



Ministry of Housing,
Communities &
Local Government

Mr M Steinbrecher
Winckworth Sherwood
Minerva House
5 Montague Close
London SE1 9BB

Our ref: APP/P4605/W/20/3250072

8 March 2021

Dear Sir,

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL MADE BY EUTOPIA LAND LIMITED (C/O EUTOPIA HOMES LIMITED)
193 CAMP HILL, BIRMINGHAM B12 0JJ
APPLICATION REF: 2018/09467/PA**

1. I am directed by the Secretary of State to say that consideration has been given to the report of J A Vyse DipTP DipPBM MRTPI, who held a public local inquiry between 6-13 October 2020 into your client's appeal against the decision of Birmingham City Council to refuse your client's application for planning permission for redevelopment to provide 480 homes, a hotel (Use Class C1), and flexible business/commercial units (Classes A1, A2, A3, B1, B2, B8 and D1), together with car parking, landscaping and associated works, including an energy centre to provide for combined heat and power and plant to serve the development, in accordance with application ref: 2018/09467/PA, dated 16 November 2018.
2. On 8 June 2020 this appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the application be approved and planning permission granted.
4. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, except where stated, and agrees with her recommendation. He has decided to grant planning permission. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report. The Secretary of State notes that the IR contains two paragraphs labelled 11.25. For the purposes of this letter he will refer to the first one, wholly on page 66, as paragraph IR11.25a, and the second, between pages 66 and 67, as IR11.25b.

Ministry of Housing, Communities & Local Government
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Matters arising since the close of the inquiry

5. An application for a full award of costs was made by Eutopia Land Limited (c/o Eutopia Homes Limited) against Birmingham City Council (IR1.5). This application is the subject of a separate decision letter.

Policy and statutory considerations

6. In reaching his decision, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.
7. In this case the development plan comprises the Birmingham Development Plan 2017, saved policies from the Birmingham Unitary Development Plan 2005 and the Bordesley Park Area Action Plan 2020. The Secretary of State considers that relevant development plan policies include those set out at IR 4.2-4.18.
8. Other material considerations which the Secretary of State has taken into account include the National Planning Policy Framework ('the Framework') and associated planning guidance ('the Guidance'), and the documents set out in IR4.19-4.23.
9. In accordance with section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the LBCA Act), the Secretary of State has paid special regard to the desirability of preserving those listed buildings potentially affected by the proposals, or their settings or any features of special architectural or historic interest which they may possess.

Main issues

Effect of the proposals on the Camphill Rail Chord Scheme

10. There is no dispute that, in general terms, the appeal site occupies a sustainable location, is suitable for the development proposed, is an appropriate use of the site in terms of planning policy and is substantially in accordance with the development plan (IR11.8). The Inspector identifies that the principle matter at dispute is whether the appeal scheme could preclude delivery of the Camp Hill Chord and whether any potential for prejudice to its delivery (insofar as it may present a design constraint on the project) is a material consideration such that planning permission should be refused (IR5.5, IR11.11). The Secretary of State has carefully considered the Inspector's assessment of the main consideration at IR11.1–11.47 and IR11.51-11.70 and for the reasons given at IR11.1– IR11.13 agrees with his conclusions as to the key material consideration.
11. For the reasons given at IR11.14-11.18 the Secretary of State agrees with the Inspector (IR11.18) that the strategic large-scale policy objectives of TP38 and TP41 are significant material considerations in this case. He further agrees, for the reasons given at IR11.19, that while the site is not within the Bordesley Action Plan Area, the objective of reopening the Camp Hill line to passenger services is a significant material consideration in this case. The Secretary of State has taken into account the Inspector's comments on Network Rail's engagement at IR11.20-11.25a, and the analysis of alignments at

IR11.25b to 11.28. He notes that there is no stated objection from Network Rail to the appeal scheme, nor any suggestion that permission should not be granted (IR11.28). He has further taken account of the Inspector's analysis at IR11.29-11.34 in relation to the potential impact of the scheme on Bordesley Station/viaduct widening/electrification. He further agrees with the Inspector's conclusions at IR11.35-IR11.39 on line speed and track curvature.

12. For the reasons set out by the Inspector at IR11.40, the Secretary of State agrees that the location of the buildings which form the scheme would allow a range of construction methods to be used, and make the compulsory acquisition of the appeal site at least less likely if not unnecessary.
13. The Secretary of State has given careful consideration to the Inspector's analysis of the main consideration at IR11.51-11.70 and agrees with her conclusions. The Secretary of State notes at IR11.51-11.54 that it is agreed by all parties, that the extent of any land take required to deliver the south-west Chord cannot be determined presently with any degree of certainty. For the reasons stated the Secretary of State agrees with the Inspector at IR11.54 that it cannot be said definitively, at this point in time on the evidence available, that the appeal scheme would or would definitely not prejudice delivery of the Chords.
14. For the reasons stated at IR11.55-11.65, the Secretary of State agrees with the Inspector (IR11.65) that were the development proposed to go ahead, the ability to construct the south-west Chord would not be lost. He further agrees, for the reasons given, that there would be limited potential for prejudice to delivery of the Chords, in particular the south west Chord. He further agrees that any potential prejudice would be limited in its extent (IR11.65).
15. The Secretary of State has considered the Inspector's analysis of the appropriate 'tests' in relation to the main consideration put forward by the parties at IR11.66-11.67 and agrees with her conclusions for the reasons given.
16. The Secretary of State agrees with the Inspector's analysis at IR11.68-11.69 about the possibility of the appeal scheme prejudicing delivery of the Chords and at the nature and extent of that possible prejudice. For the reasons stated there, the Secretary of State agrees that the potential for prejudice is limited and thus, the effect of any prejudice would be similarly limited. He therefore affords this matter limited weight.
17. For the reasons given at IR11.70, the Secretary of State agrees that there would be no conflict with paragraphs 102 (a) and (b) or paragraph 103 of the Framework. However, he further agrees that to the extent that there is some, albeit limited, potential for prejudice, there would be conflict with the strategic objectives reflected in policies T38 and TP41 of the BDP and the Area Action Plan. He further agrees that this would bring the scheme into conflict with the development plan as a whole. His analysis of this conflict is set out in his conclusions on the planning balance below.

Housing Land Supply and affordable homes

18. The Secretary of State notes the Inspector's conclusion at IR11.50 that the housing requirement set out in the Birmingham Development Plan falls significantly short of meeting identified needs, with a shortfall across the Plan period to 2031 of some 37,900 homes. For the reasons stated at IR11.50, the Secretary of State agrees that the

provision of 480 homes carries substantial weight in favour of the scheme and the provision of affordable housing carries moderate weight.

Other benefits of the Scheme

19. In terms of the benefits of the proposal beyond housing provision (which are outlined above) the Secretary of State agrees with the Inspector and finds that the economic benefits through employment during construction and through a construction employment plan maximising training opportunities (IR11.49), each carry substantial weight in favour of the scheme due to its potential to address unemployment in Birmingham and the wider West Midlands Combined Authority Area.
20. The Secretary of State notes the Inspector's finding that expenditure by construction workers in the local economy should attract moderate weight in favour. However, the Secretary of State considers that this benefit is covered by the weight given to employment above (IR11.49).
21. The Secretary of State agrees that the delivery of a new hotel would enhance the supply of business and leisure tourism accommodation, supporting the drive to expand the visitor economy and therefore considers that it carries substantial weight in favour of the proposal (IR11.50).
22. He further considers that the economic contribution of future residents to the scheme attracts substantial weight, as do the Gross Value Added (GVA) benefits for Birmingham City Council and the wider region (IR11.50).
23. He further agrees with the Inspector's conclusions at IR 11.50 about other benefits: net biodiversity gains across the site; the economic benefit of the addition of approximately 800-100 additional residents to the area; the jobs on site from the hotel and flexible workspace; and the provision of a range of uses which will ensure vitality and activity throughout the day, as well as increased natural surveillance to the surrounding streets, enhancing safety and the visual amenity of the site. The Secretary of State considers each of these benefits carries moderate weight.

The extent to which the proposed development is consistent with policies for conserving and enhancing the historic environment

24. The Secretary of State agrees that there are no heritage assets which would be directly affected by the appeal scheme, but the site lies within the setting of a number of listed buildings, locally listed buildings and a Conservation Area (IR11.41). The Secretary of State notes the Inspector's list of heritage assets which have the potential to be affected by the development proposed as a result of changes to their setting, as identified at IR11.43.
25. For the reasons given at IR11.44 the Secretary of State has concluded that overall that any harm to the setting of Holy Trinity Church would be at the lowest end of less than substantial in terms of the Framework. In accordance with the s.66 duty, he attributes considerable weight to the harm. The Secretary of State has considered whether the identified 'less than substantial' harm is outweighed by the public benefits of the proposal.
26. For the reasons stated at IR11.45, the Secretary of State agrees with the Inspector's conclusion in relation to the setting of the conservation area, that although the development proposed would be of contrasting scale to the buildings currently on the

appeal site, there would be no harm to the significance of the identified heritage assets. He further agrees with the Inspector's analysis at IR11.46 and 11.47 that there would be no harm to other heritage assets.

27. Overall the Secretary of State considers that the benefits of the appeal scheme are collectively sufficient to outbalance the identified 'less than substantial' harm to the significance of Holy Trinity Church. He considers that the balancing exercise under paragraph 196 of the Framework is therefore favourable to the proposal.

Planning conditions

28. The Secretary of State has given consideration to the Inspector's analysis at IR10.1-10.15, the recommended conditions set out at the end of the IR and the reasons for them, and to national policy in paragraph 55 of the Framework and the relevant Guidance. He is satisfied that the conditions recommended by the Inspector comply with the policy tests set out at paragraph 55 of the Framework and that the conditions set out at Annex B should form part of his decision.

Planning balance and overall conclusion

29. In so far as the appeal scheme has the potential to affect delivery of the future rail Chord, albeit to a limited extent as outlined above, the Secretary of State has concluded that the proposal is thus not in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
30. The contribution to meeting housing need in Birmingham carries substantial weight with the provision of affordable housing carrying moderate weight. The provision of flexible work space attracts limited weight. It would also lead to the creation of a new hotel which would contribute to the tourist economy, to which he affords substantial weight. The employment provided by the construction, and the employment plan, each attract substantial weight in favour. The GVA benefits and the economic benefits provided by new residents each attract substantial weight. There would also be contributions in terms biodiversity, new younger residents, ongoing employment opportunities, together with enhanced security, as outlined above, each of which carry moderate weight in favour.
31. Although less-than-substantial, there would be harm to the setting of a number of Holy Trinity Church. In accordance with the s.66 duty, the Secretary of State attributes great weight to the harm. The Secretary of State has concluded in paragraphs 29 of this Decision Letter that the identified 'less than substantial' harm to the significance of the designated heritage assets identified at IR11.41 is outweighed by the public benefits of the proposal. He considers that the balancing exercise under paragraph 196 of the Framework is therefore favourable to the proposal.
32. Overall the Secretary of State considers that the material considerations in this case indicate a decision other than in accordance with the development plan. The Secretary of State therefore concludes that the appeal should be allowed and planning permission granted.

Formal decision

33. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby allows your client's appeal and grants planning permission for redevelopment to provide 480 homes, a hotel (Use Class C1), and flexible

business/commercial units (Classes A1, A2, A3, B1, B2, B8 and D1), together with car parking, landscaping and associated works, including an energy centre to provide for combined heat and power and plant to serve the development, in accordance with application ref: 2018/09467/PA, dated 16 November 2018.

34. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than section 57 of the Town and Country Planning Act 1990.

Right to challenge the decision

35. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the Town and Country Planning Act 1990.

36. A copy of this letter has been sent to Birmingham City Council, and to The Consortium. Notification has been sent to others who asked to be informed of the decision.

Yours faithfully

Phil Barber

This decision was made by the Secretary of State and signed on his behalf

ANNEX A - SCHEDULE OF REPRESENTATIONS

General representations

Party	Date
Jeremy Brettingham	3 February 2020
George Mahood	11 February 2020
Jennifer Aldous	11 February 2020
Miriam Barnett	13 February 2020
Dr Ksenija Ivir-Ashworth	28 February 2020
Rebecca Rose	3 March 2020
Simon Jervis	29 April 2020
Alex Russell-Davis	31 May 2020
Andrew Boswell	14 September 2020

Annex B – Conditions

Schedule of recommended conditions based on the list appended to the Statement of Common Ground, the additional conditions at ID8 and the related discussion at the Inquiry

Commencement of development

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.

Plans

- 2) Unless required otherwise by any of the following conditions, the development hereby permitted shall be carried out in accordance with the following approved plans:

Site plans	
Site Location Plan	P-S001
Existing Site Plan	P-S002
Existing Elevations	E-100
Proposed Site Plan	P-S004 P3
General arrangement elevations	
GA Elevation - West - Zone 1	E-300 P1
GA Elevation - North - Zone 1	E-301 P1
GA Elevation - East - Zone 1	E-302 P1
GA Elevation - South - Zone 1	E-303 P1
GA Elevation - East Inner - Zone 1	E-304 P1
GA Elevation - North Inner 1 - Zone 1	E-305 P1
GA Elevation - North Inner 2 - Zone 1	E-306 P1
GA Elevation - East - Zone 2	E-307 P1
GA Elevation - South - Zone 2	E-308 P3
GA Elevation - West - Zone 2	E-309 P1
GA Elevation - North - Zone 2	E-310 P3
GA Elevation - East Inner - Zone 2	E-311 P1

GA Elevation – East and West Elevation	E-312 P1
GA Elevation – South Inner – Zone 1	E-314
GA Elevation – West Inner – Zone 2	E-315 P1
GA Elevation – West	E-320 P1
GA Elevation – East	E-321 P1
Block elevations	
Block A - Detail Elevation 01	E-350
Block A - Detail Elevation 02	E-351
Block A - Detail Elevation 03	E-352
Block B - Detail Elevation 01	E-353
Block B - Detail Elevation 02	E-354
Block B - Detail Elevation 03	E-355 P1
Block C - Detail Elevation 01	E-356 P1
Block C - Detail Elevation 02	E-357
Block C - Detail Elevation 03	E-358
Block D - Detail Elevation 01	E-359 P1
Block D - Detail Elevation 02	E-360
Block E - Detail Elevation 01	E-361 P1
Block E - Detail Elevation 02	E-362
Block E - Detail Elevation 03	E-363
Block F-G - Detail Elevation 01	E-364 P2
Block F-G - Detail Elevation 02	E-365 P2
Block F-G - Detail Elevation 03	E-366 P2
Central street elevations	
Central Street – North Elevation	E-500

Central Street – South Elevation	E-501 P1
Floor plans	
Ground Floor Plan - Zone 1	P-200 P1
Ground Floor Plan - Zone 2	P-200 P2
Podium Floor Plan - Zone 1	P-201 P1
Podium Floor Plan - Zone 2	P-201 P2
Level 01 Floor Plan - Zone 1	P-202 P1
Level 01 Floor Plan - Zone 2	P-202 P2
Level 02 Floor Plan - Zone 1	P-203 P1
Level 02 Floor Plan - Zone 2	P-203 P2
Level 03 Floor Plan - Zone 1	P-204 P1
Level 03 Floor Plan - Zone 2	P-204 P2
Level 04 Floor Plan - Zone 1	P-205 P1
Level 04 Floor Plan - Zone 2	P-205 P2
Level 05 Floor Plan - Zone 1	P-206 P1
Level 05 Floor Plan - Zone 2	P-206 P2
Level 06 Floor Plan - Zone 1	P-207 P1
Level 06 Floor Plan - Zone 2	P-207 P2
Level 07 Floor Plan - Zone 1	P-208 P1
Level 07 Floor Plan - Zone 2	P-208 P2
Level 08 Floor Plan - Zone 1	P-209 P1
Level 08 Roof Plan - Zone 2	P-209 P2
Level 08-18 Floor Plan - Zone 1	P-210 P1
Level 19-20 Floor Plan - Zone 1	P-211 P1
Level 21 Floor Plan - Zone 1	P-212 P1

Level 22 Floor Plan - Zone 1	P-213 P1
Level 23 Floor Plan - Zone 1	P-214 P1
Level 24 Floor Plan - Zone 1	P-215 P1
Level 25 Roof Plan - Zone 1	P-216 P1
Unit types	
Unit 1 – Studio Type 1	P-250
Unit 2 – 1 Bed Type 1	P-251
Unit 3 – 1 Bed Type 2	P-252
Unit 4 – 1 Bed Type 3	P-253
Unit 5 – 1 Bed Type 4	P-254
Unit 6 – 1 Bed Type 5	P-255
Unit 7 – 1 Bed Type 6	P-256
Unit 8 – 1 Bed Type 7	P-257
Unit 9 – 1 Bed Type 8	P-258
Unit 10 – 2 Bed Type 1	P-259
Unit 11 – 2 Bed Type 2	P-260
Unit 12 – 2 Bed Type 3	P-261
Unit 13 – 2 Bed Type 4	P-262
Unit 14 – 2 Bed Type 5	P-263
Unit 15 – 2 Bed Type 6	P-264
Unit 16 – 3 Bed Type 1	P-265
Unit 17 – 3 Bed Type 2	P-266
Unit 18 – 4 Bed TH Type 1	P-267 P1
Sections	
Section AA	X-100 P1
Section BB	X-101 P2

Section CC	X-102 P1
Section DD	X-103 P1
Section EE	X-104
Section FF	X-105 P1
Section GG	X-106 P1
Section HH	X-107 P1
Site wide floor plans	
Ground Floor Plan	P-0G0 P2
Podium Floor Plan	P-0P0 P2
Level 01 Floor Plan	P-001 P2
Level 02 Floor Plan	P-002 P2
Level 03 Floor Plan	P-003 P2
Level 04 Floor Plan	P-004 P2
Level 05 Floor Plan	P-005 P2
Level 06 Floor Plan	P-006 P2
Level 07 Floor Plan	P-007 P2
Level 08 Floor Plan	P-008 P2
Level 09-18 Floor Plan	P-009 P2
Level 19-20 Floor Plan	P-019 P2
Level 21 Floor Plan	P-021 P2
Level 22 Floor Plan	P-022 P2
Level 23 Floor Plan	P-023 P2
Level 24 Floor Plan	P-024 P2
Roof Plan	P-0R0 P2
Other plans	

Development Zones Plan

(06)P-S001

- Zone A = Block D and its environs on all other plans
- Zone B = Block B and its environs on all other plans
- Zone C = Blocks F & G and their environs on all other plans
- Zone D = Block E and its environs on all other plans
- Zone E = Block A and its environs on all other plans
- Zone F = Block C and its environs on all other plans
- Car Park = the triangular surface car park

PRE-COMMENCEMENT CONDITIONS

Site Remediation

- 3) No development shall commence (except clearance of existing buildings and areas of hardstanding) unless and until a Remediation Strategy to deal with the risks associated with contamination of the site has been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved Strategy which shall include, but is not confined to, the following components:
- a) a site investigation scheme, based on previous phase I and phase II site appraisals and the Land Contamination Summary submitted with the application, to provide information for a detailed assessment of the risk to all receptors that may be affected, including those off-site;
 - b) the results of the site investigation and the detailed risk assessment referred to in a) and, based on these, an options appraisal and Remediation Strategy giving full details of the remediation measures required and how they are to be undertaken;

- c) a verification plan providing details of the data that will be collected, in order to demonstrate that the works set out in the Remediation Strategy in b) are complete and identifying any requirements for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action.

Sustainable Drainage (Submission of Scheme)

- 4) No development shall take place until a surface water drainage scheme for the site, based on sustainable drainage principles and an assessment of the hydrological and hydro-geological context of the development, has been submitted to and approved in writing by the local planning authority. The scheme shall demonstrate that there would be no seepage to the Canal or its feeder, which should be protected. The scheme shall be implemented in accordance with the approved details before the development is completed and thereafter maintained in accordance with the provisions of condition 22 below.

Construction

- 5) No development shall commence until a Construction Environmental Management Plan (CEMP) has been submitted to and agreed in writing by the local planning authority. Development shall thereafter be carried out in accordance with the approved CEMP which shall remain in force for the construction period. The CEMP shall include, but is not confined to:
 - i) site management arrangements, including on-site storage of materials, plant and machinery; on-site parking and turning provision for site operatives, staff, visitors and construction vehicles; and provision for the loading/unloading of plant and materials within the site;
 - ii) demolition/construction/delivery hours;
 - iii) measures to mitigate the impact of noise at nearby residential premises, including noise control devices;
 - iv) measures to control the emission of dust and dirt during construction;
 - v) a construction waste management plan that identifies the main waste materials expected to be generated by the development during demolition and construction, together with measures for dealing with such materials so as to minimise waste and to maximise re-use and recycling;
 - vi) location of access/exit points on the site for construction traffic;
 - vii) the erection and maintenance of signage at all vehicular exits from the construction site advising drivers of preferred approach and exit routes to the site; and
 - viii) a crane management and protection plan.
- 6) Prior to commencement of development a scheme to protect the trees identified for retention in the submitted Arboricultural Impact Assessment (AECOM, Rev. 2, November 2018) or that are on adjoining land, during the construction process shall be submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved scheme. As part of that, no concrete mixing, storage of oil, cement, bitumen or chemicals, no trenches or pipe runs for services or drains, and no alteration of surfaces or ground levels shall take place within 1 metre of the furthest extent of the canopy of any tree or group of trees identified for retention or that are on adjoining land. These measures shall apply for the duration of the construction phase and until all equipment, machinery and surplus materials have been removed from the site.
- 7) No development shall take place, including any works of demolition, until a Construction Employment Plan has been submitted to and approved in writing by

the local planning authority. Development shall thereafter be carried out in accordance with the approved Plan, which shall remain in force for the construction period. The Plan shall provide for a minimum 60 Person Weeks of employment per £1million spend on the construction of the site for New Entrants whose main residence is in the Local Impact Area identified by Birmingham City Council's Employment Team, or an alternative source agreed by the Council, provided always that each New Entrant is suitably qualified for the relevant role. The opportunity can be as an 'apprentice', 'graduate', 'new entrant (job start)', or 'work placement'.

Breeding Birds

- 8) No removal of vegetation or demolition of buildings or structures that may be used by breeding birds shall take place between 1 March and 31 August in any year unless a suitably qualified ecologist has previously undertaken a detailed check for active birds' nests immediately before clearance/ demolition works take place and has provided written confirmation that no birds would be harmed and/or that there are appropriate measures in place to protect nesting bird interest on site. Any such written confirmation shall be submitted to and approved by the local planning authority prior to the works commencing.

Noise Insulation

- 9) No development shall take place in a Development Zone (as defined on plan No (06)P-S001 PL) other than Zone B and the Car Park, until details of a scheme of noise insulation for that Zone, including the specification of glazing and façade treatment, has been submitted to and agreed in writing by the local planning authority.

The facades to the buildings in Zones A, C, E and F shall be constructed to the design specification set out in the memo dated 25 October 2019 contained within the AECOM Composite Acoustic Report dated 6 November 2019.

The facade to the building in Zone D shall be constructed to the design specification set out in the memo dated 1 November 2019 contained within the AECOM Composite Acoustic Report dated 6 November 2019.

Development shall be carried out in accordance with the approved details for each Zone, with the measures installed to be retained thereafter.

Fume Extraction and Odour Control

- 10) No development shall take place in Development Zones B, D, E and F (as defined on plan No (06)P-S001 PL) until details of extract ventilation and odour control equipment for the ground floor non-residential uses within that Zone, including any details of any noise levels from fixed machinery, noise control, and external ducting has been submitted to and approved in writing by the local planning authority. Extraction from commercial cooking facilities shall be to roof level. Development shall be carried out in accordance with the approved details for each Zone, with the approved measures to be installed and operational prior to those premises being brought into use. The approved measures shall be retained and maintained thereafter.

EARLY STAGE AND PRE-OCCUPATION CONDITIONS

Materials/Detailing

- 11) Notwithstanding any indication on the approved drawings, no above ground works within any Development Zone (as defined on plan No (06)P-S001 PL) other than the Car Park, shall take place until the following full architectural and specification details (at a scale of 1:10) and samples where relevant, have been submitted to and approved in writing by the local planning authority:
- i) windows: overall design, glazing bar and frame dimensions and arrangement, materials, reveal, opening mechanism, handles, latches and locks;
 - ii) external doors: overall design, dimension of frames/architraves, arrangement of materials and individual components and members, materials, reveal, opening mechanism, handles, latches and locks;
 - iii) roofs: finish and fixing
 - iv) rainwater goods: design, location, materials, finish and fixing; and
 - v) masonry: position, form and bonding.

Development shall be carried out in accordance with the approved details/samples.

Affordable Housing

- 12) No part of the development hereby permitted shall be occupied until an affordable housing scheme has been submitted to and approved in writing by the local planning authority to secure 24 residential units within the development as affordable housing, to be provided as discount market sale units in accordance with the definition within Annex 2 of the National Planning Policy Framework (or any future guidance that replaces it). The scheme to be submitted shall include details of the following:
- a) the location of the discount market sale units, which shall comprise 11 x one bedroom units, 11 x two bedroom units, 1 x three bedroom unit and 1 x townhouse (with a parking space for the townhouse) (or other such mix as may be agreed in writing by the local planning authority) and the proposed specification, which shall be no less favourable than the open market residential units;
 - b) the terms on which an affordable housing unit will be disposed of at no more than 80% of open market value, which shall include covenants imposed on future purchasers to ensure that the future ownership and selling price of the relevant unit shall be controlled so that the units remain as affordable housing in perpetuity;
 - c) provisions to ensure that each affordable housing unit:
 - i) is first offered for sale to and for exclusive occupation by persons on the Council's register of persons who cannot afford to buy properties generally available on the open market who shall own and occupy the relevant unit as his or her or their sole residence, and then;
 - ii) after three months of the relevant unit being completed, marketed and available in accordance with paragraph i) above, any relevant unit without an unconditional contract for sale having been entered into may also be offered for sale to, and for exclusive occupation by, a single person with a gross annual income not exceeding £30,000 or two persons with a gross annual income not exceeding £45,000 (or, following a review in accordance with the Council's policy, for the time being such other figure specified by the local planning authority) who shall own and occupy the relevant unit as his/her/their sole residence;
 - d) details of the marketing of the units to be undertaken with the relevant cascading of any criteria for a purchaser of an affordable housing unit; and,

- e) suitable exclusions for a mortgagee or chargee in possession, or any receiver (or administrative receiver) appointed thereby (or any successors in title thereto) of an affordable housing unit.

Development shall be carried out in accordance with the approved details and the affordable housing units shall be retained in accordance with the approved scheme.

- 13) No open market residential units in any Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied until the affordable housing units in that Zone have been completed and made available in accordance with the approved affordable housing scheme pursuant to Condition 12 above.

Affordable Workspace

- 14) No part of Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be occupied until an Affordable Workspace Marketing Strategy for the 1,480sqm commercial floorspace approved for A1, A2, A3, B1, B2, B2 and D1 uses within that Zone, has been submitted to and approved in writing by the local planning authority. The Strategy to be submitted shall include details of the following:
 - a) how the affordable workspace will be marketed, including proposed marketing channels;
 - b) the proposed general leasehold terms to be offered to potential workspace providers including:
 - i. indicative fit out to shell and core finish with frontage – (meaning constructed to shell and core standard (in accordance with such building regulations requirements applicable at the time), being construction of the base structure and foundations, installation of beams, columns, floor slabs and roof structure, provision of the building envelope with exterior walls, exterior glazing, roof and area separation walls, lighting, heating, hot water, drainage and sanitation);
 - ii. indicative details of the service charge which shall be calculated in accordance with the RICS service charge code of practice and limited to a fair proportion of the costs associated with the services provided to the building as a whole; and
 - iii. the costs associated with the use and maintenance of the affordable workspace and the proposed rent levels, which shall not exceed 50% of open market value; and
 - c) a timetable for marketing of the affordable workspace to potential providers.Marketing and occupation of the affordable workspace shall be undertaken thereafter in accordance with the approved Strategy.
- 15) No part of Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be occupied until an Affordable Workspace Management Plan for the 1,480sqm of commercial floorspace approved for A1, A2, A3, B1, B2, B2 and D1 uses within that Zone, has been submitted to and approved in writing by the local planning authority. The Management Plan shall include the following:
 - i) any proposed workspace provider;
 - ii) the proposed size and specification of the units within the affordable workspace;

- iii) arrangements for letting the affordable workspace to a workspace provider on terms which provides for sub-letting or other occupational arrangements:
 - for start-ups or SME tenants only (SME being a business that has fewer than 50 employees and either a turnover of up to £10 million or a balance sheet total of up to £10 million);
 - at a rent of no more than 50% of open market value; and
 - any service charge; and
- iv) arrangements for allowing the occupation or leasing of any part of the affordable workspace at a rent of no more than 50% of open market value on a rolling temporary basis (each temporary sub-letting not to exceed three months).

