it for Class D1 or D2 purposes is objectionable per se, it having been permitted by the consent. His claim rests on the idea that it is objectionable for those uses to be carried on by the City Council in a way which produces some revenue (i.e. that the Council would charge for its use).

24. I shall start with the tests in (b) and (c). In this case the provisions of the [s 106](#) agreement make the community hall available to the City Council as a way of ensuring that best use be made of it for community purposes. The Claimant could not and did not suggest any other way of achieving that end. That community hall formed part of the application. Given also that (rightly) the Claimant has no objection to the mechanism of the lease to the Council, it follows that it is directly related to the development. It is also plainly for a planning purpose, namely to see the community hall part of the development put to best use and effectively managed. Further there is no suggestion, nor could there be, that it does not fairly and reasonably relate in scale and kind to the development. That deals with sub-paragraphs (b) and (c).

25. Turning to (a), the question of whether it is necessary, the terms of the officer’s report show that he was approaching it on the basis that the community benefit realised by provision of the Community Hall compensated for the fact that there would be an underprovision of affordable housing. In my judgement that was a planning judgement which the Council was entitled to make. Mr Booth QC sought to argue that relying on the fact of those benefits to compensate for the failure to achieve the higher percentage of affordable housing was a breach of [Regulation 122](#) . I disagree. Matters of weight and of planning judgement are for the decision maker, and the officer and his Council were perfectly entitled to think that the gain in one area made

up for the loss in another. The exercise of judgement such as this is what has to happen when local planning authorities have to deal with planning applications in the real world. In the sense used in [Regulation 122](#), this [s 106](#) obligation was necessary, because it provided a countervailing benefit to set against the disadvantage of the underprovision of affordable housing.

26. So if any issue remains, it is WTF's objections to WCC controlling the uses as occupier. That cannot amount to an objection of any substance at all. If the community hall were not leased to WCC, MSR could lease it to anyone it wished, and there would be no breach of planning control in their doing so. WCC has said that it would not seek to make a profit, but even if it did so, that could not amount to an objection in planning terms. For underlying this claim is what appears to me to be a singular lack of understanding of how community provision is often made in this country. To listen to the case for WTF, and its worries that there may be private film clubs making use of the hall, one wondered if WTF and its advisers have any real grasp of what community facilities are, and how they are provided in the real world. Throughout the country there are community facilities owned by local authorities (be they city, borough, unitary, district, town or parish councils) which can be hired for community events. Some may be open to the public for an admission fee (e.g. the local suburban dramatic society or the annual parish flower show) and some may not be open, but still involve payment to the Council (e.g. a wedding, or a keep fit class where one has to pay to take part). Some may be completely free to those attending, like (one suspects) a Farmer's Market, but still involve a charge being made by the Council to the organisers. Those are but examples. There is a whole range of activities which could take place, and properly so. That is the point of a community hall. Film enthusiasts might even be able to arrange a film evening for its members showing Working Title's excellent productions, or those more appealing to special interest groups, such as Russian emigrés (oligarchs or otherwise) who appreciate the films of, for example, Eisenstein or Tarkovsky. The Council will of course make a charge for use to those who book the hall, just as the MSR or any other lessee would have done had MSR not decided to lease it to WCC. Try hard though I have, I have been quite unable to understand why that prospect is in any sense objectionable.

27. Under [s 70 TCPA 1990](#) WCC was required to have regard to the Development Plan and to all material considerations, and by virtue of [s 38\(6\) PCPA 2004](#) it was required to determine the application in accordance with the Development Plan unless material considerations indicated otherwise. There was no suggestion before me that it failed in either respect. It was plainly material that the obligation in the 106 agreement would lead to the most effective use of the community hall.

28. I consider that this claim is one which is totally without merit. Permission to apply for judicial review is refused.