Thereafter, the affordable workspace provided shall be managed and let in accordance with the approved Management Plan.

- 16) No more than 75% of the open market residential units in any relevant Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied until the affordable workspace for that Development Zone has been practically completed to shell and core finish (meaning constructed to shell and core standard in accordance with such building regulations requirements applicable at the time, being construction of the base structure and foundations, installation of beams, columns, floor slabs and roof structure, provision of the building envelope with exterior walls, exterior glazing, roof and area separation walls, lighting, heating, hot water, drainage and sanitation) with a frontage and is available for occupation in accordance with the approved Affordable Workspace Marketing Strategy and Affordable Workspace Management Plan for that Development Zone.

Bird and Bat Boxes

- 17) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/ brought into use until bird nest boxes and bat boxes have been installed in that Zone in accordance with details that have previously been submitted to and approved by the local planning authority. The details to be submitted shall include the design, locations and post-installation maintenance arrangements. Once implemented, the bird and bat boxes shall be retained and maintained thereafter in accordance with the approved details.

Energy Centre

- 18) No part of the development hereby permitted shall be occupied unless and until the Energy Centre as shown on the approved plans has been installed and is operational.

Noise Attenuation

- 19) No residential unit within Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be occupied until a scheme of noise insulation between the ground floor commercial premises and/or plant/parking/ energy centre (where relevant) and the upper floor residential units in that Zone, in accordance with current standards, has been implemented in accordance with details that have

previously been submitted to and approved in writing by the local planning authority. The measures installed shall be maintained thereafter.

Mechanical Ventilation

- 20) No development within Zones A, C, D, E and F (as defined on plan No (06)P-S001 PL) shall be brought into use/occupied unless and until a scheme of mechanical ventilation for the buildings in that Zone have been installed in accordance with details pursuant to the specification set out in the memo dated 31 October 2019 contained within the AECOM Composite Acoustic Report dated 6 November 2019, which shall previously have been submitted to and approved in writing by the local planning authority. The measures installed shall be maintained thereafter.

Air Quality

- 21) No residential unit hereby permitted within any Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied before 1 January 2023 unless otherwise agreed in writing by the local planning authority.

Sustainable Drainage (Operation and Management)

- 22) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/ brought into use until a Sustainable Drainage Operation and Maintenance Plan for the sustainable drainage scheme secured for that Zone by condition 4) above (including arrangements for adoption by an appropriate body and any other arrangements to secure the operation and maintenance of the scheme throughout its lifetime) has been submitted to and approved in writing by the local planning authority. The approved drainage system shall be operated and maintained thereafter in accordance with the approved Plan.

Landscaping

- 23) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/brought into use until soft and hard landscaping for that Zone has been provided in accordance with details that shall previously have been submitted to and approved in writing by the local planning authority. The details to be submitted shall include, but are not confined to:
- i) finished levels or contours and sections through the public spaces;
 - ii) hard surfacing materials;
 - iii) minor artefacts and structures such as seating, raised planters, bollards and lighting, including luminance levels;
 - iv) fully annotated planting plans to a scale of 1:100, showing locations of individually planted trees, shrubs, hedges and areas of grass, including 15 metre high trees on the Coventry Road frontage as referred to in the Pedestrian Level Wind Microclimate Assessment (dated 3 April 2019);
 - v) planting schedules, noting species (particularly pollinator friendly planting), plant sizes and proposed numbers and densities where relevant, paying particular attention to the planting to mitigate the effects of the wind, and the green wall/planter shown on the plans to the south of Block G; and
 - vi) details of a programme of implementation.

The hard and soft landscaping provided pursuant to this condition shall be retained thereafter. Any trees or shrubs which, within a period of five years from the completion of the development die, are removed or become seriously diseased or damaged, shall be replaced in the next planting season with others of similar size and species.

Contamination/Verification Report

- 24) If, during development, contamination not previously identified is found to be present at the site, then no further development shall be carried out until there has been submitted to and approved in writing by the local planning authority an amendment to the Remediation Strategy secured by condition 3 above, detailing how this unexpected contamination will be dealt with. Thereafter, the development shall be implemented in accordance with the approved amended Remediation Strategy.
- 25) With the exception of the Car Park, no Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied unless and until a Verification Report demonstrating completion of the works set out in the approved Remediation Strategy for that Zone pursuant to conditions 3 and 24 above, and the effectiveness of the remediation, has been submitted to and approved in writing by the local planning authority. The Report shall include the results of sampling and monitoring carried out in accordance with the approved verification plan, to demonstrate that the site remediation criteria have been met. It shall also include a scheme for the long-term monitoring of pollutant linkages, maintenance and arrangements for contingency action, as identified in the verification plan, and for the reporting of this to the local planning authority. Development shall be implemented in accordance with the measures set out in that scheme.

Highways/Parking

- 26) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/ brought into use until a package of highway measures for that Zone has been submitted to and approved in writing by the local planning authority and the approved measures are completed in accordance with the approved details. The package of measures shall include (where relevant) removal of redundant footway crossings and laybys and the provision of new laybys, the new one-way access road linking Camp Hill to Bedford Road, and associated footways.
- 27) No development within Development Zones A, B, D, F and the Car Park (as defined on plan No (06)P-S001 PL) shall be occupied or brought into use until visibility splays have been provided at the junction of the access(es) with the public highway within that Zone in accordance with details that have previously been submitted to and agreed in writing by the local planning authority. Once provided, the visibility splays shall thereafter be retained and kept clear of any obstruction.
- 28) Development Zones C, D and F and the Car Park (as defined on plan No (06)P-S001 PL) shall not be occupied or brought into use until car and cycle parking has been constructed, surfaced and marked out in accordance with details that shall previously have been submitted to and approved in writing by the local planning authority. The parking provided shall be retained thereafter for its intended purpose.
- 29) No residential unit in Zone D (as defined on plan No (06)P-S001 PL) shall be occupied unless and until a parking management strategy (including management of disabled/parent and child spaces) has been submitted to and approved in writing by the local planning authority. The car park shall thereafter only be operated in accordance with that approved strategy.

Electric Charging Points/Photovoltaics/Green and Brown Roofs

- 30) Prior to the occupation of any residential unit in Zone D (as defined on plan No (06)P-S001 PL) 12 electric car charging points within the basement car park shall be installed and thereafter retained.

- 31) No part of Development Zones A, D and F (as defined on plan No (06)P-S001 PL) shall be occupied or brought into use until the photovoltaics shown on the approved plans have been installed and brought into use. The photovoltaics shall be retained and maintained thereafter.
- 32) A scheme for the provision and ongoing maintenance of green and/or brown roofs on the flat roofs of the blocks within Development Zones A, D and F (as defined on plan No (06)P-S001 PL) including identified biodiversity benefits, shall be submitted to and approved in writing by the local planning authority prior to the block reaching roof level. Development shall be carried out in accordance with the approved scheme prior to first occupation of the relevant block and shall be retained and maintained thereafter in accordance with the approved details.

POST-OCCUPANY CONDITIONS

Retail Floorspace

- 33) The total floorspace permitted to be used for uses falling within Use Classes A1 to A3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (or in any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order) shall not exceed a total of 1,480 square metres gross external area.
- 34) No single unit permitted to be used for uses falling within Use Classes A1 to A3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (or in any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order) shall exceed 387 square metres gross external area.

Affordable Workspace

- 35) The affordable workspace in Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be provided, operated and occupied in accordance with the approved Affordable Workspace Marketing Strategy and Approved Affordable Workspace Management Plan for that Development Zone for the lifetime of the development.

Removal of Permitted Development Rights

- 36) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development)(England) Order 2015 as amended (or any order revoking and re-enacting that Order with or without modification) the floorspace hereby approved for A1, A2, A3, B1, B2, B8 and D1 uses shall not be used for any residential uses within Use Class C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended, (or in any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order with or without modification).
- 37) Notwithstanding the provisions of Schedule 2, Part 1, Classes A and B of the Town and Country Planning (General Permitted Development) (England) Order 2015, (or any order amending, revoking and/or re-enacting that order, with or without modification) no enlargement, improvement or other alteration of any dwellinghouse approved within Zone C (as defined on plan No (06)P-S001 PL) or its roof, shall be carried out.
- 38) Notwithstanding any indication on Plan P-215 P1 (Level 24 Floor Plan, Zone 1) or any other plan hereby approved, no satellite antenna, apparatus or plant of any sort (including structures or plant in connection with any use for telecommunication systems) shall be installed on the building shown as Block A.

Retained Trees

- 39) No tree identified for retention in the submitted Arboricultural Impact Assessment (AECOM, Rev. 2, November 2018) shall be removed without the prior written approval of the local planning authority. The application for approval shall include provision for a replacement tree in the same location, including details of size and species, a maintenance schedule and a timetable for implementation. Development shall be carried out in accordance with the approved details.

Boundary Treatment

- 40) No boundary treatment within and surrounding each Development Zone (as defined on plan No (06)P-S001 PL) (including security to the Car Park where relevant) shall be installed other than in accordance with details that have previously been submitted to and approved in writing by the local planning authority. The details to be submitted shall include plans showing the locations of existing, retained and proposed new boundary treatments and scaled drawings indicating the positions, height, design, materials, type and colour of the proposed boundary treatments.

Plant and Machinery (Cumulative Noise)

- 41) The rating level ($L_{Ar,T}$) for cumulative noise from all plant and machinery at the development hereby permitted shall not exceed 5 dB below the background level (L_{A90}) at any noise sensitive premises, as assessed in accordance with British Standard 4142:2014+A1:2019 (or any subsequent guidance or legislation amending, revoking and/or re-enacting BS4142 with or without modification).

Hours of Operation/Deliveries

- 42) No deliveries shall be taken at or dispatched from the non-residential premises within Development Zones D, E and F (as defined on plan No (06)P-S001 PL) outside the hours of 07.00 and 19.00 on Mondays to Saturdays or the hours of 09.00 and 19.00 on Sundays and Bank/Public Holidays.
- 43) The non-residential premises within Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall only be open for customers between the hours of 0700 and 0300 on any day.



Report to the Secretary of State

by Mrs J A Vyse DipTP DipPBM MRTPI

an Inspector appointed by the Secretary of State

Date: 7 December 2020

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

APPEAL MADE BY

EUTOPIA LAND LIMITED

AGAINST

BIRMINGHAM CITY COUNCIL

Inquiry opened on 6 October 2020

193 Camp Hill, Birmingham B12 0JJ

Appeal Ref: APP/P4605/W/20/3250072

CONTENTS	PAGE
1. Procedural and Background Matters	3
2. The Site and its Surroundings	4
3. The Proposal	5
4. Planning Policy and Guidance	6
5. Areas of Agreement/Disagreement	9
6. The Case for Eutopia Land Limited - the Appellant	10
7. The Case for Birmingham City Council	28
8. The Case for The Consortium (Rule 6(6) party)	44
9. Written Representations	55
10. Conditions	58
11. Inspector's Conclusions	60
12. Recommendation	78

APPENDICES	PAGE
Appendix A Appearances	79
Appendix B Documents submitted during the Inquiry	80
Appendix C Core documents	81
Appendix D Recommended conditions should permission be granted	84

Appeal Ref: APP/P4605/W/20/3250072
193 Camp Hill, Birmingham B12 0JJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Eutopia Land Limited (c/o Eutopia Homes Limited) against the decision of Birmingham City Council.
- The application No 2018/09467/PA, dated 16 November 2018, was refused by a notice dated 13 February 2020.
- The development proposed is redevelopment of the site to provide 480 homes, a hotel (Use Class C1), and flexible business/commercial units (Classes A1, A2, A3, B1, B2, B8 and D1), together with car parking, landscaping and associated works, including an energy centre to provide for combined heat and power and plant to serve the development.

Summary of Recommendation: That the appeal be allowed.

Documents handed up during the Inquiry are listed at Appendix B below and are prefixed with ID. Core Documents, listed at Appendix C below, are prefixed with CD.

1. PROCEDURAL AND BACKGROUND MATTERS

- 1.1 Notwithstanding a recommendation by officers for approval, the application was refused following a vote by Members.¹ By letter dated 8 June 2020, the appeal was recovered by the Secretary of State for his determination on the grounds that it *'involves proposals for residential development of over 150 units, or on sites of over 5 hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities. The appeal also involves proposals for development of major importance having more than local significance.'*
- 1.2 The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force on 1 September 2020, amending the Town and Country Planning (Use Classes) Order 1987. However, since the planning application was submitted prior to that date, the transitional provisions (Regulation 4) mean that no alteration is required to the description of development in this case, nor any of the suggested conditions.
- 1.3 Three reasons for refusal are cited on the Council's Decision Notice. The first relates to the main consideration in this appeal. Reasons 2 and 3 relate to the absence of any mechanism to secure affordable housing and affordable workspace. As set out in the Statement of Common Ground,² it was a matter of agreement that these matters could be dealt with by a suitably worded planning obligation. The appeal was accompanied by a draft planning obligation to that effect. However, at the start of the Inquiry, having regard to the advice in the Planning Practice Guidance³ I confirmed, on the invitation of the parties, that these matters could properly be addressed by conditions subject to suitable wording. Suggested wording was discussed at the Inquiry.⁴

¹ CD3.1 and CD 3.2

² CD 2.7

³ Paragraph: 011 Reference ID: 21a-011-20140306

⁴ ID8

- 1.4 The Inquiry opened on Tuesday 6 October 2020 and sat for a total of five days (6, 7, 8, 9, 13 October). I undertook the site visit on an unaccompanied basis on the afternoon of 12 October, following an itinerary prepared by the parties,⁵ with the addition of taking in views of the rail geography of the area from the roof of Selfridges car park, as requested during the Inquiry.
- 1.5 At the Inquiry, an application for costs was made by the appellant against Birmingham City Council. That application is the subject of a separate Report.

2. THE SITE AND ITS SURROUNDINGS⁶

- 2.1 The appeal site is located approximately 1 kilometre to the south-east of the centre of Birmingham City Centre within Digbeth, a traditionally industrial area of the City. The site is to the south-west of the City Centre Retail Core area, within the City Centre Growth Area as identified on the Birmingham Development Plan Policies Map and is in an important location at a gateway to the City.
- 2.2 The site includes two parcels of land, to the east and west of Bedford Road which runs through the site. It has a total area of some 1.7ha. To the west, the site is bordered by Camp Hill (B4100) a six lane highway (including bus lanes) at this point. To the north, the site is bounded by Coventry Road which forms the southern boundary of the Digbeth, Deritend and Bordesley High Streets Conservation Area.⁷ To the east is the railway line which is raised some 6-11 metres above Bedford Road, sitting on top of a viaduct comprising brickwork arches along the Bedford Road frontage which are in commercial use. The viaduct continues across Coventry Road to the north of the site. Trinity Terrace bounds the site to the south. On the corner of Trinity Terrace and Old Camp Hill Road is the grade II listed Holy Trinity Church (deconsecrated and currently vacant). Land levels fall generally towards the north and the east of the site, with Trinity Terrace being approximately 6 metres higher than Coventry Road.
- 2.3 The site is previously developed brownfield land and is currently occupied by Sulzer, a Class B2/B8 use. Sulzer, and their predecessor Dowding and Mills, have had a presence on the site since 1912, although the buildings are now in poor condition and are under occupied. As a consequence of the limitations of the site affecting the business, Sulzer are relocating to a new purpose-built facility within the Birmingham area (currently anticipated later this year) after which the site will be vacant.
- 2.4 The larger site parcel to the west of Bedford Road, comprises a variety of C20th workshop and warehousing buildings, together with parking and servicing areas. Buildings occupy the majority of the footprint of the site area, extending up to the back of the footway for much of the Bedford Road frontage, comprising single, two and three storey structures which have developed on an *ad hoc* basis over time, with a variety of materials and roof forms. The rest of the site is given over to hardstanding and is used for

⁵ ID6

⁶ Eg Design and Access Statement and Planning Supporting Statement submitted with the planning application, the committee report (CD 3.1) and the Statement of Common Ground (CD 2.7)

⁷ CD 5.09

parking and storage. The smaller triangular parcel to the east of Bedford Road, is cleared and comprises an area of hardstanding.

3. THE PROPOSAL⁸

3.1 Following demolition of the existing buildings and clearance, the site would be redeveloped with seven blocks within the larger site parcel, together with landscaping and public realm. Vehicular access to the development would be from Camp Hill, via a new one way road that would dissect the larger parcel, or via Trinity Terrace, and also from Bedford Road. Accommodation would comprise:

- At 26 storeys, Block A at the northern end of the site would be the tallest building on the site, providing commercial floorspace on the ground floor, with 183 apartments above. It would have a staggered façade and stepped crown, set back from the street edge to create a public plaza space at the north-west part of the site;
- Block B would be part 7, part 8 storeys in height, fronting on to Camp Hill Road and would provide a 167 room hotel with reception, servicing and a hotel restaurant at ground floor. It includes recessed ground and podium levels at the northern end to provide a sense of arrival. The two top levels would also be recessed at the southern part of the building, to provide terraces to rooms;
- Block C has reversed 'L' shaped footprint, with frontages to both Bedford Road and the proposed new internal road. It would range between 4 to 8 storeys in height, with an inverted pitched roof. Commercial floorspace would be provided at ground floor, with 131 apartments above;
- Block D, located at the southern end of the Camp Hill frontage, would provide 56 apartments over four/five storeys;
- Block E, fronting the southern end of Bedford Road and the smaller triangular site parcel, would be of seven and nine storeys in height, again with an inverted pitched roof. It would include commercial floorspace at ground floor with 98 apartments above. A courtyard would be formed between Blocks D and E, with Block F lining the northern edge and Block G the southern edge. A total of 72 undercroft parking spaces are shown at ground level, plus servicing and an energy centre. Eight further parking spaces are shown in front of the Block, on the Bedford Road frontage.
- Block F, located in the southern half of the larger site parcel, fronting onto the new access road, and Block G at the southern end of the site fronting onto Trinity Terrace, each comprise six townhouses with Block G, which would sit opposite the Church, having a staggered footprint;

⁸ More detail is included in the Design and Access Statement, the Planning Supporting Statement submitted with the planning application and the committee report (CD 3.1) as well as the application plans (which are available to view on the Council's web site searched under the planning application number)

- Eight on-street parking spaces are provided, four on each side of the proposed new road, with the triangular site parcel on the western side of Bedford Road accommodating a further 38 surface parking spaces.

3.2 The mix of residential accommodation proposed comprises

- 5 x studio flats
- 224 x 1 bedroom flats
- 209 x 2 bedroom flats
- 30 x 3 bedroom flats
- 12 x townhouses

3.3 The commercial floorspace proposed, extending to some 1,480sqm (gross external area) in total, would be designed as flexible space. Internal dividing walls are able to be positioned such as to accommodate specific needs and different types of tenants, with the larger units easily split with internal dividing walls to provide smaller spaces. The space is primarily anticipated to be occupied by small and medium size enterprises and microbusinesses as part of the City's Creative Quarter,⁹ helping to encourage more start-up and creative businesses within Digbeth.

4. PLANNING POLICY AND GUIDANCE

4.1 In addition to the National Planning Policy Framework (the Framework) and the Government's Planning Practice Guidance, reference was made to policies in the development plan, which includes the adopted Birmingham Development Plan (2017) saved policies from the Birmingham Unitary Development Plan (2005) and the Bordesley Area Action Plan (2020).

***The Birmingham Development Plan (2017)*¹⁰**

4.2 This sets out the spatial vision and strategy for Birmingham from 2011 to 2031, aiming to deliver sustainable growth to make provision for a significant increase in the City's population.

4.3 PG1 (Overall Levels of Growth): identifies a need for significant levels of housing, employment, office and retail development, along with supporting infrastructure in Birmingham over the plan period. The policy refers to a target of 51,100 additional homes, although this falls below the objectively assessed housing need of 89,000 homes, which the policy states it would not be possible to deliver within the City boundary.

4.4 PG2 (Birmingham as an International City): supports development, investment and other initiatives that raise the City's profile nationally and internationally.

4.5 Policy GA1.1 (City Centre Role and Function): promotes the City Centre as the focus for retail, office, residential and leisure activity within the context of the wider aspiration to provide a high-quality environment and visitor experience. Residential development is supported where it provides well-designed high-

⁹ Digbeth Quarter is one of 'seven' Quarters identified within the City centre by policy GA1.3 (CD 4.1.4)

¹⁰ CD 4.1.1 – 4.1.15

quality living environments, with development required to provide flexible and adaptable accommodation to meet a range of needs, including for families.

- 4.6 Policy GA1.2 (Growth and Wider Areas of Change): specifies that the Southern Gateway Area of Change will be the focus for the expansion of the City Centre Core southwards, delivering a vibrant new destination for the City. Residential development will be supported as part of the future mix of uses with opportunities to stimulate the regeneration of the wider area.
- 4.7 Policy GA1.3 (The Quarters) outlines the seven 'Quarters' which make up the City Centre that will contribute to the overarching objective of delivering ambitious growth while supporting the distinctive characteristics, communities and environmental assets of each area. The aspiration for the Digbeth Quarter is the creation of a thriving creative and cultural hub with a high quality, exciting and accessible environment.
- 4.8 Policy TP20 (Protection of Employment Land): seeks protection of employment land and resources where it contributes to the portfolio of employment land needed to meet longer term employment land requirements. It also prescribes circumstances in which proposals for change of use from employment will be appropriate.
- 4.9 Policy TP21 (The Network and Hierarchy of Centres): identifies that the existing network of centres will be maintained and enhanced, and that proposals will be encouraged that enhance the quality of the environment and improve access.
- 4.10 Policy TP25 (Tourism and Cultural Facilities): advises that proposals which reinforce and promote Birmingham's role as a centre for tourism, culture and events and as a key destination for business tourism will be supported. Provision of supporting facilities such as hotels will be important and proposals for well-designed and accessible accommodation will be supported.
- 4.11 Policy TP27 (Sustainable Neighbourhoods): seeks the creation of sustainable places which are characterised by a wide choice of housing sizes, types and tenures; access to facilities such as shops, schools, leisure and work opportunities; convenient options to travel by foot, cycle and public transport with reduced dependency on cars and options for remote working; a strong sense of place, with high design quality; environmental sustainability and climate proofing through measures that save energy, water and non-renewable resources and the use of green and blue infrastructure; attractive, safe and multifunctional public spaces such as squares, parks and other green spaces; and effective long-term management of buildings, public spaces, waste facilities and other infrastructure.
- 4.12 Policy TP30 (The Type, Size and Density of New Housing): seeks to secure delivery of a range of dwelling types to meet local needs and support the creation of mixed, balanced and sustainable neighbourhoods. Densities should respond to the site, its context and housing need, with densities of at least 100 dwellings per hectare within the City Centre.
- 4.13 Policy TP31 (Affordable Housing): seeks 35% affordable homes on developments of 15 dwellings or more. Offsite provision may be considered either by way of provision on an alternative site, or a financial contribution to

enable provision through development on another site. Where an applicant considers that a development cannot provide affordable housing in accordance with Policy TP31, the viability of the proposal will be assessed through a viability assessment.

- 4.14 Policy TP38 (A Sustainable Transport Network): supports the development of a sustainable, high quality, integrated transport system, where the most sustainable mode choices also offer the most convenient means of travel.
- 4.15 Policy TP41 (Public Transport): sets out that proposals to enhance the City's rail network will be supported, including the delivery of the Camp Hill Chord scheme.

Saved Policies of the Birmingham Unitary Development Plan (2005)¹¹

- 4.16 While the majority of the policies of the Unitary Development Plan have been superseded, the design policies in Chapter 8 and paragraphs 3.14A to 3.14D continue to apply, until their replacement by the intended Development Management Policies DPD. The policies identify a need to implement good design principles to maintain Birmingham as a desirable place to live, work and visit.
- 4.17 Saved Policy 8.19 encourages the provision of additional hotels in order to provide a balanced range of hotel bed spaces subject to local planning, amenity and highway considerations.

The Bordesley Park Area Action Plan (2020)¹²

- 4.18 The Action Plan refers to the Chords at Bordesley within the Development Vision and Principles section as a wider proposal, and as a major transport priority supported by the City and transport partners. There is also reference to the Chords in the Key Opportunities for Change chapter.

Other relevant documents and guidance include:

- 4.19 ***Loss of Industrial Land to Alternative Uses Supplementary Planning Guidance (SPD) (2006)***:¹³ provides guidance for proposals involving the loss of industrial land and supports BDP Policy TP20. It aims to protect good quality sites whilst recognising that poor quality and outdated sites should either be upgraded or used for new development where appropriate. It recognises that a more flexible approach towards change of use of land from industrial to residential is required to support regeneration initiatives.
- 4.20 ***Birmingham Big City Plan: City Centre Masterplan (July 2011)***: sets out how the transformation of Birmingham to a world class city centre will be supported. The masterplan refers to quarters of the city, with the appeal site falling within the Digbeth quarter. There is an ambition for more people to live in Digbeth, although the strategy notes that they will have to embrace urban living and all that this means, and states that to create a dynamic community,

¹¹ CD 4.2

¹² CD 5.1 (NB the version in the Core Documents is the submission version (July 2018). No material differences between this and the adopted version were drawn to my attention in relation to the parts to which I was directed by the parties.

¹³ CD 4.6

businesses, venues and residents will need to come together in inventive ways to overcome potential conflict between different activities.

- 4.21 ***Birmingham Big City Plan: Birmingham Curzon HS2 Masterplan for Growth (2015)***:¹⁴ the appeal site is also within the boundary of the Curzon Masterplan area, which seeks to maximise the regeneration and development potential of HS2 in the City Centre, and in particular in the Eastside, Digbeth and eastern side of the City Centre Core. Proposals for development in the Masterplan area are identified to have potential for growth including 4,000 new homes, 36,000 net jobs and 60,000sqm hotel space. In relation to Digbeth, the Masterplan identifies this broad area as having huge growth potential and sets out that new, destination style developments will be created.
- 4.22 ***Birmingham Big City Plan: Curzon Investment Plan (2016)***:¹⁵ to help maximise the growth and regeneration opportunities of the arrival of HS2 in the City, the Curzon Investment Plan provides a strategy to guide investment. Growth opportunities identified within the area include the Digbeth Creative Quarter which the Plan identifies is set to expand significantly on the back of the arrival of HS2; and creation of 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 workforce.
- 4.23 ***Affordable Housing (SPG) (2001)***:¹⁶ seeks an element of affordable housing provision as part of development proposals and indicates that proposals of 15 or more dwellings should provide 35% affordable housing.

5. AREAS OF AGREEMENT/DISAGREEMENT

- 5.1 The Council and the appellant submitted an agreed Statement of Common Ground.¹⁷ It includes a description of the site and the surrounding area, the planning history of the site, the policy background and a list of suggested conditions in the event that the appeal should succeed.
- 5.2 Save for policies TP38 and TP41 of the Birmingham Development Plan, it is a matter of agreement that the proposal complies with all other relevant development plan policies. It is agreed that there is no policy or other document that allocates or safeguards any land for the Camp Hill Chord scheme, or that refers to the appeal site as being necessary for delivery of the Camp Hill Chord scheme. The Council and the appellant are agreed that the proposal is not premature, as described at paragraphs 49 and 50 of the Framework. That is not a view shared by the R6 Consortium, who maintained that the site should be safeguarded until a detailed design is available in case the site is needed.¹⁸
- 5.3 No issue is taken in terms of any detailing or design and it is agreed that any harm in heritage terms is outweighed by the public benefits of the scheme.¹⁹ There is agreement too, that the acoustic work that has been undertaken²⁰

¹⁴ CD 4.3

¹⁵ CD 4.4

¹⁶ CD 4.5

¹⁷ CD 2.7

¹⁸ Mr Harris in cross-examination (xx)

¹⁹ That was also confirmed by Mr Sweeney for the Council in answer to my questions following his cross-examination

²⁰ AECOM Camp Hill Composite Acoustic Report (November 2019) submitted with the planning application

demonstrates that the impacts of the additional capacity/operation of the south-west Camp Hill Chord would, subject to appropriate mitigation, not compromise the ability to achieve an acceptable noise environment for future residents should this scheme come forward.

- 5.4 As set out in the report to the planning committee²¹ and in its Community Infrastructure Levy Compliance Schedule, the Council accepts that the viability of the development scheme is such that it cannot support any financial obligations. This matter is dealt with in more detail later in this Report.
- 5.5 As set out in the Statement of Common Ground, there is no agreement as to whether the scheme accords with the development plan and whether any 'non-accordance' amounts to conflict. There is disagreement too as to the relevance of the Bordesley Area Action Plan to the appeal site and whether there is any conflict with its principles. However, the main area of disagreement in this case, as encapsulated in the Statement of Common Ground, is *'whether the appeal scheme could preclude delivery of the Camp Hill Chord and whether 'any potential' for prejudice to its delivery (insofar as it may present a design constraint on the project) is a material consideration such that planning permission should be refused.'* There is no agreement as to what, if any, weight can be ascribed to any such potential prejudice and whether it is acceptable. There is disagreement too as to the weight to be attached to delivery of the appeal scheme, insofar as it would deliver a range of uses, including homes and commercial floorspace in an area identified for growth and mixed-use.

6. THE CASE FOR EUTOPIA LAND LIMITED (THE APPELLANT)

- 6.1 This is an application to redevelop a site at 193 Camp Hill, Birmingham. The scheme will deliver 480 homes, a hotel, 1,480 square metres of high quality flexible business/commercial floorspace, together with car parking, landscaping and associated works.
- 6.2 The Council's adopted development plan²² identifies that there is a significant need for housing and high quality employment space in the City, and also supports and promotes proposals which reinforce Birmingham's role as a centre for tourism. The appeal site is located in Digbeth, which is specifically earmarked as an area for regeneration and is expected to contribute to the City's sustainable growth ambitions.
- 6.3 The very significant benefits that would flow from implementation of the appeal scheme are not disputed by either the Council or the Rule 6 party. Nor is it disputed that the appeal scheme is a high quality and transformational regeneration scheme, of the type that is supported by the development plan in this location. This is exactly the type of scheme that must come forward in order to realise the City's growth aspirations and deliver the plan requirements.
- 6.4 The Council has, nevertheless, resolved that planning permission should be refused on the basis that it 'may' prejudice delivery of the south-west Chord in

²¹ CD 3.1

²² CD 4.1.1- 4.1.15

terms of its construction and operation; a proposal to enhance the City's rail network and which is part of the wider Midlands Rail Hub project.

- 6.5 The position of Members in respect of that reason for refusal was always unsubstantiated. It was not based on any objective evidence and ran contrary to the response from the statutory consultee, Network Rail, who had been involved in talks with the Council and applicant prior to determination. Indeed, Members were expressly advised by their own professional Officer (the Interim Director of Inclusive Growth) that the basis for such a refusal was '*very slim*' and that refusal of planning permission '*wouldn't be a reasonable position from the planning point of view*'.²³
- 6.6 The evidence to the Inquiry has confirmed that the advice was right. Indeed, the headline point, following cross-examination of the Council and Rule 6 Party witnesses, is that the agreed position (between the Council, Rule 6 Party and Appellant) on the evidence is that:
- a. There is no evidence before the Inquiry that indicates that if the appeal site comes forward for development, the south-west Chord might not be able to be constructed or delivered.
 - b. To the contrary, the evidence indicates that it would be possible to construct an effective Chord alongside the appeal scheme.
 - c. There is therefore no evidential basis to substantiate the argument that the delivery of the appeal scheme might prejudice the delivery of a scheme for the south-west Chord.
- 6.7 On that basis, the Council's planning witness, Mr Sweeney, agreed that in his professional opinion, planning permission should be granted. That was clearly the only logical conclusion to reach on the evidence presented. This application is for a highly sustainable scheme, which is (and which is now undisputed, on the evidence) wholly in accordance with the development plan. It is the type of scheme that is necessary to deliver the City's growth and regeneration aspirations. It will bring much needed housing, employment opportunities and public realm improvements to an area where there is a pressing need for the delivery of the same. If the scheme for the south-west Chord progresses, the evidence is that it can do so alongside the appeal scheme. Thus, the benefits of both can be realised together for the benefit of the City. It is hard to understand how there can be any reasonable objection to the appeal scheme in these circumstances. Planning permission should be granted 'without delay' in accordance with the statutory presumption in Section 38 (6) and the requirements of paragraph 11 of the National Planning Policy Framework.

Whether the development proposed would materially prejudice the delivery of the Camp Hill Chord (the Chord) in terms of its construction and operation

Delivery of the Camp Hill Chord

- 6.8 It is not, and nor has it ever been, disputed that the aspiration to deliver a scheme for the Camp Hill Chord is a material consideration for the decision

²³ Appendix 13 to Ms Mulliner proof of evidence (PoE)

maker which, if it came forward, would be beneficial to the City. However, that is quite patently not the end of the matter.

- 6.9 Firstly, it is right to note that a scheme for the Camp Hill Chords, which has been in the pipeline for some 15 -20 years,²⁴ is still at an embryonic stage. Whilst funding has been secured to commence work on an Outline Business Case (OBC) that work will not be complete until the end of 2022. It is only following that process that a decision will be taken as to 'how or whether' the scheme should proceed to the next stage, ie the Full Business Case. If it does, it will only be then that detailed design work will progress. As Mr White's evidence sets out²⁵, whether the scheme progresses at all will be dependent upon whether it can be demonstrated to have a positive business case demonstrating that it is affordable, represents value for money, is acceptable to stakeholders, and is technically sound. None of the work required to demonstrate the same has even commenced yet. Even if the scheme passes through those 'stage gates' there will, in any event, not be a defined route alignment available until 2023-2024, and construction would not start until 2024-2029.²⁶
- 6.10 In short, whilst funding has been secured to commence the work to determine whether the Chord scheme can proceed, and whilst the aspiration to deliver the Chord is laudable, there is much work to do to understand whether there will in fact be a scheme that is feasible, viable, secures funding, and is deliverable. Accordingly, the scheme is not yet sufficiently advanced to constitute a material consideration that can be accorded weight in the planning balance.²⁷ That is particularly the case to the extent that there is reliance on that future process to identify some unknown, 'might be possible' scheme option, which 'might come forward' to be assessed at some future stage, and which does not reflect options considered to date, or parameters which have been set by the scheme designer, Network Rail, and which are unaffected by the appeal scheme.

No evidence as to material prejudice of the Camp Hill Chord

- 6.11 However, even if the contrary view were taken, there is simply no evidence that the appeal scheme will, or might, materially prejudice the delivery of a scheme for the Chord, or even that it could or might do so. This was ultimately accepted by the witnesses for the Council and the Rule 6 party during the course of the Inquiry. As explained by Ms Mulliner,²⁸ an argument that there might be potential prejudice does not even pass the threshold of materiality in circumstances where it is agreed that the prospect of such prejudice materialising is speculative, wholly theoretical, and without any evidential basis.
- 6.12 Whilst Mr Grant's closing²⁹ suggests that the appellant has not addressed this at any stage, on the basis that the potential for prejudice is anything but a material consideration, that is not correct. Whilst Ms Mulliner accepted that

²⁴ Mr Rackliff evidence and ID4

²⁵ Paragraph 30 – 32 PoE of Mr White for the local planning authority

²⁶ See Network Rail consultation response 7 November 2019 (CD 2.3)

²⁷ Evidence Ms Mulliner during evidence in chief (xic), unchallenged

²⁸ xic

²⁹ Paragraph 67.5 of his written submissions (ID9)

the scheme for the Chord was a material consideration, albeit one to which she did not attribute weight in the circumstances, it was not accepted that the potential for prejudice crossed the threshold of materiality in this case. It is accepted that in order to cross that threshold there must be a real or realistic prospect or a possibility, as opposed to a theoretical prospect of that prejudice occurring. It is also accepted, that when considering whether the threshold of materiality is crossed, the test is not the balance of probability, but simply whether there is a real prospect or possibility on the evidence. There has to be some evidential basis for that possibility. Here, there is simply none.

- 6.13 If that is not accepted and the threshold of materiality is crossed, weight then becomes a matter for the decision maker, taking into account matters such as the potential degree of harm and the likelihood of that harm being occasioned. There is no evidence in this case of any degree of harm, or likelihood that the prejudice relied on by the Council and the Rule 6 Party will occur. Thus, there is no evidence that the harm they rely on (ie failure of the Chord to come forward and the ability of the scheme to deliver the benefits they set out) would be occasioned either. The Council is dancing on the head of a pin. Its case is unsupported by evidence and is wholly unsubstantiated. Refusal to accept the inevitability of where the evidence has taken the Council in light of an express concession by one of its witnesses who was called to justify its position that planning permission should be refused, who now agrees that planning permission should be granted, underscores the unreasonableness of the Council's position.
- 6.14 In any event, there is simply no objective or evidence-based justification for withholding consent for the appeal scheme in these circumstances, and planning permission should be granted accordingly (as the Council's professional witness, Mr Sweeney, ultimately accepted).³⁰
- 6.15 Firstly, as accepted by Mr White for the Council, even if the scheme for the south-west Chord proceeds, it is unlikely that there will be an approved alignment for another four years. There is, therefore, no approved alignment with which the appeal scheme conflicts.
- 6.16 Secondly, prior to an approval of a preferred scheme for the south-west Chord, the project will need to pass through a number of stages³¹ to assess project feasibility (GRIP2), identify and sift options and refine the business case (GRIP3), and design and approve the preferred scheme (GRIP4). At the present time, the options have not been defined and indeed, the feasibility work has not yet been completed. Therefore, not only is it the case that there is no final alignment with which the appeal proposals conflict, but, as Mr White accepted, it is also the case that:
- (a) there is no proposed alignment with which the appeal proposals conflict;
 - (b) there is no option for the delivery of the south-west Chord with which the appeal proposals conflict;
 - (c) it is not even the case that there is a long list of options for the delivery

³⁰ xx G Sweeney

³¹ Described at paragraphs 22 and 25 in L White PoE

of the Camp Hill Chord, one of which might conflict with the appeal proposals;

- (d) the feasibility work for the Camp Hill Chord has not been completed, and therefore, it is not even the case that the appeal proposals would prejudice a feasible solution that has been identified for its delivery. To the contrary, the only feasibility work before the Inquiry, commissioned on behalf of Centro (the predecessor Sponsor for the scheme) identifies three options for a Chord alignment located adjacent to the appeal site, none of which require or conflict with the appeal site (see further below).

- 6.17 In those circumstances, Mr White accepted for the Council that there was no positive or objective evidence that the appeal scheme might prejudice the delivery of the south-west Chord, and that assertions to the contrary were no more than theoretical and based upon speculation rather than evidence.³² Mr. Rackliff³³ for the Rule 6 Party also accepted that there was no positive evidence before the Inquiry to suggest that the alignment of the Chord even 'might' conflict with the appeal site.

Positive evidence that the appeal scheme and a scheme for the Camp Hill Chord can come forward alongside each other

- 6.18 To the contrary, all of the evidence before the Inquiry demonstrates that the appeal scheme and south-west Chord can be delivered alongside each other. That proposition was, again, ultimately accepted by the Council and Rule 6 Party.³⁴
- 6.19 Prior to making its decision, the Council had before it a Technical Note produced by AECOM³⁵ demonstrating that, based on known parameters, an alignment for the Chord could come forward alongside the appeal proposals. That Note records that AECOM had been requested by Council Officers and the Rule 6 Consortium to test whether an alignment identified by the Council,³⁶ and which was very similar to that used in the funding submission for the Strategic Outline Case by Midlands Connect (and indeed is the only alignment in the public domain)³⁷ could be delivered alongside the appeal scheme.³⁸ AECOM was not asked to test alternative options, and no technical feedback was given requesting that they should apply or consider different parameters.³⁹
- 6.20 AECOM's conclusion was that the appeal proposals could be delivered alongside the alignment identified by the Council and one of the witnesses for the Rule 6 Party.
- 6.21 The Council and Rule 6 party are now at pains to point out that the alignment that they asked AECOM to consider may not, in fact, be the final alignment for delivery of the Chord, because the final alignment has not been determined.

³² xx Mr White

³³ xx Mr Rackliff

³⁴ L White and T Rackliff xx

³⁵ Appendix 10 to the proof of Ms Mulliner and at CD 1.2

³⁶ Plan at Fig 1.2 of the document at Ms Mulliner's Appendix 8 and at Appendix 2 of ID5

³⁷ Accepted by Mr Rackliff in xx

³⁸ See Ms Mulliner PoE paragraph 4.42

³⁹ Accepted by Mr White in xx

Those protestations miss the point. As the professional officers of the Council and the Rule 6 Party would have been aware when asking for that work to be commissioned, the relevant question is whether the appeal proposal will preclude the delivery of an effective scheme for the Camp Hill Chord. AECOM's work demonstrates that it will not, because an alignment for the Camp Hill Chord can come forward alongside the appeal proposals. As Mr White accepted in cross-examination, there is no technical or substantive evidence before the Inquiry to demonstrate the contrary. Further, and in any event, the alignment which AECOM were asked to consider can hardly be considered to be speculative, in circumstances where Midlands Connect had confirmed that a very similar alignment had been submitted as part of the Strategic Outline Business Case (SOBC).⁴⁰ Criticisms of the AECOM Technical Note therefore take the Council nowhere.

- 6.22 In any event, it is also of note that an independent detailed feasibility report prepared by Mott Macdonald on behalf of Centro, the previous scheme sponsor and indeed the predecessor to the West Midlands Combined Authority (WMCA) who are part of the Rule 6 Consortium,⁴¹ came to very similar conclusions.⁴²
- 6.23 The Mott Macdonald report (MM2010 Report) developed options to the equivalent of GRIP Stage 2,⁴³ that is, it sought to identify viable solutions for the delivery of the Chord.⁴⁴ This was a comprehensive study and was agreed as a competent engineering analysis, that purported to consider all options, filtered these to 39 feasible engineering combinations, and then filtered these again taking into account technical constraints and considerations.⁴⁵ Mr Moore's evidence (for the Rule 6 Party) was that:

'5.1.5⁴⁶ The report considered all of these aspects and made a recommendation for the three most favoured options to be taken forward, focusing on the recommendation of the solutions which provide the highest level of operational effectiveness and flexibility. This was in order to maximise the network capacity benefits afforded by the introduction of the chords' (Emphasis added).

- 6.24 It is of significant note that it was envisaged that all of those three options, which would maximise capacity benefits and would provide the highest operational of effectiveness and flexibility, could be delivered without conflict with the appeal site.⁴⁷
- 6.25 The engineering evidence to the Inquiry given by Mr Moore and Dr Raiss (and to which Mr White, who is not an engineer, deferred)⁴⁸ considered the conclusions of the feasibility report in light of current standards and parameters. The agreed position following the testing of that evidence was

⁴⁰ Ms Mulliner Appendix 9

⁴¹ The WMCA is a combined authority for the West Midlands Metropolitan county. Transport for West Midlands is an executive body of the WMCA.

⁴² CD5.2

⁴³ Dr Raiss table, page 14

⁴⁴ Paragraph 1.3 of CD5.2

⁴⁵ Including: Operational, Signalling, Civil Engineering, Pedestrian Flow, Physical Constraints, Statutory Authority Constraints, Commercial issues, Electrification, Construction. See Mr Moore paragraph 5.1.4.

⁴⁶ PoE

⁴⁷ See page 56 CD5.2, where it is confirmed that the options taken forward could not impact on the Dowding and Mills Factory (the appeal site).

⁴⁸ Confirmed in xx

that it remained the case that there were a number of feasible engineering solutions for the delivery of the Chords, which could come forward alongside (and without conflicting with) the appeal scheme.

- 6.26 Firstly, it was agreed by Mr Moore and Dr Raiss that the geometry of the three preferred options remained compliant with current standards, and the gradients applied would be suitable for all traffic, including freight, should this be required in the future.⁴⁹ Mr White deferred to the engineers in respect of engineering matters, but confirmed that he did not identify any particular changes in standards or other concerns arising from the investigations undertaken as part of that Report that indicated that any of the options set out therein might not be technical or feasible now. Further, whilst at one point there was a surprising assertion from Mr White (unsupported by either engineer) that an embankment might be one appropriate solution to carry the Chord in the vicinity of the appeal site, Mr White confirmed that he did not suggest that it would not be feasible or viable to construct the Chord on the existing structure adjacent to the appeal site, as evidenced through the feasibility study.⁵⁰ Therefore, an argument was not pursued that these points would mean that construction of the appeal development would preclude the construction of the Chord either.
- 6.27 Mr Moore had noted that, with the proximity of the residential development to the railway, it was likely that additional acoustic mitigation would be required. That was also a point raised in an early response by Network Rail.⁵¹ However, noise reports have been commissioned by the Appellant and considered by the Council, and it is agreed that mitigation can ensure an acceptable noise environment for future residents.⁵² This was not disputed by Mr Moore or the Rule 6 Party,⁵³ and this is therefore a matter that can be controlled by condition. It is therefore agreed that residential amenity will be protected, and no point is taken that bringing residential development to this location will prejudice the delivery of a Chord either.
- 6.28 Mr Moore and Dr Raiss agreed that there would be adequate space for maintenance of the three options if the appeal scheme came forward.⁵⁴ This was consistent with Network Rail's consultation response, which required a maintenance easement of 3 metres, and which it was agreed could be achieved in respect of each of the three options considered.⁵⁵ It was therefore agreed that adequate maintenance arrangements for the Chord would not be prejudiced by the appeal scheme.
- 6.29 Mr Moore agreed that he did not suggest that, if additional land was required for rainfall attenuation to take into account a greater emphasis in climate change resilience,⁵⁶ this would need to be accommodated on the appeal site, or that the appeal scheme would preclude an adequate scheme for drainage. Indeed, as explained by Dr Raiss, there would be numerous ways that this

⁴⁹ Paragraph 6.1.7 of the proof of Mr Moore

⁵⁰ See page 53 – 4 of CD 5.2 and option plans for structures and structures/earthworks combinations at the back of that report.

⁵¹ Letter 3 May 2019 (CD 2.3)

⁵² See SoCG page 22.

⁵³ SoCG page 22

⁵⁴ And see paragraph 6.1.30 – 33 of Mr Moore

⁵⁵ Letter 9 July 2019 (CD 2.3)

⁵⁶ Paragraph 6.1.5 of the proof of Mr Moore

could be accommodated, and the least likely place to do so would be the appeal site given the surrounding topography. Again, it was therefore agreed that suitable drainage solutions would not be precluded by the appeal scheme.

- 6.30 Mr Moore noted that the Chord cross section would now be wider to include more accessible walking routes.⁵⁷ However, as explained by Dr Raiss, this would be a very minimal change, and Mr Moore expressly accepted that these requirements would not bring any of the three options into physical conflict with the appeal site.
- 6.31 Mr Moore agreed that a construction zone of 10 metres would be sufficient to accommodate a "*number of*" construction methodologies, and that the appeal scheme would not, therefore, place a material constraint on constructability of the Chord. His updated option plans⁵⁸ demonstrate that a 10 metre construction zone is achievable (taking into account the updates in his proof, including a widening of the walking route – see above). This was because, as demonstrated on his updated drawings, none of the appeal buildings encroach into the 10 metre zone, and it was accepted that hard and soft landscaping could be controlled by condition.
- 6.32 The conclusion that the appeal scheme would not prejudice the constructability of the Chord, providing that a construction zone was achievable, was consistent with Network Rail's consultation response,⁵⁹ albeit that Network Rail noted that temporary access might be accommodated up to the proposed new buildings. In any event, Mr Moore accepted that those more "*onerous*" requirements from Network Rail could also be met by the appeal scheme.
- 6.33 As explained by Dr Raiss, there were also a number of other options that could be employed from within the confines of the viaduct if (for some unidentified reason) the 10 metre construction strip was not achievable (e.g. beam launcher/rail mounted crane).⁶⁰
- 6.34 In the end, Mr White and Mr Moore accepted that there was no reason that a scheme for the Chords could not be constructed alongside the appeal proposals, and the agreed position is that the constructability of the Chord would not be prejudiced by the appeal scheme.
- 6.35 The Council's closings⁶¹ suggested that in some way the appellant's response to these matters constitutes a closing of the options, or that there might need to be some trade-off in respect of construction methodology. That is wholly unsupported by the evidence to the Inquiry, particularly given Mr White's position as set out above. In fact, the evidence to the Inquiry was that the 10 metre construction strip would allow a range of construction technologies to be used. There is simply no evidence of any constraint in this respect, that would be occasioned by the appeal proposal. Nor is there any evidence at all as to costs or viability concerns or constraints. The only place they are considered is in the MM2010 Report (which Mr Moore accepted was still reasonable, with the conclusions still likely to be valid) which found that the three identified options,

⁵⁷ Mr Moore PoE 6.1.4

⁵⁸ Appendix B to his PoE

⁵⁹ Letter 9 July 2019 (CD 2.3)

⁶⁰ Dr Raiss proof paragraphs 5.2.11 – 15, where these are given as examples

⁶¹ Pages 63-64 of ID9

which do not conflict with the appeal site, were likely to be viable. Simply no evidence was produced by the Council in respect of prejudice in this regard.

- 6.36 The MM2010 Report states that it had already made passive provision for electrification in the three options taken forward.⁶² As set out above, each of these three options can be constructed without the appeal site.
- 6.37 In any event, Mr Moore, Mr White and Dr Raiss agreed that the potential for options 7 and 9 to conflict with the appeal site would be unaffected by future electrification requirements, because in those options the chords would not be raised over the top of the existing line and so vertical clearance would not be constrained. In respect of option 1, Dr Raiss explained that changes in standards might require the bridge to be raised by around 102mm.⁶³ However, the effect would be negligible, and would not bring that option into conflict with the appeal site. Mr White confirmed that he had no evidence that electrification could not be accommodated with option 1. Mr Moore agreed that he doubted that conflict with the appeal site would be likely if vertical clearances were increased in option 1 for electrification, and he did not therefore suggest that the appeal scheme would prejudice the ability to electrify the line on any of the three options considered.⁶⁴ The agreed position therefore, was that electrification of the line would not bring any of the three options into conflict with the appeal site.
- 6.38 The three options considered in the MM2010 Report, produced by the Rule 6 Consortium, assume that Bordesley Station would be removed or relocated to Upper Trinity Street.⁶⁵ That report was commissioned and agreed by Centro, the previous scheme sponsor, who is also the predecessor of the WMCA, who is part of the Rule 6 Consortium. Consistent with the assumptions made by the WMCA, the removal or relocation of the station was identified as one of the interventions required to deliver the Chord, irrespective of the appeal scheme proposals, by Network Rail in their West Midlands & Chilterns Route Study 2017, which was published following extensive consultation and stakeholder engagement.⁶⁶
- 6.39 There is no evidence in the public domain to suggest that the assumption that the station might be removed or relocated, irrespective of whether the appeal scheme comes forward, is unreasonable, could not occur or is invalid. This is perhaps unsurprising given that the station is effectively a match day platform, which is closed to the public for most of the time, and which does not meet any modern standards (such as basic accessibility standards). The suggestion, made in the MM2010 Report,⁶⁷ that the station might be located to Network Rail land a short distance away in Upper Trinity Street, is entirely sensible.⁶⁸ In the end, Mr White confirmed that it was unlikely that a requirement to close or relocate the station would prevent or prejudice the delivery of the Chord, and Mr Rackliff confirmed that it was fair to assume that if there was a requirement

⁶² Page 32, paragraph 5.2

⁶³ Not 1.5m as Mr White erroneously suggested. Note, Mr White accepted that he was not an engineer, and deferred to the engineering evidence produced by Mr Moore and Dr Raiss.

⁶⁴ Mr Moore in xx

⁶⁵ Confirmed at page 35, CD5.2

⁶⁶ See CD 15.19, pages 65 – 67 and 82 – 83.

⁶⁷ CD15.19 page 49

⁶⁸ Dr Raiss during xic

to close or relocate the station, this would not prevent a scheme for delivery of the Camp Hill Chord coming forward.

- 6.40 Ms Pindham's closings refer to a diagram before the Inquiry where the station is retained and which shows the Chord running across the appeal site. However, that fails completely to grapple with the point that there is no reason for that to occur. Whilst the Rule 6 Party produced that drawing very late in the day, showing an alignment across the site and retention of the station, at no point did the Consortium say that it would be necessary for that alignment to cross the appeal site if the station was to be retained.
- 6.41 In any case, even if some as yet unidentified reason materialised that meant that it was necessary to retain the station in its current location, Dr Raiss explained that this could be achieved by elevating the Chord above the station. His evidence in this respect was unchallenged by the Council (Mr White accepting that he had simply not considered whether it would be possible to retain the station). Indeed, Mr Moore expressly accepted that there would be "*lots of options and engineering solutions*" and that he was "*sure it would be possible to deliver a scheme for the Chords*" if the station was retained if that were the requirement. In the end, therefore, this point goes precisely nowhere, because even if there is a requirement to retain the station, contrary to all of the publicly available information and contrary to the solution to relocate it that everyone agrees would be sensible, there is no evidence that the station could not be retained, or that this might prejudice the delivery of the Chord.
- 6.42 The three options considered in the MM2010 Report could accommodate a design speed of up to 30–35mph.⁶⁹ Again, the submissions for the Rule 6 Consortium,⁷⁰ that increased line speed could bring the required curvature of the Chord across the appeal site, do not reflect the evidence to the Inquiry. Ms Pindham suggests in closing that design speeds for the three MM2010 options that could be accommodated were up to 25 mph, going on to assert that if speeds of 25-60 mph were required, that would require an alignment across the appeal site. In fact, the evidence of Mr Moore for the Consortium was that the three options could accommodate a design speed of up to 30-35 mph. Also, as Dr Raiss explained, not only was 60 mph unreasonable in terms of an assumption, but at that level the whole alignment anyway would shift to the west and would miss the appeal site completely.
- 6.43 As Mr Moore accepted, this was a reasonable assumption for the delivery of the Chords. This was unsurprising as the MM2010 Report also records, in terms, that electrification would improve acceleration on the line, and that an allowance had therefore been made for electrification in the options taken forward. It therefore appears that this matter was, in any event, considered through the feasibility work.⁷¹ Either way, Mr Moore and Mr Rackliff accepted that there is no evidence whatsoever before the Inquiry (including evidence as to line speed or timetabling) to demonstrate that, contrary to the assumptions in the Report, a design speed might be sought that would bring the appeal scheme into conflict with the three options for the Chord. In any case, Mr

⁶⁹ Evidence of Mr Moore

⁷⁰ Paragraphs 10-12 (ID10)

⁷¹ CD 5.2, Paragraph 2.6.3, page 13

Moore agreed that he had not considered whether it would be possible to avoid the appeal site if a different design speed did need to be accommodated, and Dr Raiss' evidence was that the precise design speed was normally something finalised at the detailed design stage, taking into account the desired operational requirements, having regard to site constraints. Again, this point therefore took the Council and Rule 6 Party precisely nowhere. There is, quite simply, no evidence of any particular requirement or any prejudice before the Inquiry.

- 6.44 In any case, as Dr Raiss explained, slackening the radius of the alignment in order to accommodate a higher design speed would be likely to bring the Chord into conflict with the grade II* listed Bordesley Centre, which is in active use as a Community Centre, before impacting on the appeal site. All parties⁷² agreed that a grade II* listed building should be regarded as a significant constraint, that an alignment for the Chords should seek to avoid where possible, and that this should be factored into the feasibility work as a constraint from the outset. This is exactly what the MM2010 Report did,⁷³ and the three feasible options that result do not conflict with the appeal site. In any event, there is no evidence that there has been a consideration of reasonable alternatives, such that it could be demonstrated that a harmful impact on the listed building would be necessary to deliver an effective scheme for the south-west Chord, as would be necessary (as a matter of law) before such a scheme could come forward.⁷⁴
- 6.45 Equally, although it was at one point suggested by the Rule 6 Party that there might be a future requirement for six tracks for the Chord, there was absolutely no evidence that this would (or might) have any impact on land take in the vicinity of the appeal site. The closing submissions for the Rule 6 Party⁷⁵ make a number of assertions in this regard that are not borne out by the evidence. On the contrary, whilst the 2017 West Midlands & Chilterns Route Study relied upon by Mr Moore⁷⁶ shows six tracks branching into Moor Street Station, on the viaduct and in the vicinity of the appeal site, only four tracks are shown. Mr Rackliff later confirmed that although six tracks had been considered through the SOBC submission (albeit this is not explained or expressly set out in the SOBC Report) six tracks had not been contemplated in the vicinity of the appeal site, and nor was he suggesting that it was envisaged that the viaduct might need to be widened here. There has been nothing from Network Rail to that effect either (who in fact had expressly recorded the need for only two tracks for the Chord).⁷⁷ This was, in the end, another point that went nowhere in respect of prejudice. There is no evidence before the Inquiry to indicate that it was likely, or even possible, that a six-track formation would come forward or, if it did, that it would have, or might have, the effects referred to in those closings. That submission is wholly unsupported by the evidence.

- 6.46 Taking all of the above into account, Mr Moore expressly agreed that it

⁷² Ms Mulliner and Dr Raiss (Appellant), Mr Rackliff and Mr Moore (Rule 6), Mr White (LPA).

⁷³ See CD5.2, page 27, para 3.7

⁷⁴ See *Whitby v SST and SSCLG and Network Rail* [2016] EWCA Civ 444, in particular paragraphs 47 – 49

⁷⁵ Paragraph 18 of Ms Pindham's closing submissions (ID10)

⁷⁶ Page 66 – 67

⁷⁷ CD2.3 letter 7 November 2019

remained the case that the engineering evidence demonstrated that the appeal scheme could be delivered alongside any one of the three options identified as being feasible, and which he had previously concluded demonstrated "*the highest level of operational effectiveness and flexibility... in order to maximise the network capacity benefits afforded by the introduction of the chords*".⁷⁸ Mr White accepted that the evidence before the Inquiry indicated that both the appeal scheme and a scheme for the delivery of the Chords could come forward together. That was also the conclusion of the AECOM Technical Note and Dr Raiss.

- 6.47 In short, all of the evidence points in one direction. That is, that the appeal scheme can be delivered alongside an effective scheme for the south-west Chord. It is clearly in the best interests of the City that the benefits of both can be realised. It is wholly unclear what reasonable objection the Council and Rule 6 Party have to the same, in light of the evidence before the Inquiry.
- 6.48 The Council's closings raised a broad point that there might effectively be another unidentified option that comes forward through the optioneering process, which appears to be the fundamental basis of the Council's case as it exists now. But that begs the question, so what? If it is accepted on the evidence, as it is, that the appeal scheme can come forward together with an effective scheme for the Chord, then delivery of the Chord and the realisation of the benefits that the Council and the Rule 6 Party rely on will also come forward too. On that basis, it is manifestly clear that there is simply no evidence as to prejudice, potential prejudice, future prejudice or any another type of prejudice on the evidence before the Inquiry.

Betterment

- 6.49 However, not only is there a complete absence of any demonstrable prejudice in the present case, and not only does the evidence positively demonstrate that the appeal scheme can be delivered alongside an effective scheme for the Chord, but the engineering evidence also demonstrated that the appeal scheme in fact represents a betterment for the delivery of the Camp Hill Chord.
- 6.50 This is because the existing buildings on the appeal site extend to the back of the footway on Bedford Road. Mr Moore accepted that as the appeal proposals pull the buildings away from Bedford Road, the operational space available for construction is increased, ensuring that a range of methods can be employed, and making significant and costly compulsory acquisition of the appeal site unnecessary.⁷⁹
- 6.51 The Council's closings⁸⁰ suggest that a Compulsory Purchase Order (CPO) would be inevitable. That is not consistent with the evidence of Mr White, who accepted that there was no such scheme contemplated or even in an embryonic stage. Moreover, for a CPO scheme to be successful, interference with property rights need to be justified and proportionate. One of the things to consider as part of that, is the question of reasonable alternatives. Just from the design and feasibility point of view, it is also inevitable that CPO

⁷⁸ PoE Mr Moore, paragraph 5.1.5

⁷⁹ Accepted by Mr Moore in xx

⁸⁰ Paragraph 37 ID9

procedures are inherently uncertain and are costly, requiring the payment of compensation. That is one of the points of the MM2010 Report that led to deliberate avoidance of the appeal site, because it has existing buildings on it.

- 6.52 If delivery of the Camp Hill Chord is a significant material consideration as the Council and the Rule 6 Party suggest, then it is also a significant material benefit in favour of the appeal scheme that the engineers agree that the options for construction of the Chord are enhanced by the appeal scheme. That is a matter with which the evidence of the Council and the Rule 6 Party has singularly failed to grapple.

Network Rail

- 6.53 As agreed in the Statement of Common Ground,⁸¹ Network Rail, the statutory consultee, does not object to the scheme. That lends further support to the Appellant's case. Nor, it is noted, is there any objection from the current scheme Sponsor (the Department for Transport).
- 6.54 The suggestion that Network Rail's response is in some way equivocal is wholly without merit on a plain reading of the consultation responses before the Inquiry.
- 6.55 Firstly, it is plain from the correspondence that Network Rail does not have an in principle concern that the Camp Hill Chord might not be deliverable if the appeal site comes forward in advance of the final determination of an alignment. In none of the consultation responses before the Inquiry does Network Rail say that it is unable to provide a positive or meaningful consultation response because there is not yet an alignment for the Chord. On the contrary, in its first consultation response of 12 February 2019, it expressly indicated that, in principle, it would be possible to work with the Appellant to ensure that both schemes could come forward together:

*'Network Rail is keen to engage with the developer and Birmingham City Council to explore mutually beneficial opportunities for both developments.'*⁸²

- 6.56 A period of active engagement and meetings with Network Rail then followed.⁸³ Where it had a concern that an element of the scheme might affect the delivery of the Camp Hill Chord, or could be an obstacle to it, it said so, and the Appellant responded by amending the scheme.⁸⁴ For example, Network Rail was specifically concerned that the energy centre for the scheme had previously been located on the triangle of land to the west of Bedford Road,⁸⁵ which it considered would be likely to have an impact on the ability to deliver the south-west Chord. Network Rail was clearly able to assess that proposition based on the information before it. The Appellant responded to this, and the amended proposal keeps that area clear of built development. Further, in order to respond to Network Rail's concerns, the appeal buildings were pulled back from the appeal site boundary, access arrangements were reconsidered so that the site is not dependent on Bedford Road in the event that a temporary or

⁸¹ Page 23

⁸² Letter 12th February 2019, CD2.3

⁸³ eg 5 March (see first paragraph of CD 2.3 letter dated 3 May 2019)

⁸⁴ Accepted by Mr Rackliff during xx

⁸⁵ Letter 12th February 2019, CD2.3

permanent closure is required for construction, and noise reports were commissioned with mitigation to safeguard residential amenity proposed.

- 6.57 Further guidance was given in the Network Rail letter of 9 July 2019, all of which the Council and the Rule 6 Party agree can be met by the appeal proposals.
- 6.58 In short, all of the parameters set by Network Rail have been met, and a fair reading of the consultation letters is that the statutory consultee is satisfied that the emerging proposals for the delivery of the Chord can be accommodated. That is, it is submitted, the only fair reading of the consultation responses in circumstances where there has been active engagement, where parameters have been set and met, and where the statutory consultee expressly confirms that:

'Network Rail welcomes the changes made to the proposed development layout to accommodate the emerging proposals for the delivery of the Bordesley Chord railway scheme.'

- 6.59 It is also unsurprising that the statutory consultee has welcomed the appeal proposals, in circumstances where the agreed evidence to the Inquiry is that it has been demonstrated that the south-west Chord and appeal scheme can come forward together. Network Rail like both the engineers who gave evidence to the Inquiry, can be expected to understand the standards that it applies to the design of such schemes, and to understand the physical and engineering constraints of the local area.⁸⁶ The reality is that there is no objection because, following active engagement, the appeal scheme is the realisation of Network Rail's aspiration for '*mutually beneficial opportunities for both developments.*'
- 6.60 Mr Grant's closings for the Council⁸⁷ point out that the Network Rail responses must be caveated because they do not, as yet, have information as to curvature, gradient or alignment. However, that does not help the Council's case because, notwithstanding that the detailed design has not yet been determined, Network Rail felt able to welcome the appeal scheme as meeting parameters it had set out. The Council has not explained why curvature, alignment etc might prejudice the delivery of an effective scheme for the Chord if the appeal scheme were to come forward. There is simply no evidence before the Inquiry to that effect.
- 6.61 The appeal scheme is also in full compliance with paragraph 102(a) of the Framework on this basis. Paragraph 102 (a) sets out that transport issues should be considered from the earliest stages of development proposals, so that the potential impacts of the development on transport networks can be addressed. As Mr Harris⁸⁸ noted for the Consortium, there will be no impact on existing transport networks, but in any event, potential transport impacts on the emerging scheme for the Chord were considered at the earliest stage through active engagement with Network Rail. The Appellant has done everything asked of it in amending the scheme to meet all known requirements and all identified parameters, and to address any potential

⁸⁶ Mr White in xx

⁸⁷ Paragraph 42 (ID9)

⁸⁸ For the R6 Party

identified impacts of the development on the emerging scheme for the Chords. That is exactly the approach promoted by national policy.

Consequences for the Council's case

- 6.62 The Council's case, both in terms of an alleged conflict with policies TP38 and TP41 of the development plan, and in terms of other material considerations, was wholly dependent on the argument that the delivery of the Camp Hill scheme might be prejudiced by the appeal scheme, such that its benefits would not therefore be realised.⁸⁹
- 6.63 However, in light of the evidence to the Inquiry, Mr Sweeney had to accept that:
- 'there was no objective evidence to support a suggestion of even potential prejudice at even the slightest level.'*
- 6.64 Returning to the Council's closing submissions, it was not simply the case that Mr Sweeney accepted that there was no evidence that there would be prejudice to delivery of the Chord. He expressly accepted that there was no evidence to support even a suggestion of even potential prejudice at the very slightest level. That is correct on the basis of the concessions and evidence to the Inquiry.
- 6.65 In light of the complete absence of any evidential basis or objective analysis to support a finding of prejudice, or to support the Council's reason for refusal, Mr Sweeney expressly accepted that his professional opinion was that permission should be granted.
- 6.66 That concession was plainly very significant. It means that the Council has failed to produce any evidence, professional or otherwise, to demonstrate that planning permission should be refused, and has failed to produce evidence to substantiate its reason for refusal.
- 6.67 The points raised in Mr Grant's closings that planning permission should be refused, are completely unsupported by any evidence that the Council has been able to call, in circumstances where its own witness accepts, on the basis of the evidence before the Inquiry, that planning permission should be granted.
- 6.68 Further, as noted by the Appellant's planning witness Ms Mulliner,⁹⁰ the fact that the professional Officers of the Council and the professional witnesses for the Council and Appellant all agree that planning permission should be granted is highly material and should be accorded significant weight.
- 6.69 In any event, there is, quite simply, no evidence to support the proposition that planning permission should be refused, and the fact that the LPA persists in its objection despite having literally no evidence whatsoever to support its case is unsupportable and unreasonable.

Consequences for the Rule 6 Party's case

- 6.70 Mr Harris for the Rule 6 Party also conceded that, since it had not been

⁸⁹ Accepted by Mr Sweeney in xx. See also eg 9.5.2 of his PoE

⁹⁰ xic

demonstrated that there would be prejudice to the delivery of the Chord, and since the evidence was that both the appeal scheme and a scheme for the Chord could come forward together, there would be no conflict with policies TP38 and TP41 of the development plan. It was also conceded that there would be no conflict with the policies of the Bordesley Area Action Plan, since both the appeal site and Chords are situated outside of the policy area.⁹¹

- 6.71 Accordingly, Mr Harris confirmed that the Rule 6 Party could not demonstrate conflict with the development plan. Paragraph 102 (a) of the Framework is addressed above. However, Mr Harris also confirmed that there was no conflict with Framework paragraph 103 either, because the site was situated in a highly sustainable location, and that paragraph is concerned with managing patterns of growth so that proposed development is focused on the most sustainable locations.
- 6.72 In that context, Mr Harris confirmed that all that was left of the Rule 6 Party's case was an argument that the appeal site should be safeguarded "in case" an unknown concern in respect of deliverability materialised at some point down the road.
- 6.73 Such arguments are wholly unsupported by policy and are wholly unsustainable. As agreed in the Statement of Common Ground, there is no policy or other document that requires, or could justify, the appeal site being safeguarded.⁹² Nor are there any criteria based policies that justify the same conclusion.
- 6.74 In addition to the complete absence of policy support for the Rule 6 Party's case, the Statement of Common Ground identifies that there is no policy or other document which refers to the appeal site as being necessary for the delivery of the Camp Hill Chord scheme. There is not even any evidence before the Inquiry to demonstrate that the appeal site "might" be required later, or to explain why this might be the case given that all of the evidence suggests that a scheme for the Chords can come forward alongside the appeal scheme. Finally, as Mr Moore accepted,⁹³ there has not even been an assessment as to whether an alignment across the site would be feasible or viable taking into account, for example, any consequent impacts on the grade II* listed Bordesley Centre, or the fact that the site is currently occupied by existing built development, and that costly compulsory acquisition of the entirety of it would likely be required, a compelling case for which (taking into account alternatives) would need to be demonstrated in the public interest.
- 6.75 Paragraph 11 (c) of the Framework provides that decisions should apply a presumption in favour of sustainable development, which means, in the context of decision taking, *"approving proposals that accord with an up-to-date development plan without delay"*.
- 6.76 The Rule 6 Party's case that the appeal site should be sterilised, in the absence of any policy requirement or justification for the same, for at least four years unless and until a final route alignment is fixed, is the antithesis of that national policy requirement. It is a position that it unsupported by evidence.

⁹¹ A point also conceded by Mr Sweeney – see paragraph 6.6.2 of his PoE.

⁹² Page 22-23

⁹³ xx

It is unsurprising that this is not an argument that has ever been supported by the Council.⁹⁴ The Rule 6 Party's case is wholly unsupportable.

The planning balance

- 6.77 Taking all of the above into account, it is clear that the appeal proposal represents a sustainable scheme for development, that is compliant with the development plan and national policy, and in respect of which all of the witnesses giving planning evidence to the Inquiry, and the Council's own Interim Director of Growth,⁹⁵ agree that permission should be granted.
- 6.78 The benefits of the scheme will be significant and substantial. They are set out in the evidence of Ms Mulliner,⁹⁶ and the Appellant's Socio Economic Benefit Statement (which the Appellant invites the Inspector and Secretary of State to read in full)⁹⁷ and have not been disputed. Those benefits are very significant, cannot be understated, and should not be overlooked.
- 6.79 The delivery of 480 homes, including much needed affordable homes, to meet the demands of a growing population is a significant material benefit. The reasoned explanation to policy PG1 of the adopted Plan recognises that one of the most significant challenges the City faces is the growth in its population, and the resultant pressure this places on services, jobs and infrastructure.⁹⁸ Birmingham's housing land requirement falls significantly short of meeting its housing needs (with a shortfall of 37,900 homes arising across the plan period), and in order to meet even its planned requirements and growth potential, the City is dependent upon sustainable sites in the urban core, such as the appeal site, coming forward for development.⁹⁹ The delivery of sustainable urban sites, such as the appeal site, is critical if the City is to meet its housing needs and growth aspirations. The provision of 480 homes, including affordable homes, should be accorded significant weight in the planning balance.
- 6.80 The scheme will also make a very positive economic contribution. For example:
- The scheme will transform the site, delivering new high quality, modern, flexible and affordable commercial space in accordance with development plan objectives, and will assist with the diversification of the City's economy in accordance with the aspirations of the development plan (e.g. policy PG1, which promotes significant levels of employment and office development).
 - The appeal scheme will deliver 122 – 178 direct FTE jobs (equating to a total of 112 – 165 net additional jobs for the Birmingham City Region).
 - The proposed construction investment for the scheme would generate demand for up to 460 workers per year over a three year build period, in a City where some 2,000 unemployed residents cite construction as their main profession.

⁹⁴ Mr Grant confirmed, on behalf of the Council, that it did not take a safeguarding point

⁹⁵ Ms Mulliner Appendices 12 and 13.

⁹⁶ Paragraphs 7.4 – 7.9

⁹⁷ Ms Mulliner Appendix 1

⁹⁸ CD 4.5, paragraph 4.3

⁹⁹ CD 4.5

- The scheme will provide support for the City's visitor economy through the development of the new hotel, which could generate around 69,000 guests spending around £5m per annum in the City's visitor economy.
- This is wholly in accordance with policy TP25 of the development plan, which seeks to reinforce and promote Birmingham's role as a centre for tourism and support the City's existing tourist facilities. The provision of hotel development is expressly recognised as "*important*" in that context.¹⁰⁰
- The scheme will facilitate potential household spending of around £4.4 million available for capture by local businesses providing household goods and services, and the potential for a one off injection of around £2.6 million through new household furnishing and decorating homes.
- The scheme will contribute significantly to the economy of the area, with £3.6 - £5.3m in net additional Gross Value Added to the Birmingham City region.

- 6.81 There will be significant environmental benefits as a result of the implementation of the appeal scheme, which will contribute to wider place making objectives in Digbeth. This regeneration scheme will significantly improve the visual appearance and public realm of this brownfield site in an area identified for regeneration and growth (see policies GA1.1–3 of the Birmingham Development Plan.¹⁰¹ The appeal site is currently occupied by old industrial buildings, which are not fit for purpose, and bringing forward a viable and sustainable use for the site is a very positive and significant material consideration.
- 6.82 Without the appeal scheme proceeding, the evidence is that the fall back for the appeal site is that it will be left vacant, with its future uncertain. It will be a deadweight within the City, and there is no indication that the benefits and mix of uses that are deliverable as a result of the appeal scheme can be secured at a later date. Set against this, if permission is granted, there will be increased flexibility for the construction of a scheme for the south-west Chord. In addition, the benefits that the appeal proposal will bring to the City are substantial, are evidenced, are not disputed, and are deliverable. As explained by Ms Mulliner, this is a very significant material consideration in favour of the appeal scheme.
- 6.83 The importance of these undisputed scheme benefits is only amplified by the Covid19 Crisis and the UK's entry into a deep recession, which has a particular resonance in the City of Birmingham. Unemployment has risen substantially in Birmingham as a result of the crisis, and new development has a part to play in supporting the local and national economy recover from Covid19 impacts. The investment that can be provided by a significant scheme such as the appeal scheme has the real potential to bring people back into the City Centre, support new business creation and growth, and generate immediate opportunities through construction activities as the City starts to emerge from the crisis.¹⁰² It is respectfully submitted that it has never been more important

¹⁰⁰ CD 4.9

¹⁰¹ CD 4.2-4.4

¹⁰² See page 24 Socio Economic Report, Ms Mulliner Appendix 1.

to ensure that the benefits of this important regeneration scheme, which it is accepted can deliver such important material economic and social benefits, is secured now for the benefit of the City.

- 6.84 In short, this is exactly the type of scheme that should be supported, and exactly the type of site that should be the subject of redevelopment and renewal, in accordance with the policies, growth aspirations and regeneration objectives of the Council's adopted plan, and in accordance with the objectives of national policy.
- 6.85 The Council's Interim Director of Inclusive Growth was right to advise Members that, in these circumstances, the basis upon which the Council might refuse the application was "*very slim*" and that to withhold consent "*wouldn't be a reasonable position from the planning point of view*".¹⁰³ The Council's professional planning witness was also right to concede that planning permission should be granted. There is simply no justification for sterilising the appeal site for (at least) four years until a final alignment is defined, in circumstances where there is no evidence that the appeal scheme would preclude the delivery of a scheme for the south-west Chord, and where all of the evidence demonstrates that an effective scheme for the Chord could in fact come forward alongside the appeal proposals such that the benefits of both are realised.
- 6.86 In conclusion, this is a scheme for sustainable development that should be permitted in accordance with the provisions of both the development plan and national policy. It will bring significant benefits to an area where there is an acute and critical need to deliver the same, and it is wholly in accordance with the Council's growth and regeneration objectives for the City. The benefits of the appeal scheme are needed now, are deliverable, and it is respectfully suggested that planning permission should be granted accordingly.

7. THE CASE FOR BIRMINGHAM CITY COUNCIL

- 7.1 The main issue is agreed to be that recorded in the Inspector's Case Management Conference Note, namely whether the development proposed would materially prejudice delivery of the South West Camp Hill Chord (the Chord) in terms of its construction and operation. This is indeed a multi-faceted issue which encompasses a number of different considerations.

Introduction and approach to the main issue

- 7.2 The written case for the Appellant explores the issue in a number of ways, which seek to tip the approach in terms of allowing the appeal scheme to proceed. The first such means is to allege that the development plan is not infringed in any way, that the proposal accords with the development plan and, accordingly, should be permitted without delay. Ms Mulliner accepted in cross-examination that that it is not the Appellant's case irrespective of any prejudice to the delivery of the Chords found to exist.
- 7.3 The case for the Council is that should material prejudice be found, such a finding would not be in accordance with, and thus would be in conflict with, the development plan. In any event, it is the case for the Council that material

¹⁰³ Ms Mulliner Appendices 12 and 13.

prejudice would, in any event, amount to a material consideration of such weight that refusal would be justified. The key finding is that the prejudice matters or is material.

- 7.4 The written evidence of Ms Mulliner explores a difference between a proposal which is in accordance with the development plan, and one that is in conflict with it. Whilst it is important to determine whether the proposal accords with the development plan, in this case it is submitted that this will not necessarily be conclusive. The key consideration is whether allowing the appeal scheme matters in terms of a prejudicial consequence for the delivery of the Chords.
- 7.5 It is for this reason that the written evidence of Ms Mulliner is taking the decision in the wrong direction, where she refers to the absence of a specific criterion based policy which tests the appeal proposals against which the proposal fails, as an alleged policy pre-requisite to dismissing this appeal.¹⁰⁴
- 7.6 A related point made in the written case for the Appellant, is that the proposal will fall to be determined under paragraph 11c of the Framework, as the accordance with the development plan as whole will mean that the presumption in favour of sustainable development is accordingly engaged.
- 7.7 For decision-taking, this means '*approving development proposals that accord with an up-to-date development plan without delay.*' This must, however, give way to the statutory test under section 38(6) of the 2004 Act, in that decisions can be taken other than in accordance with the development plan where material considerations indicate otherwise. This is recognised in paragraph 12 of the Framework.
- 7.8 Other approaches to the evidence seek to confine the decision in a more specific way in the context of the evidence given. Thus, a formulation adopted by Ms Mulliner¹⁰⁵ is to require the Secretary of State, as decision-maker, to identify whether the appeal scheme, if built, would in fact pre-empt the use of the land to such an extent that it would in fact prejudice the delivery of the Chords. This introduces two tests, both on the balance of probabilities:
 - first, whether on the balance of probabilities [would] use of the appeal land pre-empt the use of the land for the Chords;
 - if so, this is not enough as second, it would also be required to show that this [would] be to such an extent that it would in fact prejudice the delivery of the Chords.
- 7.9 This is not the correct approach, and it only seeks to set an artificially high threshold to the decision - one which seeks to place a constraint to materiality that does not exist as a matter of law. It is an approach that consciously puts the delivery of the Chords at a significant material risk. It is not necessary to show that the appeal use is likely to be pre-emptive to use for the Chords. It is sufficient that it realistically could be pre-emptive. Moreover, and in addition, it cannot be right that it is necessary to show that this pre-emption would in fact prejudice the delivery of the Chords – in the current context this is a very high burden - it is sufficient that it could realistically have that effect.

¹⁰⁴ See Ms Mulliner PoE paragraph 5.75

¹⁰⁵ at her PoE paragraph 6.8

If the effect of allowing the appeal scheme meets this lesser test, then it would materially prejudice the delivery of the Chords.

- 7.10 Ultimately, in cross-examination of Ms Mulliner, the issue narrowed to the point that the key issue is whether allowing the appeal proposals to proceed could have an adverse on the delivery of the Chords. Miss Reid asked a series of questions of Mr White in cross-examination, addressed to whether his concerns were merely theoretical on the basis that such concerns were not materially prejudicial. In answer, he acknowledged that those concerns were theoretical on the basis that he had adduced no evidence of actual current prejudice. Conversely, he was keen to make clear that this was expressly on the basis that there was no evidence of absence of future prejudice. This will be said by the Appellant to be critical to whether it is, or remained reasonable, for the Council to continue to seek to prevent this development. This closing will return to this key issue.
- 7.11 Another attempt to confine the decision is offered at paragraph 6.13 of Ms Mulliner's proof of evidence, which says that there is no policy requirement for all potential options for the Chords to be protected. It has already been accepted that there is no criterion based policy in the development plan that dictates refusal. This is a similar species of point and is similarly flawed. It is not reasonable to anticipate that a policy would protect all potential, or indeed realistic options, for the delivery of the Chords as a gateway to materiality. The absence of such a policy, however, does not mean that the weight to the consequential prejudice is not necessarily decisive. The exploration with Ms Mulliner in cross-examination of the dates¹⁰⁶ does show that the impetus behind the Chords has cranked up since examination of the Birmingham Development Plan early in 2004, but it is accepted that no such corridor exists.
- 7.12 Turning to the core of the Appellant's case and the objective limitations of the Appellant's technical evidence, a key attempt to confine the decision is offered in various places:-
- the AECOM letter of January 2020;¹⁰⁷
 - the AECOM Technical Statement of March 2020;¹⁰⁸
 - the evidence of Dr Raiss;
 - the evidence of Ms Mulliner.
- 7.13 The crux of this part of the case, is the Appellant's contention that it is only necessary to show a single feasible option for the development of an alignment of the Chords with which the appeal proposals do not interfere, for an absence of material prejudice to the Chords to have been satisfactorily addressed and shown.
- 7.14 Again, the Council does not accept that the consideration of this issue should be confined in this manner, for a number of reasons:-

¹⁰⁶ ID4

¹⁰⁷ CD 1.2

¹⁰⁸ Appendix MR1 to the proof of Dr Raiss

- a) the fact that an alignment can be shown, does not demonstrate that this is the alignment that is likely to emerge from proper consideration of alignment options;
- b) if it is realistic that other options will emerge from proper consideration of the alignment options, then such options could well provide a better case for delivery;
- c) the premise of advancing a single feasible option whilst accepting that such an option may influence the design (or dictate it) and may influence the construction methodology (or dictate it)¹⁰⁹ cannot properly be reconciled with a robust optioneering process which has been shown by the evidence of Mr White not to have yet occurred;
- d) whilst this does not reveal current evidence of present prejudice to the delivery of the Chords, this is to set an unattainable target given the stage the optioneering process has reached. The possibility of prejudice does, however, remain and despite the clear answers of Mr White in cross-examination¹¹⁰ that he could only currently state that these were theoretical – these answers need to appreciate what is meant by the answer and do not reflect the case for the Council.
- e) the case for the Council picked up his answers in re-examination, that until the optioneering process (commissioned by the DfT and being conducted by Network Rail) had been conducted, the prejudice would remain theoretical. However, given that prejudice remains possible, and given that Network Rail certainly does not rule out prejudice on a reasonable interpretation of the correspondence,¹¹¹ it is submitted and is the case for the Council, that this remains real rather than theoretical prejudice for reasons that can objectively be understood.

The Importance of delivery of the Chords

- 7.15 Delivery of the Chords is a corporate priority of Birmingham City Council. It is a matter of truly great significance. The importance to the Council in this decision is very evident including in the note of the Council Minute provided by Ms Mulliner.¹¹²
- 7.16 Within the context of national, regional and sub-regional transport policy for rail, the Chords is an intervention of recognised importance.¹¹³ All of this evidence which goes to the importance of the Chords, has not been challenged by the Appellant in this Inquiry.
- 7.17 It is right that the development plan does identify the importance of the Chords. Whilst it provides a long term strategy for the whole of the City, the Birmingham Development Plan will not be able to provide all the detail necessary to guide all development.¹¹⁴ Moreover, it is clear from the dates set

¹⁰⁹ See Ms Mulliner PoE paragraph 6.12

¹¹⁰ The answers of Mr Sweeney in xx were plainly led by this also – see for example his PoE paragraphs 1.1.4 and 1.1.5 at bullets 6-7

¹¹¹ See CD 2.3 and Ms Mulliner Appendix 8.

¹¹² Ms Mulliner Appendix 13

¹¹³ This appears to be agreed by all of the parties to the Inquiry. See Mr White's PoE at paragraph 76.

¹¹⁴ See CD 4 and 4.1.1. Foreword and Introductory Paragraphs to Birmingham Development Plan (2017).

out in ID4 that the more recent impetus lying behind the Chords scheme post-dates the policy evolution of the Birmingham Development Plan. Nonetheless, the importance is clear. In chapter 9 "Thematic policies – connectivity" the overall objectives of the policies are introduced by identifying that high-quality connections by all modes including rail are vital to the City's future economic prosperity and social inclusiveness and in terms of enabling wider access to jobs and high order opportunities.¹¹⁵ Under this main issue, policy TP38, as relevant, states:-

'The development of a sustainable, high quality, integrated transport system, where the most sustainable mode choices also offer the most convenient means of travel, will be supported.

The delivery of a sustainable transport network will require:

Improved choices by developing and improving public transport....networks.

The facilitation of modes of transport that reduce carbon emissions and improve air quality.

Improvements and development ofrail...routes to support the sustainable and efficient movement of goods.

Working with partners to support and promote sustainable modes and low emission travel choices.

Ensuring that land use planning decisions support and promote sustainable travel.'

- 7.18 In policy TP41, which lies under the more general TP38, public transport is dealt with specifically and, in respect of rail, the following is provided:-

'Rail

Proposals to enhance the City's rail network will be supported, including:

- *The delivery of Camp Hill Chord Scheme and the facilitation of services from the Camp Hill line and from the Tamworth/Nuneaton to run into the new platforms at Moor Street Station.'*

- 7.19 The explanation for this is provided within paragraph 9.28 in terms of the importance of the Chords in delivering the needed enhancement of the City's suburban rail network enabling local services, whilst "*offering additional benefits to help relieve capacity constraints at New Street Station and the national rail freight network running through the region.*" The latter offers insight into the regional and national importance of the Chords.

- 7.20 The Chords will allow the delivery of ten additional trains per hour, identified by Network Rail as necessary to cater for future demand. As indicated in evidence from both the Rule 6 Party and the Council, the benefits extend to a number of destinations, with Mr White referring to the West Midlands Rail Investment strategy which includes:

¹¹⁵ CD 4.1.14

- a) Kings Norton via new stations at Kings Heath, Moseley and Hazelwell;
 - b) the diversion of services from New Street into Moor Street so enabling additional services into New Street (up to five an hour) on the Coventry – New Street route;
 - c) a similar effect enabling new services from Sutton Coldfield to operate from New Street; and,
 - d) a similar effect enabling additional services between Nottingham/Derby and Leicester/Stansted airport.¹¹⁶
- 7.21 The available evidence shows the increasing importance of rail as a relatively sustainable mode. In central Birmingham, rail's share of the peak travel market has increased from 17% in 2001 to 38% in 2015.¹¹⁷ This is a trend that needs to continue and it is vital that it should.
- 7.22 The importance of the Chords in bringing forward necessary capacity in the network is identified in the Network Rail West Midlands & Chilterns Route Study (August 2017).¹¹⁸ As the Rule 6 Party makes clear, this is a pivotal component of the Midlands Connect Strategy (March 2017) and 'Midlands Rail Hub'. The Chords will connect Moor Street Station to the railways serving the East Midlands and North East, and Worcestershire and the South West.
- 7.23 Delivery of the Chords will enable best use to be made of the railway network and, in particular, will build upon committed rail infrastructure investment.¹¹⁹
- 7.24 Since adoption of the Birmingham Development Plan, the Chords have been the subject of investment, showing a level of renewed impetus. The evidence of the Rule 6 Party shows that following an initial investment of £5 million, a SOBC was submitted to the Department for Transport (DfT) in July 2019. In March 2020, a further £20 million was announced in the Spring 2020 Budget to enable the development of an Outline Business Case equivalent to GRIP3 or Rail Network Enhancements Pipeline (RNEP) Stage 2 'Determine'.¹²⁰
- 7.25 Moreover, the increased practical impetus since adoption of the development plan is more than matched by a clear and obvious upward shift in the urgency surrounding the decarbonising agenda. There can be no doubt that the role of rail is pivotal to the targets set at national and more local level. The DfT's March 2020 publication 'Decarbonising Transport – Setting the Challenge' shows that the Government is clearly committed to maximising a shift of users to rail from more polluting modes both for movement of passengers and goods.¹²¹
- 7.26 Thus the importance to be attached to the delivery of the Chords should properly be seen as very important indeed. By the same token, to allow a development to proceed which could serve to frustrate the delivery of the

¹¹⁶ See Mr White PoE paragraph 39.

¹¹⁷ See Appendix LW3 to the PoE of Mr White

¹¹⁸ CD 5.19

¹¹⁹ As described in Mr White's PoE paragraph 18 and elsewhere

¹²⁰ PoE Mr White paragraph 60 and Mr Rackliff Appendix 15

¹²¹ See CD 5.22 paragraph 2.33 whilst recognising that electrifying more of the railway is likely to be necessary to deliver decarbonisation. [see paragraph 2.36].

Chords, should be seen as a very substantial negative effect,¹²² the significance of which extends beyond Birmingham – it will serve to compromise necessary growth in service frequency for passengers and use of a more sustainable mode for passengers and goods.

- 7.27 It is accepted and understood that the evidence of Mr Sweeney in cross-examination was that, having heard the evidence, he was not able to identify objective evidence of prejudicial effect on the Chords and that on that basis, his opinion was that planning permission should be granted. In this respect, the case for the Council is to be understood from the written evidence, the evidence of Mr White in re-examination, and as set out in these submissions.
- 7.28 Elements of the written evidence of Ms Mulliner look at the interpretation of policy in a critical way, which may lead to a finding of absence of conflict even where prejudice could be shown.¹²³ Such an approach would frustrate the objectives of such policy. Not only will the development proposals not support the delivery of the Chords, which is expressly the policy in TP38 and TP41, they could seriously undermine and frustrate the delivery of what the policies seeks. This is a policy conflict. It is unnecessary for a policy to be drafted negatively to show such conflict and to suggest otherwise is pedantry. If this is the effect – then the importance is not diminished by the absence of such a negatively worded policy, or indeed the absence of a safeguarding policy. Ms Mulliner appeared to accept the thrust of this in cross-examination, returning to the pivotal point for the Appellant – an absence of evidence of such prejudice.

The site and its context

- 7.29 The area surrounding the appeal site is described in Section 3 of the Statement of Common Ground (SoCG) with the site itself is described in section 2 of the document. The context is a relatively complex one and this can be seen from the relevant contextual plans including the DWG1-4 series of plans found to the back of the MM2010 Report.¹²⁴
- 7.30 Outside the area described in the SoCG, the grade II* listed Bordesley Centre is to be found to the south east of the roundabout junction described as Camp Hill Circus on Stratford Road to the south.
- 7.31 Mr White is correct to describe the current rail geography as complex. This can be seen from his evidence at Figure 1 and paragraphs 10-12. It is also a tight urban context. As such, given the very strong case for the delivery of the Chords, it is inevitably going to lead to the exercise of compulsory purchase powers and will be likely to mean the acceptance of significant impacts. The evidence given by the Appellant on a claimed betterment from drawing the proposed buildings slightly further away from the railway than the current buildings, must be seen in that light.
- 7.32 The appeal site remains occupied by Sulzer. The Planning Statement¹²⁵ submitted in support of the application in 2018, refers to the existing occupier

¹²² Mr White PoE paragraphs 74-78

¹²³ See above including at paragraph 13.

¹²⁴ CD 5.2

¹²⁵ See paragraph 6.4 of the Planning Statement and paragraph 2.7 of the Loss of Industrial Land report submitted with the planning application.

relocating to a purpose-built facility in the Birmingham City region in 2019, at which point the site will then remain vacant.¹²⁶ The same statement is made in the SoCG in August 2020 and the intention to relocate has been moved back until November 2020.¹²⁷ The reason for making that clear relates to questions asked of Ms Mulliner in cross-examination.

Network Rail

- 7.33 The Appellant seeks to derive a great deal of support and comfort from the position of Network Rail. This is a position that greatly influenced the Officers of the Council in recommending as they did. As the Council takes a different view, it is important that the extent of the role and any limitations on the known position of Network Rail should be explored and so far as possible, properly understood.
- 7.34 The extent of its role is explored in the evidence of Dr Raiss, including at paragraph 3.1.8 of his proof. However, it is important to note that Network Rail is not the current promoter of the Chords scheme. Until recently, that was the sub-national transport body Midlands Connect but, from approximately July 2020, it was announced that promotion of the Camp Hill Chords would be taken over by the DfT. This immediately highlights the regional, and indeed national importance, of the delivery of the Chords.
- 7.35 Again, emphasising the extent of the role of Network Rail, it is understood that in July 2020, DfT commissioned it on a consultancy basis to develop the Camp Hill Chords scheme to Outline Business Case (OBC) level, which would then take the scheme to the equivalent of GRIP3 or RNEP Stage 2.¹²⁸
- 7.36 Not only is Network Rail not the promoter of the Chords, but it will accordingly not be responsible for funding it. This, as Mr White states at paragraph 25 of his proof, is likely to depend on public money and, accordingly, the delivery of scheme value, having emerged through a necessary process and evolution.
- 7.37 In this context, the consultation responses and other correspondence from Network Rail needs to be understood as much for what they do not say, as for what they do say. From the correspondence,¹²⁹ it can be seen that:
- on 12 February 2019, a SOBC was yet to be developed, nor had engineering drawings been developed at that stage;
 - on 3 May 2019 it is made clear that 'g(G)iven the current level of project maturity, we have not yet completed the engineering design activities to be able to have a defined alignment for the western chord';
 - on 9 July 2019 Network Rail was at pains to point out that '*we do not as yet have a final, fixed design for the Bordesley Chord proposals and their positioning could change as the design progresses*'. They also make clear that '*Network Rail had not selected a construction methodology*';

¹²⁶ Whilst not a criticism, Ms Mulliner in xx stated that the original intention was for a move in October 2020. Having checked as above, the original intention was earlier.

¹²⁷ See SoCG paragraph 2.5

¹²⁸ PoE Mr White paragraph 20

¹²⁹ CD 2.03

- the officers of the Council took the trouble to ask specific probing questions of Network Rail in November 2019, from which it can be seen there was:-
 - no ability on the part of Network Rail to provide any detail of alignment or indeed parameters for a plan for the alignment;
 - it is not possible to determine the land take requirements;
 - in the absence of a design construction methodology land take for construction was yet to be determined;
 - whilst it was envisaged that the Chords would be built – it was unclear if both the north-east and south-west Chords would be built simultaneously or sequentially.

- 7.38 Accordingly, whilst Network Rail has not objected to the appeal proposals, this should be understood in context and it cannot be taken from its heavily qualified position that there is no realistic likelihood of material prejudice to the delivery of the Chords if the appeal scheme is allowed to proceed. This is the only way that the correspondence can reasonably be read. The evidence from the Appellants occasionally sought to suggest the position of Network Rail is clearer than it can properly be considered to be. Dr Raiss appeared to suggest that the letter of 9 July 2019 could be read to mean that any change in design would not result in any additional requirements arising from the building of the Chords. This cannot be so, as the later letter of 7 November 2019 makes very clear. The gradient, curvature speed and alignment are not known, nor are the land take requirements.
- 7.39 The implications of the line speed being unknown are important. Dr Raiss confirmed in his oral evidence that a saving of 8.5 to 17 seconds could be achieved by increasing speeds to 40 mph. More could be achieved by increasing to 45 mph. This is very far from fanciful. With an agreed need to design for electrification¹³⁰ in light of the decarbonisation agenda, timetable gains through increased speeds could be significant as Mr White indicated. When suggested in cross-examination by Miss Reid that this would be a few seconds (rather than 8.5 to 17 seconds) he informed the Inquiry that even such gains could well be significant. All of this will be established through the evolution of the business case in due course.
- 7.40 Dr Raiss identified that the increased speeds would be likely to take the line into conflict with the Bordesley Centre prior to the appeal site. All the evidence to the Inquiry agrees that impact on a grade II * listed building should be avoided if it reasonably can be and such impact will be considerable in terms of harm in any planning balance. However, the Ordsall Chords Decision (and Inspector's Report)¹³¹ illustrates that impact on heritage assets can be sanctioned where the benefits are so significant as to justify them. Accordingly, in the absence of understanding the business case, the impact on Bordesley Centre cannot be seen as an inevitable "show-stopper" in respect of increased line speeds. If that is right, then it cannot be assumed that there will not be a greater requirement for the appeal site.

¹³⁰ Dr Raiss in xx

¹³¹ CD 5.18

Evaluation of the evidence of AECOM

7.41 AECOM does appear to have had a hand in identifying constraints in respect of the evolution of the design of proposals. Dr Raiss was not involved personally but, as originally conceived, the design was only changed as a reaction to the consultation response from Network Rail. This can be seen from the Briefing Note dated July 2018 provided by Ms Mulliner.¹³² The position of the Applicant at that stage is essentially summed up at paragraph 1.13:-

'There is therefore no indication that the land at the site at Camp Hill would be required in association with the scheme, and no certainty as to whether, or when, a scheme may come forward.'

a) The AECOM evidence

7.42 The evidence of AECOM has sought to fill the evidential gaps left in the position taken by Network Rail. It is clear that the AECOM evidence:-

- was drawn up on the basis of its own assumptions based on their experience of what Network Rail's requirements would be and the physical constraints of the site;¹³³ and,
- included within those are assumptions including "Network Rail aspirations" for future line speeds of the chord. Dr Raiss was less than convincing¹³⁴ on what this was based on in light of the letters from Network Rail which show this issue was yet to be determined.

b) The Range of options

7.43 Both the AECOM letter of January 2020¹³⁵ and the Planning Statement of March 2020¹³⁶ are intended to support the single option put forward – unarguably described as the AECOM indicative alignment.¹³⁷ The appeal was entered on this basis. AECOM indicates that it was unaware¹³⁸ of the contents of the MM2010 Report until provided to it by the Rule 6 Party with its Statement of Case. The AECOM evidence to the Inquiry is that the three "preferred options" carried forward in the MM2010 Report (1A, 7G and 9I) were almost identical to that considered in the initial AECOM evidence, so further confirming an absence of prejudice. The Council does not accept that this can properly be asserted.

7.44 There is common ground that the alignment will need to comply with the necessary processes set out within the technical evidence.

7.45 It can be seen that the technical approach advised at the times relevant to the evolution of the appeal proposals, and indeed the present time and stage in the process, is to keep options for the delivery of the Chords open. This is

¹³² Ms Mulliner Appendix 3

¹³³ Dr Raiss proof of evidence (PoE) paragraphs 2.4.3 to 2.4.5

¹³⁴ It is submitted that there were also occasional lapses into bullish optimism by Dr Raiss, including a strong unsolicited assertion that there would be no effects whatsoever – which he accepted when challenged had not been put in his PoE.

¹³⁵ CD 1.2

¹³⁶ Dr Raiss Appendix MR1

¹³⁷ Notwithstanding the later refinement of the case to place much greater emphasis on the Birmingham City Plan in terms of provenance. Indeed, during xx, he placed greater reliance on the work of Mott McDonald in 2010.

¹³⁸ Dr Raiss PoE at 2.4.12

explicitly so prior to the proper development of a SOBC. In the context of the March 2018 DfT document 'Rail Network Enhancements Pipeline' (RNEP)¹³⁹ paragraph A4 states:-

'A proposed Enhancement will not be developed further without a Strategic Outline Business Case (SOBC). This SOBC should set out and consider the range of approaches available to meet the opportunity identified, that than focusing on one.'

- 7.46 Further beyond that stage, within the same publication at RNEP Stage 2, there continues to be a need to gain a more detailed understanding of what is required for the intervention and will require an evaluation of the costs and benefits of a range of options and more detailed information such as engineering design may be required (paragraphs A6-A9). Moreover, it is clear that still further beyond that:-

'A10 An enhancement cannot progress to the Design stage of the pipeline without an Outline Business Case (OBC). Government will not agree and endorse this OBC before engaging in a Decision to Design with all the relevant parties.'

- 7.47 This is not the position taken in the evidence of the Appellant. Indeed, the evidence of Ms Mulliner is that it is only necessary for the Appellant to show a single feasible scenario.¹⁴⁰ However, this is the position in fact reached later in the RNEP process (see above and A12).
- 7.48 The approach of the Appellant in the written evidence to the Inquiry, is to present a single option and to thereafter test it by reference to a ten year old study. Only when the emphasis of the criticism in the evidence of the Council became clear, did the oral evidence adjust to agree the need for much wider optioneering.
- 7.49 A parallel process which guides option development, is agreed to be the GRIP process. It is common ground that the appeal scheme has not been through GRIP3, which is concerned with "Option Selection" and again at this stage, closing options prior to that is not readily reconciled with the GRIP process.¹⁴¹
- 7.50 The theme continues in the extract from the Treasury Green Book¹⁴² at paragraph 2.7 which provides:-

'Generating a long-list of options at the start of the appraisal process ensures that a full range of possibilities are considered. This should be informed by stakeholder consultation or engagement, lessons learned from previous interventions, international best practice and the wider evidence base. Starting out with a narrow set of options or a pre-determined solution may miss the opportunity to explore more novel, innovative solutions that might offer better social value.'

- 7.51 Further to the more general point¹⁴³ about the optioneering process, keeping

¹³⁹ CD 5.15 page 16 of Annex A

¹⁴⁰ See Ms Mulliner PoE paragraph 6.14

¹⁴¹ CD 5.14

¹⁴² CD 5.25 [2018]

¹⁴³ see also DfT Treasury Appraisal Guidance paragraph 1.1.5 provided at CD 5.23

options open two specific matters stand out as warranting careful re-consideration in light of changes over the last ten years since MM2010 Report, namely the closure of Bordesley Station and the need to take account of future electrification of the line.

- 7.52 It can be seen that the AECOM indicative alignment, and all of those in the MM2010 Report, assume the closure of Bordesley Station. This is pre-determined in the evidence of the Appellant. It is a position reached in advance of necessary stakeholder engagement.
- 7.53 The full range of possibilities must include keeping Bordesley Station open in its current position and that matter must be informed by engagement. This is prior to selecting an option. Stakeholder engagement, as with any genuine exercise in consultation, must be able to inform and influence outcomes. This is advice which makes sense and is reinforced by the statutory provisions which cover a later part of the process. A reminder of this is contained in the rebuttal of Mr White at paragraphs 6-8, which refer to the process under the Railways Act 2005 section 29 and Schedule 7. Both the Passenger Transport Executives of any area affected, and the local authority for the area of the station, are among those specifically identified as stakeholders. As Mr White explains in the rebuttal, it is not appropriate to remove this option at this stage.
- 7.54 The entire reason for the advice and the statutory provision is that good reasons for the retention of the station could be advanced. For example, transport sustainability advantages for the retention of the station, such as by reference to the match day benefits for the usage to support the use of the Birmingham City football stadium; the removal of a longstanding ¹⁴⁴ community asset; and resistance to the closure of an established station which is a railway network asset.
- 7.55 It is reasonable to question assumptions in the MM2010 Report with respect to electrification. Electrification should not simply be seen as a matter for detailed design but should be considered in the initial phases.
- 7.56 This is an instance where standards have changed, as Mr White says in his rebuttal. Moreover, to factor this into a design is consistent with the direction of Government policy in terms of decarbonisation.¹⁴⁵
- 7.57 Further, the electrification of the scheme needs to be taken into account in considering the delivery the Chords as a whole. Increased standards for clearance for electrification will lead to increased height of a Chord running over the existing Moor Street to Small Heath line, with implications for the tie into the south-west Chord.
- 7.58 The loss of a station is a serious matter. For statutory consultation to mean something, it must be able to influence outcomes. The outcome cannot be assumed. The evidence of Dr Raiss did not respond in a written rebuttal, but for the first time provided detailed explanations in oral chief. This should have been done earlier and the evidence submitted by the Rule 6 Party showing the

¹⁴⁴ Opened in 1855 – see paragraph 3.3.4.2 and Figure 7 of MM2010- CD 5.2

¹⁴⁵ See CD 5.22 [March 2020] paragraph 2.36

greater implications for the appeal in that scenario has illustrated very well why this is so.

- 7.59 All of this supports looking at the options more widely, particularly so in the context of the passage of time since the MM2010 Report and changes in standards in the meantime.

c) Method of construction

- 7.60 The written evidence shows the Appellant's closing of options and indeed retrofitting of analysis clearly extends to the method of construction of "the AECOM indicative alignment." This has clearly occurred. This is not entirely surprising. As Dr Raiss states at paragraph 1.1.2 of his proof, his background is as a specialist in "working with contractors preparing alternative tender or design and build contracts for viaducts and other structures for transportation projects. The essence of such costs-effective designs is to consider the methods of construction before developing the detailed structural design."
- 7.61 This is not the correct order or sequence to be derived from a true interpretation of technical guidance for the evolution of a scheme such as the Chords, in which construction methodology needs to be evaluated later in the process following detailed consideration of the costs and benefits of the range of options for construction – indeed Dr Raiss acknowledged in cross-examination that there was a tension between his approach and the guidance in this respect.
- 7.62 Looking at the range of alignment options more widely, even within the MM2010 Report it is acknowledged that the scheme had not reached GRIP3 – which through engineered design and trade-offs between "a lower cost embankment and the higher cost structure with the possibility of land use below will become easier to calculate" would lead to the provision of a single preferred option.¹⁴⁶ As Mr White makes clear,¹⁴⁷ there is yet to be a properly explored consideration of those necessary trade-offs in terms of construction methodology. This would allow necessary design engineering. This is entirely consistent with the active optioneering approach leading to the identification of a preferred option which will be worked up in the options for designing a scheme which results in a plan endorsed by an OBC "to design the optimal railway solution that will realise the desired benefits". This can be seen from the RNEP process to be a stage after stakeholder engagement has taken place and after engineering design optioneering has taken place.¹⁴⁸
- 7.63 Paragraph 35 of the rebuttal by Mr White sums this up in a manner which is wholly consistent with the consultation responses of Network Rail as explained previously:-

'Dr Raiss' overview of construction approaches is limited in scope and works on the basis the chord alignment he identifies as being the only option. In reality, other options may emerge from the development work now commenced by Network Rail that would require other approaches to construction not explored by Dr Raiss.'

¹⁴⁶ See CD 5.2 pages 79/80

¹⁴⁷ paragraphs 31-35 of his rebuttal

¹⁴⁸ See CD 5.15 Annex A paragraphs A7-10

Conclusions on the main issue

- 7.64 The Council is not oblivious to the merits of the appeal proposals. They were recognised by the officers of the Council and are recognised in the evidence of Mr Sweeney who gives the planning evidence on behalf of the LPA. In the views of both there are countervailing factors in the planning balance quite apart from the main issue.
- 7.65 However, it is entirely clear in the view of the Council that this is the decisive issue. For the avoidance of doubt therefore, if it is concluded that there is no material prejudice to the Chords, then it is not the case for the Council that there are any other factors weighing against the appeal proposals that justify refusal. This is because there is no doubt that the construction and delivery of the appeal scheme does itself confer a series of considerable benefits which are acknowledged to meet a raft of policy objectives in the Development Plan.
- 7.66 However, notwithstanding the concessions made by witnesses called for the Council in cross-examination in this case, this is not the conclusion that the Secretary of State is invited to reach. The evidence of the Council includes the written evidence and the basis of the concessions have to be understood, namely that there is no evidence that there will be prejudice. This is because given that the route alignment is yet to be duly arrived at, no such evidence can be shown. However, there cannot be confidence from the qualifications on the correspondence from Network Rail that the alignment will look something like the ones considered in the MM2010 Report, and the analysis of AECOM depends on this being so. Future prejudice could actually occur.
- 7.67 Based on the evidence before this Inquiry, the Secretary of State is invited to conclude that allowing the appeal proposals to proceed could, in the future, materially prejudice the delivery of the Chords for the following reasons.
- 7.68 Delivery involves actual construction of the Chords. This is a very substantial prize in planning terms - the economic, social and environmental case for which fits well within the Government's agenda to invest in infrastructure to level up the regions and to decarbonise Britain.
- 7.69 The support for the delivery of the Chords is clearly set out in the development plan and has two sides - one is to welcome the implementation of the Chords, the other is to ensure that it can take place at all. To say that one side has relevant and active policy support but the other is not active or neutral, is a non sequitur – both sides are engaged by the policy.
- 7.70 Reference is made to some fundamental elements of case law within the Note from the Council at CD7.1. In this case some elaboration is required on CD7.3 (*Samuel Smiths v North Yorks CC [2020] UKSC 3 (on appeal from: [2018] EWCA Civ 489)*) which is expressed somewhat pithily. The *Samuel Smiths* case in the Supreme Court concerned the proper approach to Green Belt policy. It is immediately appreciated that this is not such a case. However, the judgment of Lord Carnwath is instructive as to why planning law, and in particular the approach to development plan policy, is an area in which, subject to hard-edged questions of interpretation, considerable judicial deference is afforded to the decision-maker. In terms of legal principle, Lord Carnwath further illuminated the limitations of *Tesco v Dundee* at paragraph

21,¹⁴⁹ particularly in the context of broad statements of development plan policy, which may be mutually irreconcilable. To prescribe a requirement for a safeguarding policy, or a negatively worded criterion in a development plan, as a necessary pre-requisite to finding policy conflict with support for a very important infrastructural improvements scheme, is to approach policy in the wrong way. If a development proposal has the effect of frustrating that scheme, then it will not be capable of being supported and on any sensible view, there will be a conflict with development plan policies TP38 and TP41, notwithstanding the statement of support for delivery is a broad and high level one.

- 7.71 There can be no doubt that this is, in any event, a material consideration and the Appellant has not at any stage addressed this on the basis that the potential for prejudice is anything but a material consideration – the adjustments that the Appellant has made reflect specific requests in the Network Rail correspondence, notwithstanding future uncertainty.
- 7.72 The written case for the Appellant did experiment with the application of various thresholds to the materiality of the consideration. This indeed is an issue to be handled with tremendous care. In guiding this matter the Council advances the following:
- 7.72.1 There is no requirement as a matter of law that the delivery of the Chords should be shown to be more than a possible future use of land, which includes the appeal site, for it to be a material consideration.
- 7.72.2 Supporting the delivery of the Chords goes beyond simply placing support behind the specific process of delivering that scheme and extends to seeking to both avoid and minimise alternative future use of land which will, or could well have, the effect of frustrating the delivery of the Chords.
- 7.72.3 To require it to be shown that the alternative future use will have the effect of frustrating the delivery of the Chords, sets too a high a threshold for materiality, or indeed weight and, consistent with paragraph 7.75 above, it is sufficient for it to be shown that it could have that effect.
- 7.72.4 If the appeal scheme could have that effect, it would be prejudice and that prejudice would be more than theoretical.

¹⁴⁹ "21. Much time was taken up in the judgments below, as in submissions in this court, on discussions of previous court authorities on the relevance of visual impact under Green Belt policy. The respective roles of the planning authorities and the courts have been fully explored in two recent cases in this court: *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13, [2012] PTSS 983, and *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865. In the former Lord Reed, while affirming that interpretation of development plan, as of any other legal document, is ultimately a matter for the court, also made clear the limitations of this process:

"Although a development plan has legal status and legal effects, it is not analogous in its nature or purpose to a statute or to a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse..." (para 19)"

- 7.72.5 The assessment of weight is a matter of planning judgment for the Secretary of State, which must be informed by assessment of the importance of the delivery of the Chords and the assessment of the implications of presently losing the opportunity to grant permission for the appeal proposals and the potential for sooner delivery of the many benefits associated with the appeal proposal.
- 7.72.6 The weight which lies behind the delivery of the Chords is at the top end of the scale - it is very substantial. This is important in informing the weight to attach to the potential for frustrating that delivery – it is submitted that if the effect could be one of prejudicing delivery, then that suffices to justify dismissal.
- 7.72.7 If the MM2010 Report can be relied upon as showing the true and only realistic options for the delivery of the Chords, then indeed there would not be a materially prejudicial impact on the delivery of the Chords.
- 7.72.8 Conversely if the evidence shows that these are not the only true and realistic options and other options may require the use of the appeal site, then not only could there be prejudice, given the requirement for such infrastructure schemes to evolve through a process of optioneering, design engineering, stakeholder engagement and demonstration of value, it could potentially have an impact on delivery of the Chords.
- 7.72.9 It is clear:
- that the evolution of the Chords has not yet reached a point at which options have been fully evaluated let alone selected;
 - that it has not yet reached a point at which refinement of designs against costs-benefits and assessment of construction techniques has taken place;
 - that stakeholder engagement has not been conducted upon any such options and certainly there has been no stakeholder engagement on anything that could properly be described as a preferred option;
 - that the statutory processes in respect of closure of Bordesley Station are yet to take place; and,
 - and that there is no business case for a preferred option nor a resulting plan.
- 7.72.10 In such circumstances and in the absence of this having occurred, it is plainly the case that options exist which are yet to be tested and emerge from the necessary processes. Such options will include a full assessment of the retention of Bordesley Station, will factor in future electrification within the process of optioneering, and will not necessarily assume that it is necessary to avoid impact on listed buildings or their settings.¹⁵⁰

¹⁵⁰ This is demonstrably the case as the example of Ordsall Chords (CD 5.18) illustrates. The route chosen did not avoid a number of listed buildings which Option 15 did – nonetheless, the overall case for the option remained superior in terms of transport and cost benefits.

7.72.11 Accordingly, the pre-determination of just the options considered in the evidence from the Appellant does not succeed in showing an absence of material prejudice, since the significant public investment involved in the delivery of the Chords needs to pass through a series of gateways to achieve delivery, the achievement of which requires that options should remain open not closed, and the achievement of which does not view the delivery of the Chords through the premise of enabling the grant of planning permission upon the appeal scheme, or indeed avoiding the appeal site.

Reasons 2 and 3

- 7.73 The Council has explained that it has accepted the viability based justification for the appeal scheme not meeting the full policy targets for affordable housing. It has explained why it has judged that a balance can and should be struck between achieving as much affordable housing as the scheme can sustain, whilst also obtaining much needed affordable employment space.¹⁵¹
- 7.74 It has always been accepted by the Council that reasons for refusal 2 and 3 can be overcome by the provision by the Appellant of a suitably worded planning obligation under section 106 of the Town and Country Planning Act 1990 (as amended). Upon the invitation of the parties, the Inspector indicated that in the circumstances, a planning condition would be acceptable. Accordingly the Council has worked with the Appellant to agree a wording on this basis.

Other matters

- 7.75 For the reasons advanced in the evidence of the Council, as set out in this Closing, which also gleans support from the position of the Rule 6 Party, the Inspector is invited to recommend to the Secretary of State that the appeal proposals should be dismissed and the Secretary of State is invited to dismiss the recovered appeal.

8 THE CASE FOR THE CONSORTIUM (RULE 6 PARTY)

- 8.1 The Consortium comprises the West Midlands Combined Authority (Mr Moore (of Mott MacDonald) and Mr Harris) and the West Midlands Rail Executive (Mr Rackliff).
- 8.2 The main matter for determination is whether the appeal development would materially prejudice delivery of the south-west Camp Hill Chord (the Chord) in terms of its construction and operation. What has emerged from the evidence is that the issues are in fact extremely simple and the potential consequences extremely profound. The benefits of the Chord are agreed; that the final alignment is still unknown is agreed. Network Rail, whilst welcoming changes made to the appeal proposals, has not categorically ruled out the risk of prejudice. The decision therefore turns on the question of whether, given the acknowledged importance of the Chord, and given the acknowledged uncertainty of its final design, there is enough evidence before the inquiry to demonstrate that no matter what the objectives and viability constraints are, it can be delivered and so the appeal development is acceptable.

¹⁵¹ See the CIL justification statement submitted by the LPA.

8.3 The Consortium says this is not the case.

EXPERT RAIL EVIDENCE

- 8.4 The common ground amongst all the parties is that it is not known what the final design of the Chord will be, nor whether it will be proposed across any or all of the appeal site. The Appellant's rail evidence confirms its understanding is that *'[t]he extent of any land take cannot be determined at this stage'*.¹⁵²
- 8.5 In the face of that uncertainty, the Appellant has no choice but to rely on the lack of objection from Network Rail. However, this must be set in the context of Network Rail refusing to confirm, as recorded by the Council's officer, that the appeal development would not *'prevent or compromise'* the delivery of the Chord.¹⁵³ In the face of *that* uncertainty, the Consortium has no choice but to oppose the proposed development.
- 8.6 It is unfortunate that Network Rail felt unable to assist the Inquiry or, ideally prior to the Inquiry, any of the parties, with the provision of further information which could have provided greater clarity on the risks involved. The desire not to publicly commit to any one design is understandable, but the failure to provide any information on why exactly Network Rail considered the appeal development *could* prevent or compromise the delivery of the Chord has made the task before the Secretary of State incredibly difficult. A very great deal of public money and time has been expended at this Inquiry exploring Network Rail's position of non-objection with an acknowledged risk of potential prejudice. This could have been avoided if Network Rail had been able to provide either more detailed information on the Chord alignment, or more definitive commentary in respect of prejudice. Instead, the parties at the Inquiry have been forced to attempt to decipher this conundrum in the dark.
- 8.7 It has to be noted that both Mr Moore and Dr Raiss did the best they could in the circumstances. Both experts are amongst the most experienced railway engineers in the country, so they have seen all manners of problems and devised all manners of solutions. Their job is to solve problems. That explains Dr Raiss' confidence that he could deliver a chord alongside the appeal development. If enough money is thrown at an engineering problem it tends to be resolvable. It may not be resolvable though from the public purse's point of view. Dr Raiss rightly conceded that, from a common sense layman's point of view, if compulsory purchase of the appeal site, or part of it, were necessary as part of the delivery of the Chord, the appeal development presents more of a constraint than the existing site.¹⁵⁴ In his evidence, Mr Moore took pains to highlight the complete lack of certainty about any of the diagrams before the Inquiry.
- 8.8 The simple, but difficult, position that has emerged is this. In the absence of any detail, it is still not known whether the appeal development will definitely not prejudice the delivery of the Chord. Given this continuing uncertainty, the fear remains that the entire Midlands Rail Hub scheme - of which the Chord in particular is a key part - could be scuppered.

¹⁵² CD 1.2 page 3 under "Observations on the discussion of land take"

¹⁵³ CD 3.1 page 29, paragraph 6.27. Officer's report recording the position of Network Rail

¹⁵⁴ Dr Raiss in XX

- 8.9 Mr Rackliff was absolutely right to say that the diagrams before the Inquiry showing compatibility between the appeal development and the Chord provided a "*false sense of security*".¹⁵⁵ Notably, Mr Moore was the author of the MM2010 Report,¹⁵⁶ so his opinion on its lack of utility in predicting the ultimate design of the Chord must be preferred. That was echoed by Network Rail when it confirmed that it did "*not as yet have a final, fixed design for the Chord proposals and their positioning could change as the design progresses*".¹⁵⁷ This is also consistent with the position recorded in the officer's report to Planning Committee that "*[t]here is an expectation from the rail bodies that Network Rail or Midlands Connect can provide assurance that the proposed development will not prevent or compromise the construction or operation of the South West Chord. However neither can do so*".¹⁵⁸
- 8.10 All of this is entirely consistent with Network Rail's final consultation response, where it confirmed, when asked to provide details of the radius of the curve of the south-west Chord, that "*[t]he alignment of the chords will be based on a number of factors, comprising the track gradient, track curvature, and line speed. It is not possible to provide any level of detail on a plan at this stage*".¹⁵⁹
- 8.11 Track curvature and line speed in particular could well bring the required curvature of the Chord across the appeal site. This was acknowledged by Dr Raiss,¹⁶⁰ who took great pains to find reasons why these factors would not result in prejudice to the Chord.¹⁶¹ None of the factors cited by Dr Raiss provided the requisite degree of certainty that the Chord could definitely be delivered.
- 8.12 It was common ground between the parties that infrastructure would be designed to avoid adverse impacts on heritage assets when there is an alternative, but that when there is no alternative such impacts do occur.¹⁶² There may be no alternative here. Dr Raiss, rightly, accepted that the radius of the curve affects the line speed.¹⁶³ Line speed is non-negotiable in terms of the ability to deliver the intended outputs of the Chord. Dr Raiss accepted this,¹⁶⁴ again rightly, as it accords with his colleagues' statement that "*the size and alignment of the chord...is governed by...the required line speeds of both line[s]*".¹⁶⁵ Thus, the line speed needed in order to get the requisite number of trains in and out of Moor Street Station will determine the radius of the curve. Dr Raiss agreed that the line speed could be increased above the assumed 25mph, as Network Rail often takes the opportunity presented by the electrification of railway lines to upgrade the existing infrastructure to allow for greater line speeds.¹⁶⁶ Increased line speeds are also important in the context

¹⁵⁵ Mr Rackliff eic

¹⁵⁶ CD 5.2

¹⁵⁷ CD 2.3 letter dated 9 July 2019, under (1)

¹⁵⁸ CD 3.1 page 25, paragraph 6.27

¹⁵⁹ CD 2.3 letter dated 7 November 2019, response to question 1

¹⁶⁰ Dr Raiss eic

¹⁶¹ Dr Raiss PoE page 24, Figure 7 in particular, relying on location of grade II* listed Bordesley Centre as a key determinant of final alignment design

¹⁶² Dr Raiss xx however pointing out that he had never seen a grade II* building demolished

¹⁶³ Dr Raiss PoE page 23, paragraph 4.3.14

¹⁶⁴ Dr Raiss xx

¹⁶⁵ Dr Raiss Appendix MR1, page 6, paragraph 3.1.1(b)

¹⁶⁶ Dr Raiss xx

of electric trains as they accelerate faster than diesel trains.¹⁶⁷ It was common ground that the Secretary of State should assume the Chord will be electrified.¹⁶⁸ Therefore, if Network Rail needs a line speed above the assumed 25mph in order to meet the required in-out train service pattern at Moor Street Station, the radius of the Chord's curve could be broadened to impact on the appeal site. If line speed is required to be between 25mph and 60mph, for example, Dr Raiss accepted it would come across the appeal site.¹⁶⁹

- 8.13 In response to this line of questioning Dr Raiss tried to make a convoluted point about cars travelling faster as a convoy at lower speeds on a highway than at faster speeds. This analogy does not apply to the Chord. Unlike cars, trains are limited by how closely they can travel together by stopping distances and how quickly each train clears a signalling section. As was pointed out to Dr Raiss, we are concerned here with getting train A sitting in Moor Street Station at zero mph out into the network as quickly and safely as possible. This is necessary in order to allow train B to use that platform, or for train C to depart from an adjacent platform. If train A can clear the station faster, going 60mph along the Chord, then train B can access the platform, or train C can depart the adjacent platform more quickly than if train A is limited to 25mph along the Chord. That is common sense.
- 8.14 Simply put, Network Rail will need to design the Chord to get 'X' number of trains into and out of Moor Street Station within a set period of time. If it cannot do that then the objectives of the Chord will not be met and it will not be delivered.¹⁷⁰ There is nothing before the Inquiry to say this can be achieved at a line speed that corresponds with the radius of the curve being compatible with the appeal development. That those options may entail an impact on the Bordesley Centre will be a matter for the decision makers in due course. Such things do happen when in the wider public interest. Given the enormous public importance of the Midlands Rail Hub, which depends on the Chord being delivered, the acceptability of such an impact in all the circumstances would not be an unreasonable judgment to make.
- 8.15 The complete lack of certainty as to whether the evidence before the Inquiry, including the MM2010 Report, demonstrates that an alignment that will meet the required objectives is clear when one compares the context in which the indicative alignments before the inquiry were drawn and now. The MM2010 Report was drafted in a different context a decade ago. It was concerned with a local scheme long before the Midlands Rail Hub was proposed (in 2017).¹⁷¹ The Midlands Rail Hub strategy has changed what was a local scheme into a critical component of a much more comprehensive scheme to alleviate capacity constraints affecting the entire national rail network and maximise the benefits of HS2. This could easily mean there are different objectives today which Network Rail has to design the Chords to satisfy. Further, the alignments were drawn before the DfT took over as the Midlands Rail Hub scheme promoter. Dr Raiss agreed that a different promoter could have different objectives,

¹⁶⁷ Mr Moore eic and Dr Raiss XX agreeing electric trains accelerate faster than diesel trains

¹⁶⁸ All the rail experts including Dr Raiss XX

¹⁶⁹ Dr Raiss eic noting a 60 mph alignment would probably pass to the west of the site, and 25mph diagrams showing the alignment along the eastern boundary of the site before curving across over the "triangle" of land on the appeal site

¹⁷⁰ Dr Raiss confirming in XX that if the objectives cannot be met then the Chord will not be delivered

¹⁷¹ Proposed as a strategy in CD 5.19 Network Rail's West Midlands & Chilterns Route Study, 2017

including different train service and capacity output requirements,¹⁷² which again means potential changes to the design of the Chord. Dr Raiss rightly agreed that if the objectives cannot be met the Chord will not be delivered.¹⁷³

- 8.16 In addition to factors which may be different now than in 2010, some factors are known to be different. First is the retention of Bordesley Station. Critically, once the assumption made in the MM2010 Report that this station will be demolished or moved is corrected to include the presence of the station, then none of the diagrams before the Inquiry showing compatibility work.
- 8.17 Mr Moore provided diagrams demonstrating that once this correction is made the Chord would have to run across the appeal site.¹⁷⁴ Despite the fact that this evidence was provided to the Appellant prior to the exchange of evidence, Mr Moore was presented with an alternative by the Appellant only during his cross-examination and the "bones" of this alternative were only provided to the Inquiry during Dr Raiss' evidence in chief, after Mr Moore had given his evidence. Mr Moore did the best he could in the circumstances, but given the way this evidence was presented to the Inquiry no weight should be given to Dr Raiss' "alternative" to Mr Moore's carefully thought out professionally engineered diagrams¹⁷⁵ showing the effect of the retention of Bordesley Station. They are the best available evidence before the Inquiry on the effect of Bordesley Station on the design of the Chord.
- 8.18 Dr Raiss argued that Mr Moore's diagrams would involve the closure of Bedford Road and be more costly as an option, but there is no evidence supporting his argument to show that Bedford Road will inevitably need to be closed, or alternatively cannot be closed, or that a high level flyover viaduct above an in-use railway station is less costly than a relatively short length of parallel track which could be designed to bridge over Bedford Road. As a matter of common sense, Dr Raiss' argument is highly questionable. Why would Network Rail elect to construct major infrastructure carrying a high level of train traffic over an existing railway station when it could simply provide an adjacent viaduct for the Chord beside the station? Also, on a common-sense basis, it does not seem plausible that an adjacent viaduct would be more costly than the construction of a high level viaduct over the top of an existing station, with all the maintenance, construction and additional safety precautions that would entail. Dr Raiss confirmed that his alternative would also require a length of parallel viaduct to be constructed in any event to join the higher level westernmost track to the Snow Hill Line.¹⁷⁶ His creativity is commendable but the argument that this is a better, cheaper way to retain Bordesley Station alongside the construction of the Chord is not credible.
- 8.19 Mr Rackliff pointed out that the station currently has an important function serving Birmingham City football stadium and that, ironically, developments such as the appeal proposal strengthens the public case for the retention of the station.¹⁷⁷ He also noted that options set out in the SOBC for the Midlands

¹⁷² Dr Raiss xx

¹⁷³ Dr Raiss xx

¹⁷⁴ Mr Moore Appendix 2 diagrams ending 004 (close up) and 005 (wider view)

¹⁷⁵ Dr Raiss xx agreeing there was no dispute in terms of the engineering accuracy of the diagrams

¹⁷⁶ Dr Raiss eic

¹⁷⁷ Mr Rackliff Eic

Rail Hub indicate viaduct widening on the northern side which could provide a six-track railway formation.¹⁷⁸ His evidence was that such a six-track formation would almost certainly rule out a relocated Bordesley Station being sited on the already wider section of viaduct in the vicinity of Upper Trinity Street.¹⁷⁹ Notwithstanding assumptions that it would be demolished or relocated, the evidence is that there are no current proposals to embark on a formal closure process and if the six-track formation is progressed there is a question over whether it could even be relocated. Since the status quo is that Bordesley Station is open and operational and will stay where it is, irrespective of whether it meets modern standards or not, this must be the basis for the Secretary of State's decision.¹⁸⁰ The only diagrams before the Inquiry showing the effect of this demonstrate that the Chord will run across the appeal site, including several of the proposed buildings.¹⁸¹

- 8.20 Moreover, the introduction of domestic residents onto the appeal site will increase construction costs, due to the additional mitigation that has to be put in place to protect their amenity, something Dr Raiss accepted.¹⁸²
- 8.21 Adding the most weight to the basket of potential prejudices however, are the dire consequences if prejudice materialises. Birmingham's plans for ready connectivity from Bristol, Cardiff, Gloucestershire, Worcestershire and Herefordshire to HS2 services to the north of England and Scotland, would not be realised, nor would the local connectivity to the new HS2 station from the more local areas of Moseley, Kings Heath and Hazelwell. Birmingham New Street's capacity constraints would remain unresolved and the hugely expensive "Brumderground" solution becomes all the more necessary but no more affordable even in the longer term.¹⁸³ In the meantime, the knock-on impacts of congestion at Birmingham New Street to the rail network from Aberdeen to Penzance, Bournemouth to Manchester, London to Glasgow, and across to Wales¹⁸⁴ would also remain unresolved.
- 8.22 The aim of improving productivity and access to opportunity for the people of Birmingham and its environs, reducing inequality and increasing prosperity, would be hindered because people will not be able to get from where they are to where they need to be in a safe, efficient, reliable and environmentally sustainable way. This is the context for the questions before the Secretary of State, and this is why the delivery of the Chord matters so very much to the Consortium.
- 8.23 A final word must be said about the evidence. Mr Rackliff and Mr Harris, on behalf of the Consortium, prepared and gave evidence alongside unabated full time work, and voluntarily subjected themselves to cross examination which

¹⁷⁸ Mr Rackliff EiC referring to TR App 7 (Strategic Outline Business Case) page 27 reference to widening the viaduct, under XX he noted it was his own knowledge that this means two tracks, and see TR App 13 (Moor Street Station Vision, February 2019) page 22 showing new platforms 0 and -1 on the eastern side of the viaduct

¹⁷⁹ Mr Rackliff EiC and XX

¹⁸⁰ Agreed Dr Raiss xx. Noting that demolition or relocation of an in-use rail station requires a statutory process which has not commenced and there are no plans to commence it

¹⁸¹ Mr Moore Appendix diagrams 004 and 005

¹⁸² Dr Raiss xx

¹⁸³ See reference to tunneling underneath New Street Station to create additional platforms at CD 5.19, page 53, second column on page, final paragraph. "Brumderground" comes from Mr Rackliff EiC

¹⁸⁴ Mr Rackliff EiC on extent of Birmingham's rail network's impact due to its central location. See also CD 5.19 page 65, second column fourth paragraph down "*Birmingham New Street is critical to the UK rail network in terms of performance, with the ability for delays to have an impact on several regional and long-distance routes*".

carried a risk (in the event, unrealised) of impugning their established professional reputations. They also ensured they provided, in the spirit of openness, all the relevant evidence the Secretary of State would reasonably need to reach an independent decision. This dedication to service solely in the public interest, which involved a great deal of personal stress, risk and sacrifice, has to be commended.

THE STRATEGIC AND POLICY CONTEXT

- 8.24 The strategic importance of the south-west Camp Hill Chord cannot be overstated. In its very first consultation response,¹⁸⁵ Network Rail took pains to ensure that the Council was well aware of the wider context and importance of the Chord. It drew attention to the policy in the adopted Birmingham Development Plan (TP41¹⁸⁶) which expressly supports the delivery of the Camp Hill Chords. Network Rail noted *'[t]he Midlands Rail Hub programme is intending to deliver a significant uplift in passenger capacity in passenger capacity to and from central Birmingham from across the Midlands and the Southwest to support economic growth in the region and maximise connectivity with HS2.'*
- 8.25 Referring to the Camp Hill Chords, Network Rail then confirmed just how important they were to the overall Midlands Rail Hub: *'[the Camp Hill Chords] are an integral part of the Midlands Rail Hub Programme as they allow a number of new train services to access Birmingham Moor Street that currently are unable to. Without both of the [Camp Hill] chords it will not be possible to deliver all of the intended outputs of the programme.'*
- 8.26 When given another opportunity through another consultation request Network Rail, yet again, took the trouble to point out to the Council that *'[t]he Midlands Rail Hub...is the cornerstone of the rail industry's established strategy for the future rail requirements in the West Midlands.'*¹⁸⁷
- 8.27 The SOBC for the Midlands Rail Hub labelled the two Camp Hill Chords (both north east and south west) 'pivotal', but expressly noted that it was the south west Camp Hill Chord that had the stronger business case¹⁸⁸ and advised that *'consideration needs to be given to delivering it sooner'*.¹⁸⁹ The critical nature of the Chords is clear: the Strategic Outline Business Case for the Midlands Rail Hub confirms that *'[p]roperly fulfilling the [Midlands Rail Hub's] objectives does appear to centre on the case for the [Camp Hill] Chords.'*¹⁹⁰
- 8.28 Should the Appellant still try to rely on a consultation response from Centro from 2013,¹⁹¹ the first thing to note is that this is inconsistent with the very strong emphasis just noted, which Network Rail places on the delivery of the Chord. The second thing to note is that this comment on the significance of the Chord was made prior to the Midlands Rail Hub scheme being developed.

¹⁸⁵ CD 2.3 letter dated 12 February 2019, first page

¹⁸⁶ CD 4.1.15

¹⁸⁷ CD 2.3 letter dated 3 May 2019, first page

¹⁸⁸ Mr Rackliff Appendix 12, SOBC, page 3, "pivotal" in second bullet point, good economic case for south-west chord ("west chord") at third bullet point; see also "high value for money" re. west chord at page 29, third bullet point

¹⁸⁹ Mr Rackliff Appendix 12, page 3, third bullet point

¹⁹⁰ Mr Rackliff Appendix 12, page 3, second bullet point

¹⁹¹ ID7, consultation reply to draft Birmingham Development Plan

That only became the rail industry's strategy in 2017 with the publication of Network Rail's West Midlands & Chilterns Route Study.¹⁹²

- 8.29 After noting that '[t]here is clear evidence that high quality transport networks are an important enabler of economic growth',¹⁹³ and that "conditional outputs are dependent upon affordability, funding and a value for money business case"¹⁹⁴ the 2017 Study points out that it was only in 2013 that the rail industry started work on Market Studies to understand the demand for rail over the next 30 years.¹⁹⁵ The strategy chosen as a result of that work was threefold: accommodating demand for train services into key cities and towns; maximising the opportunities presented by HS2; and improving links between the East and West Midlands. The Midlands Rail Hub ticks all three of those boxes. The capacity of Moor Street Station will be improved by adding new platforms, its use would relieve pressure on the at-capacity New Street Station, and its location would offer an improved interchange with the new HS2 Curzon Station next door.¹⁹⁶ The two Chords at Bordesley are required to achieve all these aims, and are therefore labelled '*a critical element*' of the entire Midlands Rail Hub.¹⁹⁷ This document is also where Network Rail points out that if the Midlands Rail Hub is either not delivered, or demand outgrows the capacity it will create, then tunnelling underneath New Street Station would have to be developed as a way to avoid acquiring the necessary costly land in Birmingham City Centre.¹⁹⁸
- 8.30 As set out by Mr Harris, the strategic importance placed on delivery of the Chord is aligned with importance of connectivity set out in relevant transport policy, strategy and guidance. It is also fully consistent with the Birmingham Development Plan's overall vision and objectives. It has to be pointed out that Mr Harris' expertise is in the promulgation of transport policy. He was of course able to venture a view on how he intended it to be interpreted and applied but that actual exercise is done by pure planners, which he was very clear to point out he is not.
- 8.31 The Birmingham Development Plan relies on the benefits of greater connectivity by sustainable modes of transport such as rail.¹⁹⁹ Support for the delivery of the Camp Hill Chords in particular is set out in policy TP41.²⁰⁰ Sustainability and enhancing the environment are also key aims of the development plan, and it is notable in this respect that transport is the largest contributor to UK domestic greenhouse gas emissions.²⁰¹
- 8.32 A host of other local and regional forward planning documents and strategies also rely on the benefits which the Chord will deliver. Neither the benefits nor the existence of the material consideration of other policy and guidance

¹⁹² CD 5.19

¹⁹³ CD 5.19, page 3, fourth paragraph down

¹⁹⁴ CD 5.19, page 18, second paragraph down

¹⁹⁵ CD 5.19, page 21, fifth paragraph down

¹⁹⁶ CD 5.19, page 53, second column on page, first and second paragraphs down

¹⁹⁷ CD 5.19, page 53, second column on page, third paragraph down

¹⁹⁸ CD 5.19, page 53, final paragraph second column

¹⁹⁹ Mr Harris App 1-6 extracts from BDP including TP38, TP41, BDP also found at CD 4.1. Specifically: Objectives page 18, Connectivity at page 24 para 3.29, para 3.31, para 3.37; page 39 para 5.23 (last sentence), para 5.24, para 5.72 "enhanced connectivity", para 5.76 refers to Camp Hill line being reopened at Bordesley

²⁰⁰ Policy TP41 extract at CD 4.1.15

²⁰¹ CD 5.2 page 10, paragraph 1.6

supporting greater connectivity are in dispute. It is worth, all the same, briefly summarising this wealth of support for transport infrastructure schemes such as the Chord given that it is the Rule 6 Consortium's case that this increases the weight to be given to the risk of prejudice to the delivery of the Chord.

- 8.33 For example, the West Midlands Strategic Transport Plan 'Movement for Growth' confirms that transport is '*firmly at the heart*' of the West Midlands Combined Authority's plans for positive, enduring change and economic growth.²⁰² An effective transport system is seen as important for the creation of new jobs, economic growth which benefits all, new housing, clean air and improved health in the conurbation. The investment in infrastructure is a fundamental element of the West Midlands Combined Authority's devolution plans.²⁰³ A 'Key Transport Priority' of that investment plan is the delivery of the Camp Hill Chords to increase central Birmingham's rail capacity.²⁰⁴
- 8.34 The Midlands Connect Strategy confirms how important the Midlands Rail Hub is: it is said to be '*vitally important and fundamental to the future success of the Midlands in terms of rail*' and Midlands Connect is committed to seeing this '*implemented as soon as practicable*'.²⁰⁵ Further confirmation that the Midlands Rail Hub is now the 'flagship' rail project of Midlands Connect is set out in its Summary Report (June 2019).²⁰⁶ This 'flagship' project expressly includes delivery of the Camp Hill Chords.²⁰⁷
- 8.35 Supporting this vision for the West Midlands' rail network is the DfT's Strategic Vision for Rail (November 2017) which confirmed funding was committed to developing a business case for the Midlands Rail Hub.²⁰⁸
- 8.36 'Birmingham Connected' (November 2014) which is the White Paper supporting Birmingham's Mobility Action Plan, confirms that investing in a radically improved integrated transport system will realise the City's potential to support sustainable economic growth, job creation, and link communities.²⁰⁹ It confirms that investing in transport infrastructure is an important means of helping achieve strong and sustained economic growth, as part of this improved journey times and increased capacity on key commuter corridors into central Birmingham have been identified as specific connectivity needs.²¹⁰ The White Paper confirms these needs will be partly addressed by the improvements that the delivery of the Camp Hill Chords will bring about.²¹¹
- 8.37 The Foreword to the Draft Birmingham Transport Plan (January 2020) confirms that '*[g]ood transport is the most important ingredient in ensuring that the benefits of Birmingham's growth are felt in every part of the city*'.²¹²

²⁰² Mr Harris Appendix 7, Movement for Growth, page 1, first paragraph

²⁰³ Mr Harris Appendix 7, page 1, second paragraph

²⁰⁴ Mr Harris Appendix 7, page 13, Key Transport Priorities for the National and Regional Tier, bullet point six

²⁰⁵ Mr Harris Appendix 8, Midlands Connect Strategy, page 29, first and second paragraphs

²⁰⁶ Mr Harris Appendix 11, Midlands Rail Hub: The case for transformational investment in the region's rail network, page 3

²⁰⁷ Mr Harris Appendix 11, page 10, first bullet point under Notable Interventions and page 16 first row on page

²⁰⁸ Mr Rackliff Appendix 9, DfT Strategic Vision for Rail, page 25, paragraph 2.41

²⁰⁹ Mr Harris Appendix 8, Birmingham Connected, page 2, first paragraph

²¹⁰ Mr Harris Appendix 8, page 18, first paragraph and forth paragraph under blue box

²¹¹ Mr Harris Appendix 8, page 21, first, fifth, and seventh paragraphs

²¹² Mr Harris Appendix 10, Draft Birmingham Transport Plan, page 4, final paragraph

- 8.38 The HS2 Connectivity strategy (July 2015) sets out the expansive program of works intended to maximise the benefits of HS2 in Birmingham (of which both Chords are a part). Some £1.3 billion worth of connectivity improvements are to be delivered to ensure when HS2 finally arrives Birmingham is ready. A further £270 million investment is planned once HS2 services start running. The aim is to ensure over two million people in the Midlands will be able to access the HS2 stations by public transport.²¹³ It also specifically identifies the “significant enhancements” planned for the rail network to enhance regional and national connectivity to Birmingham Moor Street Station.²¹⁴
- 8.39 The West Midlands Strategic Economic Plan’s strategy is to create the conditions for growth by ensuring that the whole area benefits from connectivity improvements. People need to be connected to jobs, businesses to markets.²¹⁵ The transport system is integral to the area’s future economic success: significant investment in the system is needed to *‘help widen labour markets, unlock high value growth clusters and support regeneration and place making initiatives. As well as giving people access to skills, education and training a balanced and effective transport system will enable agglomeration and reduce business overheads in accessing the supply chain and markets.’*²¹⁶
- 8.40 The West Midlands Local Industrial Strategy confirms that the aim is for the West Midlands to be *‘the centre of transport innovation in the UK, leading the low carbon movement of people and goods and connecting people to new opportunities.’*²¹⁷ This is further detailed as a plan to continue a significant programme of transport investment to develop an integrated, clean, multi-modal system linked to the locally led HS2 Growth Strategy to improve air quality and directly address productivity challenges by connecting people to new job opportunities and skills provision, improving access to healthcare and green space.²¹⁸ The reduction of congestion through improvements in public transport provision, which will also help ensure every part of the West Midlands is close to local and national opportunities, is an express commitment in this Strategy.²¹⁹ This is particularly important locally as only 41% of residents of the West Midlands can access three or more strategic centres by public transport within 45 minutes a peak times: the Strategy identifies this lack of physical access to jobs and skills *“an issue for too many people”*.²²⁰
- 8.41 The Snow Hill Masterplan sets out West Midland Rail’s aspiration to be recognised as the *‘country’s best region for rail’*.²²¹
- 8.42 The West Midlands Rail Executive’s Strategy (December 2018) commits it to “strong support” for the Midlands Rail Hub, of which the Camp Hill Chords are recorded as a supporting element.²²²

²¹³ All found at Mr Harris Appendix 11, HS2 Connectivity Strategy, page 3, final paragraph

²¹⁴ Mr Harris Appendix 11, page 6, first paragraph

²¹⁵ Mr Harris Appendix 12, West Midlands Strategic Economic Plan, page 23, eighth bullet point

²¹⁶ Mr Harris Appendix 12, page 25, first paragraph under “Connectivity”

²¹⁷ Mr Harris Appendix 13, West Midlands Local Industrial Strategy, page 17

²¹⁸ Mr Harris Appendix 13, page 23 under “Develop an integrated transport system in the West Midlands”

²¹⁹ Mr Harris Appendix 13, page 23, fourth bullet point under “Locally led commitments”

²²⁰ Mr Harris Appendix 13, page 60, second paragraph

²²¹ Mr Harris Appendix 14, Snow Hill Masterplan, page 3, third paragraph

²²² Mr Rackliff Appendix 10, Driving a Revolution in Rail Services for West Midlands, page 18, sixth bullet point

- 8.43 Birmingham's Big City Plan: City Centre Masterplan recognises that transport networks are crucial to more than just the ability of people and goods to get around. The "*quality of a connections are an important ingredient in a city's economic performance.*"²²³ Birmingham has very ambitious plans to become environmentally sustainable and the reduction of the environmental impact of the City's mobility needs through low carbon transport is specified as a necessary contribution to achieving those goals.²²⁴
- 8.44 The 'key principles' set out within the Big City Plan's Birmingham Curzon HS2 Masterplan Connectivity section, include '*[t]he provision of an effective, efficient and comprehensive public transport system, [and] high quality routes*'. These are '*key enablers for economic growth*'. '*New and improved sustainable transport connections integrated into the wider City Centre*' is a '*key principle on which the transport strategy for Birmingham Curzon has been developed*'.²²⁵
- 8.45 The clear theme here is that improved connectivity through sustainable modes of travel such as rail is strongly supported by a range of policy, strategy and guidance in the West Midlands. This is particularly important given the economic benefits that are derived from greater connectivity because this aligns with the West Midlands' aspirations for strong and sustainable growth. Thus, very substantial weight should be given to the risk of prejudice to the delivery of the Chord.
- 8.46 Taking a more focussed perspective, the central theme of this Inquiry has been uncertainty. In an ideal world a safeguarding policy would be in place and we would then have a firm policy position from which to assess the appeal proposals. But Birmingham's development plan was drafted in a completely different world for the rail industry in the West Midlands; the capacity problems at Birmingham New Street had not reached the present levels; HS2 was less advanced; the Midlands Rail Hub strategy was years away; and it had not benefitted from commitments in the elected Government's Manifesto,²²⁶ the Queen's Speech,²²⁷ a further £20m of development funding from the Chancellor's Spring 2020 Budget,²²⁸ and national sponsorship from the DfT. The only certainty before the Inquiry, is that provided the appeal development does not prevent the Chord from being delivered, it benefits from strong support from Government and all levels of policy and will be delivered, provided the appeal proposals do not prejudice that delivery.

CONCLUSION

- 8.47 As demonstrated by Mr Rackliff and Mr Harris, the delivery of the South West Camp Hill Chord is of major strategic local and national importance. It is pivotal to the delivery of the Midlands Rail Hub, which is the cornerstone of the

²²³ Mr Harris Appendix 19, Big City Plan, page 9, under Connectivity

²²⁴ Mr Harris Appendix 19, page 18, fourth bullet point promotes low carbon transport. See also connectivity plans at page 20 which promotes a greater role for public transport

²²⁵ CD 4.3 page 60

²²⁶ Mr Rackliff Appendix 14, Manifesto, page 27 (unpaginated but see pages 26 or 28), "[w]e will invest in the Midlands Rail Hub, strengthening rail links including those between Birmingham, Leicester, Nottingham, Coventry, Derby, Hereford and Worcester."

²²⁷ Mr Harris Appendix 18, page 101, fourth bullet point "The Government has also committed to a number of major investments in the railway, including: Midlands Rail Hub"

²²⁸ Mr Rackliff Appendix 15, Spring Budget West Midlands, sixth bullet point

rail industry's strategy for the West Midlands. Because of the wider national implications of the benefits to be derived from the Midlands Rail Hub, the scheme is now sponsored by the DfT and featured in the most recent budget. It is a key Manifesto commitment, it featured in the Queen's Speech, it is fundamental to the connectivity, productivity and quality of life aspirations of local and regional planning documents, including the local development plan. It relies on the delivery of the Chord. It is such a weighty material consideration that any risk of prejudice to the Chord's delivery outweighs the acknowledged benefits of the appeal development.

- 8.48 That risk exists, as demonstrated by the evidence of Mr Moore and as confirmed by Network Rail's consultation responses and the record of Network Rail's position as set out in the officer's report. The Consortium therefore respectfully requests that the appeal be dismissed.

9. WRITTEN REPRESENTATIONS

- 9.1 The planning application attracted numerous letters of objection which are summarised in the officer's report.²²⁹
- 9.2 Further letters were received from a number of persons in response to the appeal. The correspondence set out below relates to those letters submitted by persons who did not speak to the Inquiry.
- 9.3 **Councillor Gareth Moore:** I am a Member of the Planning Committee which considered this application and ultimately voted to refuse on the basis of the objections received from various transport authorities, which expressed concern that the application could compromise the delivery of the Camp Hill Chords rail project. This project forms part of the Birmingham Development Plan at policy TP41 and is a key infrastructure scheme to improve public transport in Birmingham.
- 9.4 I acknowledge that the application does offer a number of public benefits, but significant weight has to be attributed to the objections, as they are public organisations with significant expertise in the delivery of public transport. I do not believe that they would object to a planning application frivolously or without significant justification. It was also not just one transport authority, but several – all of whom had reached the same conclusion.
- 9.5 It had been my hope that a way forward could be found between the applicant and objectors but, despite the Planning Committee deferring the application in December 2019, this was not achieved. This meant it was necessary to weigh up the material planning considerations. I was, and remain, of the view that on balance, the public benefits offered by the application do not outweigh the harm that would be caused through the Camp Hill Chords being compromised – which was a distinct possibility given that attempts to resolve the concerns raised by objectors was unsuccessful. This meant that the application was not in accordance with the Birmingham Development Plan. I do not believe that public transport bodies would maintain their objection without good reason, and this was clearly a view shared by my colleagues who also voted for the application to be refused.

²²⁹ CD 3.2

- 9.6 Unless these concerns can be overcome and certainty provided that the Camp Hill Chords would not be compromised, the application will continue to conflict with the Birmingham Development Plan and I would urge the Secretary of State to dismiss the appeal in line with the reasons set out by Birmingham City Council.
- 9.7 **The Moseley Society:** We hope that Birmingham City Council's decision to refuse planning permission for the appeal will be upheld. If so, we hope that the applicants will work with the West Midlands Rail Executive to agree a development that will also permit the construction of the South West Bordesley Chord.
- 9.8 So much has changed since this application was submitted in 2018. Since the go ahead for the construction of the HS2 line was given in February 2020, Covid-19 and the consequent economic crisis have changed many assumptions. The only factor that has not altered is the need to make changes to every aspect of our lives to reverse climate change. Encouraging public transport, particularly by rail, is an important part of the response to climate change. We hope the Secretary of State will encourage the applicants to reassess their plans in the light of these fundamental changes that have taken place in recent months.
- 9.9 Had the 480 homes already been built, how would the people living in them have coped during the pandemic lockdown? The applicants may well welcome an opportunity to rethink their plans in the light of what has been learned in recent weeks and we hope they will be encouraged to do so.
- 9.10 **Solihull and Leamington Rail Users Association:** I inputted into the original planning application seeking a rejection of the scheme as it impinged on the proposed site of the Camp Hill/ Bordesley Chords project for raising rail capacity in the West Midlands. This scheme has been in formation for almost a decade by the former Centro and now the West Midlands Combined Authority, who have also sought the rejection of the scheme. With the go ahead of the HS2 scheme, this is now complementary in increasing capacity. Until the current lockdown, rail travel was growing at the fastest rate in the West Midlands than any other area nationally.
- 9.11 It is regrettable that Network Rail did not survey their requirements ahead of this application. In conclusion, I stand by my previous submission that the railway requirements should take priority over the current planned development. I would point out that I welcome the development of a tired area, even though it means the closure of Bordesley Station which is only open when there is a football match at the nearby St Andrews Stadium.
- 9.12 **Birmingham Airport Limited:** During the planning application stage, we advised that *"based upon the information provided, the proposals have been found to be acceptable subject to a crane management plan being agreed with the Airport prior to commencement of construction. The request for a crane management plan, is due to the height of the tallest building proposed being 205m above ordnance datum (AOD), which will mean that any cranes used during construction will be close in height to the Outer Horizontal Surface height of 242m AOD and should therefore be assessed to ensure that they are appropriately safeguarded"*. If the appeal is allowed, we request that this is imposed as a planning condition.

- 9.13 **Jeffrey Wong:** I write on behalf of thousands of residents in Moseley and Kings Heath who have campaigned and desired for many years for the Camp Hill railway line to re-open to passenger services and provide a frequent commuter rail link into Birmingham City Centre. This topic has been number one in any political hustings for many years. We were always told that the issue stopping it happening was the cost of building the Camp Hill Chord – a link to redirect the trains to Moor Street Station as New Street does not have the capacity for the extra services.
- 9.14 In 2013, Moseley Forum was made aware that the land where a developer is now seeking this permission to build was to be sold by Birmingham City Council. They, together with other community groups and local councillors, objected to the sale on the grounds it could compromise the later building of the Camp Hill Chord. However, Birmingham City Council in their wisdom, dismissed the need to protect the route of the link railway line stating they could 'always compulsorily purchase it back' at a later date.
- 9.15 In September 2018, Transport for West Midlands, the West Midlands Rail Executive and Network Rail unveiled initial designs to rebuild stations at Moseley, Kings Heath and Hazelwell with the expectation the line would re-open to allow two passenger services an hour into New Street Station, in time for the 2022 Commonwealth Games. This news was received with enormous excitement and anticipation locally, but also led to many calls to West Midlands Mayor, Andy Street to ensure that the construction of the Camp Hill Chord would still happen so that the line would, in time, become a fully functional high frequency train service. He fully acknowledged this call and stated that the opening of the line earlier than expected would not stop later construction of the Chords, which are now referenced in the Birmingham Development Plan, the Bordesley Area Action Plan, the West Midlands Local Transport Plan, in the proposed enhancements pipeline for the London North Western route, and in the long-term strategies of Midlands Connect and West Midlands Rail Executive. Network Rail is currently carrying out development work on the Midlands Rail Hub on behalf of Midlands Connect, with a SOBC due for submission to the DfT by summer 2019.
- 9.16 The Camp Hill Chord would allow up to ten extra trains an hour in and out of Birmingham. That is 85,000 extra seats a day. This will enable many more passengers into and out of Birmingham, so easing pressure on our already congested road system and reducing vehicle emissions both in the centre and suburbs of Birmingham. The Midlands Rail Hub project is being developed by Midlands Connect to significantly increase passenger capacity to and from Birmingham from across the Midlands and the South West. Early analysis suggests the Midlands Rail Hub could bring overall economic benefits of £649 million a year to the region and the country by 2037. Network Rail stated in 2017 that the work that included the Camp Hill Chord was worth up to £2 billion of economic benefits through unlocking jobs and supporting economic growth and maximising transport connectivity.
- 9.17 If this planning application is approved, the subsequent development has the potential to block the alignment and construction of the Camp Hill Chord, preventing the expansion of and long term desired frequency of rail passenger services. This would be a huge blow for the Birmingham and West Midlands community. Economic and environmental drivers will be severely and critically

harmed if this planning application is allowed to go ahead in any form that prevents the City from installing the Camp Hill Chord.

- 9.18 On behalf of the community of Moseley and Kings Heath I ask that, when considering this application, as a very minimum sufficient land is protected to enable the construction and accommodation of an up and down south/east railway link at Bordesley from the Camp Hill railway line, known as the Camp Hill Chord. I also urge the applicants and developers to work with the Council, with Network Rail and local rail community groups to protect the future alignments of the proposed Camp Hill Chords and to explore mutually beneficial opportunities for both developments to avoid any impediment to the Chords' future construction.
- 9.19 **Richard Joinson:** I object to this development- it risks blocking the Bordesley Chord rail link, which will allow improved train service to Kings Heath., as well as improved freight and other regional rail services. It also contradicts the Birmingham Transport Plan and Birmingham Plan 2031. Improving train services to areas currently not served, will allow people to get to the City Centre whilst reducing their emissions. Please reject this application
- 9.20 **Peter Dixon:** I am concerned that this development will affect the train line that will link the already approved Kings Heath line to Moor Street.

10 CONDITIONS

- 10.1 Should the appeal succeed, recommended conditions and the reasons for them are attached as Appendix D. They are based on the suggested conditions appended to the Statement of Common Ground between the appellant and the Council, supplemented by additional conditions submitted during the Inquiry (ID8). The Council's CIL Compliance statement also sets out the background in relation to affordable housing and affordable workspace. The conditions were discussed at the Inquiry in the light of related advice in both the Framework and the Planning Practice Guidance. During the discussion, minor alterations were made to the wording of a number of the suggested conditions in the interests of precision. Suggested condition 17, relating to materials and detailing was deleted on the basis that there was significant overlap/duplication with suggested condition 18.
- 10.2 The conditions numbers referred to in brackets below reflect those in the Appendix D schedule. Conditions 3-9 are necessarily worded as pre-commencement conditions and are agreed by the appellant.
- 10.3 In addition to the standard condition on commencement of development (1) it is necessary to specify the approved plans in the interests of certainty. (2)
- 10.4 Given the previous industrial use of the site and having regard to the requirements of policy PG3 of the Birmingham Development Plan (BDP) and paragraphs 170, 178 and 179 of the Framework, it is necessary to ensure that any site contamination, or the potential for such, is detected and remediated accordingly and that any risks from contamination are properly dealt with to protect the health of future occupiers and to prevent pollution of the environment. (3, 24 and 25)
- 10.5 Conditions (4) and (22) requiring the provision and ongoing maintenance of a sustainable drainage scheme, are necessary to prevent increased risk of

flooding, to improve and protect water quality, and improve habitat and amenity in accordance with BDP policy TP6, the Council's SPD on Sustainable Management of Urban Rivers and Floodplains and Framework paragraphs 163 and 165.

- 10.6 A construction management plan is required in the interests of protecting the amenities of those living and working in the locality and of highway safety, as supported by BDP policy PG3. (5) In the interest of visual amenity, retained trees, and those on land adjacent to the site are to be protected during construction. (6) Pursuant to BDP policy TP26, condition (7) secures job training opportunities for local people to help address high levels of unemployment and worklessness.
- 10.7 Conditions in respect of breeding birds (8) and for the installation of bat and bird boxes (17) are necessary to safeguard protected species and in the interest of biodiversity.
- 10.8 It is necessary to secure an acceptable living and working environment for occupiers of the dwellings/premises proposed in terms of noise and disturbance, odours, and ventilation, as supported by BDP policy PG3. (9, 10, 19, 20, 41, 42 and 43) In addition, the whole of the Council area, including the appeal site, is designated as an Air Quality Management area due to concerns over the achievement of nitrogen dioxide air quality objectives. A primary focus at the present time is the development of a Clean Air Zone (CAZ). The appeal site lies within the CAZ. The Air Quality Assessments submitted with the planning application confirm that in the future baseline scenario at 2023, without the development proposed, the short-term NO₂ objective is unlikely to be exceeded in the expected opening year at the selected receptors. The annual mean concentrations of PM₁₀ and PM_{2.5}, and the number of exceedances of the 24-hour PM₁₀ objective are also predicted to be below their relevant air quality objectives at all selected receptors. In order to ensure an acceptable living environment for future occupiers in this regard, it is necessary to preclude occupation of any of the residential accommodation proposed until 2023. That is supported by BDP policies PG3, TP27 and TP37. (21)
- 10.9 Conditions controlling architectural detailing and materials, hard and soft landscaping, tree retention, and boundary treatments, are required in the interest of visual amenity. (11, 23, 39 and 40)
- 10.10 It is necessary to secure the affordable housing and affordable workspace in perpetuity, together with arrangements for occupation, marketing, management etc pursuant to BDP policies TP30, TP31 and the Council's Affordable Housing SPD together with policies PG1, GA1.1, GA1.3 and TP20, the Birmingham Curzon Masterplan for Growth, and to mitigate for the quantum loss of employment floorspace. (12, 13, 14, 15, 16 and 35)
- 10.11 The scheme includes provision for an on-site energy centre. It is necessary to ensure that this is installed and operational prior to occupation of any part of the development, in accordance with BDP policies TP1, TP4 and TP5, which together and among other things seek to reduce the City's carbon footprint by incorporating low and zero carbon forms of energy generation within new developments. (18) A condition securing the provision of electric car charging points is necessary to help mitigate and adapt to climate change and promote

the use of sustainable travel modes in accordance with Framework paragraph 108 and BDP policies TP1, TP2 and T43. (30) For the same reason, condition (31) secures provision of photovoltaics. Provision of the green/brown roofs shown is necessary in the interests of sustainability and increasing biodiversity pursuant to BDP policy PG3. (32)

- 10.12 Conditions to secure necessary highway works and visibility splays, the provision and management of car and cycle parking spaces are necessary in the interest of vehicular and pedestrian safety and to secure a high quality development in accordance with BDP policies PG3, TP44 and the Council's Car Parking Guidelines SPD. (26, 27, 28 and 29)
- 10.14 Conditions removing permitted development rights should not be imposed unless there is clear justification for doing so. In this case, it is necessary to remove rights permitting change of use of the employment floorspace to residential, in order to retain that floorspace for its intended use in this location in accordance with BDP policies PG1, GA1.1 and GA1.3, the Birmingham Curzon Masterplan for Growth and to mitigate for the loss of employment land in accordance with the aims of TP20. (36) Given the intimate relationship of the townhouses with each other and the constrained nature of the private amenity areas, it is necessary to remove permitted development rights relating to extensions, alterations and curtilage buildings etc in order to protect the living conditions of adjoining dwellings and in the interests of visual amenity. That is supported by BDP policy PG3 and the Council's Places for Living SPG. (37) Given the proximity of Block A proposed to the adjacent Conservation Area, it is necessary to remove rights related to the erection of satellite antenna etc in the interest of visual amenity. (38)
- 10.15 In order to maintain the vitality and viability of the City centre and the hierarchy of existing centres in accordance with BDP policy TP21, it is necessary to constrain the maximum floorspace that can be put to retail use on the site and the maximum size of any one retail unit. (33 and 34)

11. INSPECTOR'S CONCLUSIONS

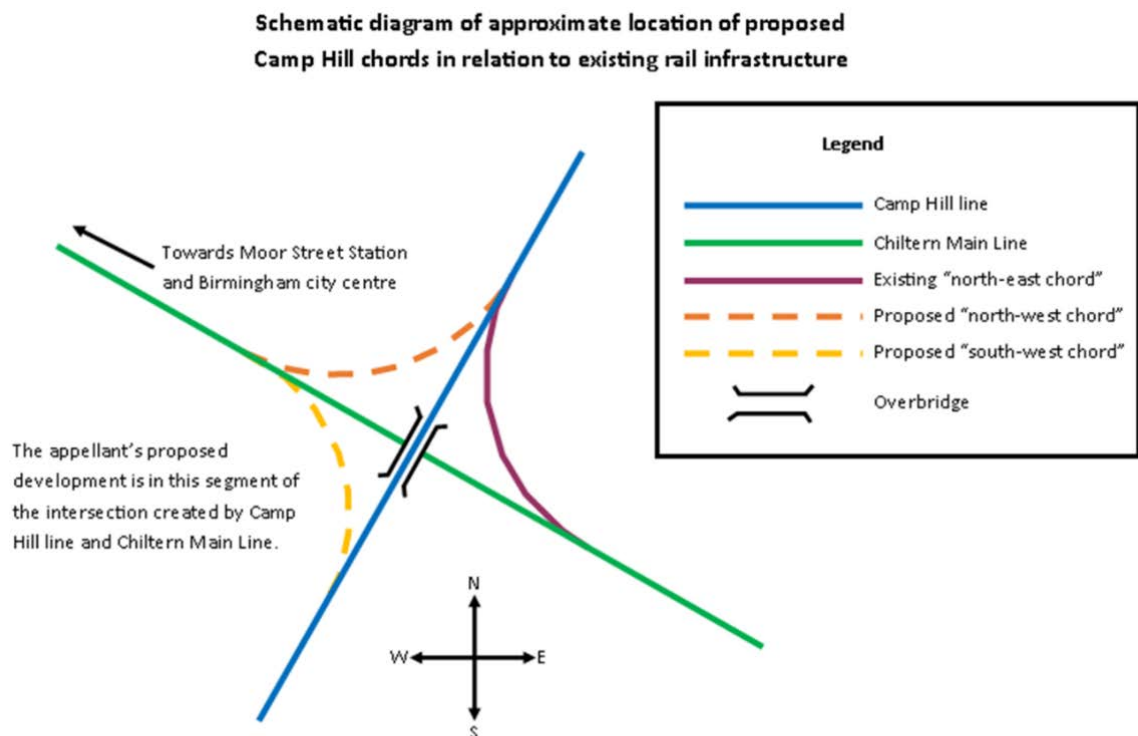
- 11.1 The following conclusions are based on the oral and written representations to the Inquiry and on my inspection of the site and its surroundings. The numbers in parentheses thus ^[1], refer to paragraphs in the preceding sections of this Report from which these conclusions are drawn.
- 11.2 To provide some context for the main consideration in this case, I first set out some background in relation to the Camp Hill Chords.

The Chords Scheme²³⁰[6.23, 6.24, 7.19, 7.22, 8.42, 8.48, 8.56, 9.10, 9.13, 9.16]

- 11.3 The lack of rail network capacity into central Birmingham, in particular on the congested section of network into the eastern end of Birmingham New Street Station, via Proof House Junction, led Centro (the predecessor to Transport for

²³⁰ Eg the summary provided at Section 3.2 of the proof of Mr Harris, the 2010 Mott MacDonald pre-feasibility Study (CD 5.2), the West Midlands & Chilterns Route Study 2017 (CD 5.19) and the Midlands Connect Strategic Outline Business Case 2019 (Appendix 12 to the proof of Mr Rackliff)

West Midlands²³¹) to commission Mott MacDonald to undertake a pre-feasibility study into the provision of two new rail Chords at Bordesley, east of Birmingham (MM2010 Report²³²). Known as the Camp Hill (or Bordesley) Chords, they comprise a north-west and a south-west Chord as shown on the diagram below.²³³



Please note: this diagram is not to scale and does not accurately represent the exact layout or geometry of existing and proposed infrastructure; it is provided only for illustrative purposes to provide a general understanding of the location of the proposed chords in relation to the existing railway and the appellant's proposed development.

- 11.4 Together, the two Chords would provide a link between the Camp Hill line and the Chiltern mainline towards Birmingham Moor Street (also referred to as the Snow Hill line) which would allow services to be routed into an expanded Moor Street Station from the north, via Water Orton, and from the south via Kings Norton. It is the south-west chord that is particularly relevant to this appeal.
- 11.5 The MM2010 Report looked at the engineering practicalities for the proposed Chords, identifying some 39 feasible combinations. Filtering reduced these to three preferred alignments to take forward (options 1A, 7G and 9I).²³⁴ I was advised that Network Rail had no direct input into that Report but, as confirmed by Mr Moore of the R6 Consortium (who was Project Director for the Report) during his evidence in chief, they had all the Network Rail information

²³¹ Transport for West Midlands is the public body responsible for co-ordinating transport services in the West Midlands. It is an executive body of the West Midlands Combined Authority who were part of the R6 Consortium at the Inquiry.

²³² CD 5.2

²³³ Diagram taken from the Statement of Case for the R6 party (CD 2.06) with the author's consent

²³⁴ Appendix E of the MM2010 Report includes plans of the three options. Each option is shown with the alternative of support on structures or using a structures/earthworks combination.

that was publicly available and had worked extensively on previous Network Rail schemes and so were cognisant of all its documentation and standards. The Report confirmed that the final preferred combined option would most probably be determined by the signalling and operational considerations governing the practical engineering solutions at a later stage of the project, once the proposed usage of the new Chords is finalised, the final factor in that decision being the cost appraisal.²³⁵

- 11.6 The current Midlands Rail Hub concept, published in the West Midlands & Chilterns Route Study (2017),²³⁶ built on the earlier MM2010 Report. The Rail Hub is a more holistic, integrated package of improvements to address capacity constraints across a wider area in order to facilitate up to ten extra trains per hour into Birmingham, so transforming east-west rail connections. The project will also provide better connectivity between HS2 and regular train services.²³⁷ The Camp Hill Chords, in particular the south-west Chord (described as the west chord in the Strategic Outline Business Case (SOBC)²³⁸) are a key part of the Hub.²³⁹ In addition, it would facilitate well advanced aspirations for a new local service on the Camp Hill Line to Kings Norton, serving Moseley, Kings Heath and Hazelwell.
- 11.7 Midlands Connect and Network Rail continue to progress the Rail Hub, including the Chords, assisted by additional funding to the tune of £20 million recently secured from Government to develop the proposal to Outline Business Case (OBC) stage.²⁴⁰ Network Rail itself is not the sponsor (promoter) for the Hub or the Chords. Whilst Midlands Connect was the sponsor during the early stages of the planning application, the Department for Transport (DfT) has now taken over that role. As sponsor, the DfT has commissioned Network Rail to develop the technical evidence necessary to confirm the detail of a scheme at OBC level (roughly equivalent to GRIP3 and RNEP Stage 2 'Determine' level).^[7.14, 7.24, 7.35] That work is anticipated as taking around two years to complete. Neither Network Rail nor the DfT presented any evidence to the Inquiry.

Main Consideration

- 11.8 There is no dispute that, in general terms, the appeal site occupies a sustainable location, is suitable for the development proposed, is an appropriate use of the site in terms of planning policy and is substantially in accordance with the development plan. It is also agreed that the matters raised in reasons for refusal 2 and 3 set out on the Council's Decision Notice, relating to affordable housing and affordable workspace provision are secured satisfactorily and no evidence was pursued in relation to those matters.
- 11.9 There is no disagreement either, as to the significance of the Chords as an integral part of the Midlands Rail Hub, which seeks to improve network capacity into central Birmingham. That is a consideration of regional if not national importance. The Chords would also facilitate well advanced

²³⁵ Final paragraph page ii of the Executive Summary (CD 5.2)

²³⁶ CD 5.19

²³⁷ See the benefits listed at page 2 of the Strategic Outline Business Case (Appendix 12 to the PoE for Mr Rackliff)

²³⁸ Appendix 12 to the proof of Mr Rackliff

²³⁹ As shown on Figure 5.10 of Study (CD 5.19)

²⁴⁰ eg paragraph 5.5 of the proof of Mr Rackliff and his Appendix 15

aspirations for a new local service on the Camp Hill Line to Kings Norton, serving Moseley, Kings Heath and Hazelwell.

11.10 In light of that, and as agreed by the parties at the Case Management Conference, the main consideration in this case relates to whether the development scheme would materially prejudice delivery of the South West Camp Hill Chord in terms of its construction and operation. Pursuant to the related discussion at the Conference, I confirmed in my post-Conference Note to the parties that the wording encompassed a range of different considerations which would be explored through the evidence in due course.

11.11 The determinative matter in this case is essentially a material consideration within the decision-making matrix. It is necessary to apply the matrix before reaching an overall conclusion. In that context, and having regard to the evidence as it emerged during the Inquiry, I draw attention to the Statement of Common Ground,²⁴¹ which was agreed by the Council and the appellant, which captures the various facets of the matter in dispute as:

'whether the appeal scheme could preclude delivery of the Camp Hill Chord and whether 'any potential' for prejudice to its delivery, insofar as it may present a design constraint on the project, is a material consideration such that planning permission should be refused.'

11.12 I agree with that analysis.

11.13 Section 70(2) of the Town and Country Planning Act 1990 provides that, in dealing with proposals for planning permission, regard must be had to the provisions of the development plan, so far as material to the application, and to any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that *'If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.'* As with any S78 planning decision therefore, the starting point here is the development plan. In terms of the structure of the remainder of this Report, I then look at the range of other consideration that have a bearing on this case, concluding with a final assessment against the main consideration in that context.

Policy Framework^[4.1-4.23, 5.2, 6.70, 6.73-6.76, 7.5, 7.11, 7.17-7.19, 7.28, 7.70, 7.70, 8.51, 8.57-8.59, 8.72, 8.73]

11.14 As set out in section 4 above, the development plan for the area includes the Birmingham Development Plan and the Bordesley Area Action Plan. It is a matter of agreement that there are no policies in the development plan (or indeed any other publicly available document) that identify or safeguard a route for the Chords.^[5.2, 6.73, 7.29, 8.73]

11.15 Policy TP38 of the Birmingham Development Plan supports the development of a sustainable, high quality, integrated transport system, listing a total of eight requirements for delivery of that. Inasmuch as the appeal scheme is not, of itself, a transport initiative, I have reservations as to whether the policy, which is relied on by both the Council and the Rule 6 Party, is properly engaged here. In coming to that view, I am mindful of the supporting text to the policy, which

²⁴¹ CD 2.7

refers in various places to development of the transport network and the City's transport system, transport initiatives, targets for improving transport, transport impacts etc.

- 11.16 Having said that, I recognise that one of the requirements listed in the policy is '*Ensuring that land use planning decisions support and promote sustainable travel*'. If it went ahead, the south-west Chord would clearly form part of a sustainable transport network. As a consequence, if the appeal scheme were to have the potential to frustrate its delivery then there may be conflict with policy TP38, if the policy is engaged. Whilst the Council prayed in aid other of the listed requirements, they are more generic, relating generally to the promotion and improvement of sustainable modes of transport. On the basis that the proposal is not for part of a sustainable transport network, I consider that those other requirements are not germane to the outcome of this appeal.
- 11.17 Notwithstanding my reservations, I shall revisit this matter once I have come to a view on whether prejudice to delivery of the Chord scheme would be caused. In any event, I fully recognise that delivery of an efficient, comprehensive and sustainable transport system is an essential element in supporting the City's economic competitiveness, reducing CO₂ emissions and enabling the delivery of sustainable development. As such, that strategic large-scale policy objective - an objective which includes the Camp Hill Chords as part of a sustainable transport system for the City - is a significant material consideration in this case. Indeed, there is no dispute on the part of the appellant that, as a matter public interest, the Chords would benefit the City and improve public transport connections. That is a material consideration in this case.²⁴²
- 11.18 Among other things, policy TP41 is supportive of proposals to enhance the City's rail network. One of the proposals specifically supported by the policy is '*The delivery of the Camp Hill Chord scheme and the facilitation of services from the Camp Hill line and from Tamworth/Nuneaton to run into the new platforms at Moor Street Station.*' However, given that the appeal scheme is not, of itself, a proposal to enhance the rail network, nor indeed is it a scheme proposing delivery of the Chord, it is my view that the policy is not engaged. In the absence of any specific safeguarding of land for that purpose (unlike the identified safeguarded area for HS2 within the same policy) it is not a necessary corollary in my opinion, that any effect (potential, theoretical or otherwise) of the development proposed on delivery of the Chord necessarily brings the appeal scheme into conflict with this policy. Nevertheless, as I found in relation to policy TP38, that strategic large-scale policy objective is a significant material consideration in this case.
- 11.19 The appeal site lies close to but outwith the boundaries of the Bordesley Area Action Plan.²⁴³ Principle 2 within the Action Plan supports and promotes proposals which, among other things, enhance public transport across the Action Plan Area in order to improve linkages within and across the Area to the City Centre and other centres of activity. It was agreed that the policy only extends to development *within* the Action Plan boundaries. Since the appeal site is not located within the Action Plan Area, there can be no conflict with the

²⁴² PoE Ms Mulliner paragraph 6.7

²⁴³ CD 5.1

policy. My attention was drawn however, to the supporting text, which refers to a number of initiatives under the heading *Wider Proposals* which, whilst not directly improving connectivity within the Action Plan Area will, nonetheless, have an impact on movement within the City and are supported through the Birmingham Development Plan. The re-opening of the Camp Hill line to passenger services is one of the initiatives cited, including a connection into Moor Street Station via new Chords at Bordesley.²⁴⁴ The need for a full assessment of the implications of the Chords, along with considerations of any development opportunities that may arise on adjoining land, is also referred to. As with policies TP38 and TP41 of the Birmingham Development Plan, that objective is a significant material consideration in this case.

Network Rail^[6.27, 6.28, 6.32, 6.53-6.61, 7.14, 7.33-7.38, 7.63, 7.66, 7.71, 8.29, 8.32, 8.33, 8.36, 8.37, 8.52-8.53, 9.15-9.18]

- 11.20 Network Rail is a statutory consultee and is also tasked with developing the technical evidence necessary to confirm the detail of a scheme at OBC level. I was advised that that work is anticipated as taking around two years to complete.
- 11.21 In August 2018, prior to the planning application being lodged, it set out in writing to the applicant that a check had confirmed that the application site was clear of any areas for construction of the Chord lines.²⁴⁵ As set out in that correspondence, the writer confirmed that he was working on the Rail Hub project, giving operational advice and leading on track and signalling modifications. He initially advised that he was 'pretty sure' that development of the appeal site would not 'clash' with the Network Rail site, also confirming that it was looking at developing the old railway site at Upper Trinity Street to build in more capacity. He went away and checked with his Construction Manager, leading him to confirm a few days later, that the appeal site was indeed clear of any areas for construction of the Chord lines. We do not know what plans were before the writer, but it seems to me that some detail must have been available to Network Rail to have informed the wording of that response.
- 11.22 The Network Rail responses to consultation on the planning application itself are found at CD 2.3. The correspondence there makes it clear that its responses are given in the context of the Midlands Rail Hub project and the importance of the Chords to that. Whilst the responses confirm that it had not completed the required engineering design for the Chords and that it did not have a final fixed design, with the July correspondence noting that the positioning could change as the design progresses, Network Rail did not demur from providing informed advice on the appeal proposal.
- 11.23 In February 2019, it advised that it believed that the biggest impact in terms of delivering the south-west Chord would be felt by the inclusion of the triangular parcel of land to the east of Bedford Road as part of the development scheme. In response, the appellant removed the planned energy centre from that part of the site, relocating it to beneath Block B, with the

²⁴⁴ An indicative location for the Chords is shown plan No 18 within the Area Action Plan. The south-west Chord is located wholly outwith the Plan area

²⁴⁵ Appendix 4 to the evidence of Ms Mulliner

triangle site now to be used only as a surface car park. That revision was specifically welcomed by Network Rail in May, which correspondence also highlighted the opportunity for the design of the residential properties to consider the amenity of future occupiers and to reduce any impact of the planned Chord, such as through internal layout and the overall orientation of the buildings.

11.24 In July 2019, Network Rail again welcomed further changes made to the development layout to accommodate delivery of the proposed Chord (as opposed to welcoming the development itself as asserted by the appellant.^[6.59, 6.60]) Whilst confirming that it had not reached a conclusion on construction methodology, the potential to require temporary access to the appellant's land, right up to the proposed new buildings to facilitate construction activities was highlighted, together with the possibility that construction of the Chord may require temporary or permanent closure of Bedford Road. It suggested that access arrangements to, and within, the development should be designed with suitable flexibility and should not rely on access from Bedford Road. The need for a maintenance easement of 3 metres was also confirmed. All of these matters have been accommodated by the appeal scheme, including the submission of a Composite Acoustic Report with the planning application, and the setting back of Block E by some 15 metres from the frontage to Bedford Road (opposite the triangular parcel)²⁴⁶ with Blocks A and C set back some 11-20 metres from the face of the viaduct.²⁴⁷

11.25 The final response from Network Rail, in November 2019, gave its answers to a number of specific questions asked by the Council. Among other things, it set out that a defined route alignment should be available only after the Full Business Case has been confirmed, circa 2023-24, with construction not anticipated until at least Construction Period 7 (2024-29).^[6.9] Whilst construction methodology would be dictated by the final design, with structures of a similar size and nature having used a variety of methods, it was also confirmed that in terms of land take for construction, Bedford Road was likely to be integral to the construction solution and would be required for the delivery of materials, scaffolding, hoardings, the siting of construction plant and lifting plant, welfare facilities etc. There is nothing in those answers, or indeed any of the earlier responses, to suggest that there is any concern that the buildings proposed would, or would be likely to, impinge directly on delivery of the south-west Chord either in terms of its support structure, or in terms of facilitating its construction. It seems to me that if there was any shadow of doubt in these regards, then Network Rail could have expressed concerns. It did not.

Alignments^[6.19, 6.15, 6.19, 6.21, 6.40, 6.42, 7.14, 7.37, 7.38, 7.43, 7.62, 7.66, 8.29, 8.37, 8.42, 9.17, 9.18]

11.25 The only Chord alignments before the Inquiry that have had any sort of engineering input are the three preferred alignments set out in the MM2010 Report. An earlier plan, at Appendix 2 to a 2007 report to the Cabinet Member for Transportation and Street Services²⁴⁸ shows a similar, albeit indicative,

²⁴⁶ See plan Nos P-S004 P3, P-200 P2 and P-200 P1

²⁴⁷ Figure 5 to the Technical Statement that comprises Appendix MR1 to the proof of Mr Rackcliff

²⁴⁸ ID5

alignment as does a later indicative alignment plan produced by AECOM²⁴⁹ in response to a request at a meeting in early January 2020 attended by the Council, Network Rail and third party rail groups.²⁵⁰ At that meeting, the appellant was asked to instruct an infrastructure consultant to review the proposed chord route and its interface with the development proposed, and the constructability of the chord should it come forward at some point in the future.²⁵¹ That Plan informed the AECOM Technical Note dated 10 January 2020.²⁵²

- 11.26 AECOM's²⁵³ indicative alignment was based on its own assumptions, working on Network Rail standards and guidelines and its knowledge of their normal practices, together with the physical constraints of the site, without sight (at the time the plan was drawn up) of the MM2010 Report. The evidence of Dr Raiss²⁵⁴ is that the detailed list of requirements/parameters which informed the MM2010 Report are consistent with the assumptions that informed the AECOM indicative alignment and the Technical Note of January 2020, and the later Technical Statement.²⁵⁵
- 11.27 The notes of the early January meeting²⁵⁶ set out that Midland Connect had confirmed that the potential alignment depicted on the 2007 plan closely aligned with the route it had used as the basis for its submission for funding in the SOBC, and that the alignment shown represented a worst case position in term of proximity to the proposed buildings on the appeal site, with no reason to suppose that the route of the Chord would move further west towards the appeal site. The note also sets out agreement that preparation of the Technical Note was the most suitable way of demonstrating that the length of the Chords passing through the site could be constructed and that the built development proposed would not prejudice that. The content of the meeting note was not challenged at the Inquiry.
- 11.28 Network Rail has clearly been engaged in ongoing discussions with the appellant, the Council and representatives of the Rule 6 Party throughout the application process and the application has been amended to accommodate all the matters of concern it raised. As it stands at the time of writing, there is no stated objection from Network Rail to the appeal scheme, nor any suggestion that permission should not be granted. There is not even a suggestion that it is too early to tell whether there might be any conflict or not. Network Rail could have made representations to the Inquiry if it considered there to be an issue in this regard, particularly given the significance of the chord as an integral part of the Midlands Rail Hub project. It did not.

²⁴⁹ The indicative alignment plan is included as Figure 6 in the later Technical Statement found at Appendix MR1 of the PoE of Dr Raiss.

²⁵⁰ Note of meeting at Appendix 10 to the proof of Ms Mulliner

²⁵¹ A Note of the meeting is at Appendix 9 to the PoE of Ms Mulliner

²⁵² CD 1.2 or Appendix 10 to the PoE of Ms Mulliner

²⁵³ As set out at Section 2 of the Technical Statement, AECOM is one of the largest suppliers of professional services to Network Rail, including design, construction and operation and maintenance of railway infrastructure and has designed railway infrastructure of this nature for Network Rail. (Section 2 of Dr Raiss Appendix MR1)

²⁵⁴ Paragraph 4.1.3 of the PoE of Dr Raiss

²⁵⁵ At Appendix MR1 to the proof of Dr Raiss

²⁵⁶ Appendix 9 to the evidence of Ms Mulliner

Bordesley Station/Viaduct Widening/Electrification^[6.36-6.41, 6.43, 6.45, 7.39, 7.51-7.58, 7.72.9, 7.72.10, 8.43-8.46, 9.11]

- 11.29 Bordesley Station is located on top of the arches along the eastern side of Bedford Road, opposite the appeal site. It is a relatively small facility, being limited by the viaduct crossings over the Coventry Road to the north and Bordesley Middleway to the south, comprising a simple, uncovered island platform serving the Up and Down Snow Hill lines. There is no ticket office and it has no vehicular access. The only pedestrian access to the platform is by a staircase via an opening in the abutment of the viaduct span which crosses Coventry Road. It serves primarily as a match day stop for the nearby St Andrews Stadium (home ground of Birmingham City Football Club, currently shared also by Coventry City Football Club) when there are home fixtures. The access is locked at all other times. Adjacent to the Up Snow Hill line is another island platform which is disused, heavily overgrown and is missing its original buildings.
- 11.30 All 39 of the options examined in the MM2010 Report, including the three preferred alignments, envisage demolition of the station, allowing the Chord options to take advantage of the land formerly occupied by the station and keeping the footprint within the existing viaduct. A potential alternative location for the station is identified, if required, a very short distance to the north-west, in a wide area of the viaduct adjacent to Upper Trinity Street on land owned by Network Rail. I note in this regard, that Mr Moore (for the Consortium) who raised the potential for the station not being closed, was the Project Director for the MM2010 Report, a report that was developed in consultation with a wide range of stakeholders and which took no issue with the principle of closing the existing station, including its relocation if necessary.
- 11.31 Mr Moore's evidence to the Inquiry suggested that if the station were to be retained in its current location, then the Chords could not be kept within the footprint of the existing viaduct, pushing this part of the Chord further west, beyond land in the ownership of National Rail, bringing it into conflict with Bedford Road and the appeal site.²⁵⁷ In his evidence in chief, Dr Raiss described an alternative arrangement which would not result in the loss of the public highway or conflict with the appeal scheme and which, in his view, would be feasible in engineering terms. I am mindful, in this regard, that a primary aim of Network Rail's processes and related standards for rail construction, is to keep new infrastructure within existing boundaries if at all possible, avoiding unnecessary land take and costly modification of existing structures, such as the Bordesley viaduct.²⁵⁸ The construction of a new viaduct would involve not only significant cost, but would also involve the acquisition of land beyond the current viaduct footprint, including closure of a public highway.
- 11.32 Mr Moore's evidence also refers to Figure 5.10 in the West Midlands & Chilterns Route Study of 2017²⁵⁹ which, he suggested, shows a new two-track viaduct to the west of the existing viaduct. However, that plan is clearly a high-level schematic diagram. Unlike the plans in the MM2010 Report, it is not to scale,

²⁵⁷ Mr Moore Appendix B

²⁵⁸ Paragraph 3.1.11 of Dr Raiss PoE

²⁵⁹ CD 5.19

it is not overlain onto any map which might give points of reference and in my view cannot be taken as providing any meaningful indication as to potential construction solutions or land take etc. In any event, the diagram shows four tracks which, as confirmed by Mr Rackliff in his oral evidence to the Inquiry on behalf of the Consortium, could be accommodated without any need to widen the existing viaduct adjacent to the appeal site.

- 11.33 Whilst Mr Rackliff suggested that six tracks was a preferable option, removing the need for the north-west Chord to fly over the main line and avoiding interference with rail traffic on the Snow Hill line (referring to page 27 of his Appendix 12)²⁶⁰ he confirmed that there was nothing in the SOBC document that referred to viaduct widening in the vicinity of the appeal site. Neither was there anything in any of the consultation responses from Network Rail about any concerns in this regard. Whilst a six track arrangement would, it seems, necessitate widening of the viaduct, Mr Rackliff confirmed during his evidence in chief that that would be required primarily from wherever the Chords end, onwards into Moor Street Station and would almost certainly take place some distance away from the appeal site (as suggested by the Figure 5.10 plan).
- 11.34 Mr Moore also suggested that the impact of electrification would be amplified by retention of the station, as the wires would be required to be higher as a safety feature through the station. Be that as it may, any such arrangement would not be materially constrained as a consequence of the development proposed.

Line Speed and Track Curvature^[6.42-6.44, 6.60, 7.38-7.40, 7.42, 8.37-8.41]

- 11.35 In cross-examination, Mr Moore confirmed that whilst the assumptions used in the MM2010 Report would need to be re-checked for any Chord design going forward, they were unlikely to be materially different, other than if there was a requirement for much higher speeds. If there was, he confirmed that that would give rise to a very different series of Chords, with 'tie-ins' to the Snow Hill main line in different places.
- 11.36 He confirmed that the three alignments in the MM2010 Report could accommodate speeds of some 30-35 mph, limited by the assumption that the switch and crossing speeds at each end of the Chord is limited to around 25 mph²⁶¹ and, given the length of the Chord, that acceleration much beyond 30 mph is unlikely. I am mindful in this regard, that the Report specifically acknowledged that electrification of the Camp Hill line would improve acceleration, reducing headways thus resulting in a better service '*hence the allowance for electrification in the options selected to take forward.*'²⁶² It seems to me therefore, that increased speeds facilitated by electrification were taken into account and informed the preferred options.
- 11.37 Mr Moore went on to suggest that, with an appropriate alignment, a reasonable assumption would be a possible line speed of up to 40 mph along the Chord. Firstly however, as he agreed with Miss Reid, account needs to be taken of the surrounding rail network. He confirmed that the line speed on the Snow Hill line, some 500 metres to the west (between the appeal site and

²⁶⁰ Midlands Rail Hub Midlands Connect SOBC (July 2019)

²⁶¹ See bullet 4 of section 5.2 of the MM2010 Report

²⁶² Section 2.6.3 of the MM 2010 Report (CD 5.2)

Moor Street Station) is currently restricted to 30 mph, although I recognise that could change in the future.

- 11.38 Higher speeds for trains departing from Moor Street Station and using the Chord would need a greater radius for the curve, so tie in points would need to move. On the plan at Figure 7 in the evidence of Dr Raiss, such an alignment would be likely, it seems, to involve demolition of the grade II* listed Bordesley Centre at the southern end of the Chord which, as acknowledged by all parties, should be avoided if at all possible. Indeed, the MM2010 Report sought to avoid conflict with the listed building.
- 11.39 Mr White suggested that, in an ideal world, it would be desirable for the Chord to run at 60 mph, being the speeds on the Camp Hill and Snow Hill lines. Even if that was a reasonable assumption, the uncontested oral evidence of Dr Raiss in evidence in chief, was that at that level, the whole alignment of the Chord would shift so far to the west anyway that it would miss the appeal site completely.

Building Location^[6.49-6.52, 6.56, 7.31]

- 11.40 The existing buildings on the appeal site extend to the back of the footway on Bedford Road. In contrast, Blocks A and C proposed would be set back from that frontage by approximately 5-6 metres, with Block E, opposite the triangular parcel of land, set back by some 15 metres.²⁶³ As accepted by Mr Moore, that would increase the operational space available compared with the existing situation, ensuring that a range of construction methods could be employed, also making compulsory acquisition of the appeal site at least less likely if not unnecessary.²⁶⁴

Heritage Assets²⁶⁵

- 11.41 No heritage asset would be directly affected by the appeal scheme. However, the site lies within the setting of a number of listed buildings, locally listed buildings and a Conservation Area. As set out in the report to the planning committee, the Council is of the view that there would be some, albeit less than substantial harm to those assets. That impact did not, however, form a reason for refusal on the basis that the harm was clearly outweighed by public benefits.
- 11.42 The written evidence of Mr Trehy (for the appellant) deals with heritage assets. It was provided at my request given the statutory duty placed on the decision maker by Section 66 of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 and the advice at paragraph 190 of the Framework. That evidence was taken as read and was not challenged.
- 11.43 The heritage assets which have the potential to be affected by the development proposed as a result of changes to their setting, are identified as:
- Holy Trinity Church (grade II listed)

²⁶³ Eg Plan Nos P-200 P1 and P-200 P2 together with Figure 5 of Appendix A to the AECOM Technical Statement which forms Appendix MR1 to the proof of Dr Raiss

²⁶⁴ Accepted by Mr Moore in xx

²⁶⁵ See the Committee report (CD 3.1) the Heritage Statement submitted with the planning application (CD 1.1) the Statement of Common Ground (CD 2.7) and the PoE of Mr Trehy)

- Digbeth, Deritend and Bordesley High Streets Conservation Area
- former Barclays Bank, 123 Deritend High Street (locally listed building grade B)
- Clements Arms (grade II listed)
- 46 Coventry Road (Bordesley House) (locally listed building grade B)
- canal bridge 93 (locally listed grade B)

11.44 Located at a high point on the main road, part of the heritage significance of the Church is its important landmark function in the wider setting, which is clearly expressed by the variable views of its dramatic roofline and pinnacles. Whilst the wider setting of the Church has been much altered over the years, leaving it sitting in an area of fragmented and poor quality townscape, it remains as a prominent feature in numerous views. Although views from the south and west would be unimpeded by the development proposed, its dominance would be challenged to some extent in views on the approach from Deritend High Street to the north, moving south onto Camp Hill, and in views from the railway to the east. However, the overall design and layout of the appeal scheme has been modelled so as to reduce its impact on the setting of the Church and there is agreement that any harm in this regard would be at the lowest end of less than substantial harm. I have no reason to disagree.

11.45 The southern boundary of the Conservation Area runs along the northern side of Coventry Road, to the north of the appeal site. Its designation specifically included expected areas of redevelopment, including the area at its southern end. The only extant structures of value in the immediate locality are the 1852 viaduct and the locally listed former bank on the High Street. Whilst the appeal site clearly lies within the setting of the Conservation Area and the former bank, it makes no contribution to their heritage significance. As such, although the development proposed would be of contrasting scale to the buildings currently on the appeal site, there would be no harm to the significance of the identified heritage assets.

11.46 In relation to the Clements Arms, No 46 Coventry Road and the canal bridge, all lie to the north-east of the site on the far side of the elevated railway. Their setting is very mixed and is visually dominated by the railway bridge and the dark brick of the viaducts, and by the large scale highway infrastructure at Bordesley Circus to the east. As identified by Mr Trehy, the contribution of setting to the heritage significance of the Clement Arms building is limited to the legibility of the group value of the surviving historic buildings. The contribution of the setting of the canal bridge to its significance is largely derived from the canal itself, the locks and former wharf, and the corresponding relationship with the decorative office building at No 46. Whilst the scale and height of the development proposed means that there would be some intervisibility between those assets and the appeal site, that does not, of itself, equate to harm. There is no evidence to suggest that the appeal site makes any contribution to the significance of those heritage assets in terms of their setting and I find no harm in this regard.

11.47 The grade II* Bordesley Centre referred to in the evidence is sufficiently distanced from the site, separated by intervening buildings and infrastructure,

that the development proposed would not engage with its heritage significance.

Benefits of the Development Proposed²⁶⁶ [6.78-6.83]

11.48 A number of what are described by the appellant as benefits relate to an absence of harm, for instance high quality design and measures to ensure no increased flood risk. As such, they attract no positive weight in the planning balance. For the purpose of clarity, where there is positive weight to be ascribed, I have used the following scale: limited, moderate and substantial.

11.49 Key benefits *during construction* can be summarised as:

- employment of up to 460 workers per year over the estimated three year construction period; (substantial weight)
- construction worker expenditure in the local area of around £1.3-£2.1 million in local shops and amenities over the construction period; (moderate weight)
- the development would be the subject of a construction employment plan (secured by condition) in order to maximise employment and new training opportunities for the local area, including 60 person weeks of employment per £1 million spend for New Entrants (including apprentices, graduates, work placements and unemployed adults seeking work). Benefits in this regard are enhanced given the potential to address unemployment in the Birmingham and the wider West Midlands Combined Authority area, which has risen substantially during the Covid - 19 crisis. (substantial weight)

11.50 Key benefits of *completed development* can be summarised as:

- the delivery of 480 new homes with a range of housing types and sizes, in a highly sustainable location on a brownfield site at a time when the housing requirement set out in the Birmingham Development Plan falls significantly short of meeting identified needs, with a shortfall across the Plan period of some 37,900 homes, including around 14,400 affordable homes, is a consideration that attracts substantial weight.
- policy TP31 of the Birmingham Development Plan requires 35% provision of affordable homes on schemes of this size. The application was accompanied by a Financial Viability Assessment, which was independently assessed on behalf of the Council. In light of that, it is a matter of agreement that the development cannot support any planning obligations. Nevertheless, in accordance with paragraph 64 of the Framework, the appellant offered the provision of 10% discount market affordable homes, equating to 48 units across the site. However, acknowledging the loss of employment land as a consequence of the development proposed, whilst at the same time noting the location of the site in light of the policy aspirations for the Digbeth area, it was agreed that the 10% provision should be evenly split between affordable housing

²⁶⁶ Camp Hill Socio-Economic Benefit Statement at Ms Mulliner PoE (Appendix 1) the Planning Statement submitted with the planning application, and the report appended to the appellant's Statement of Case (CD 2.1)

and affordable workspace. Whilst the provision of affordable housing is a benefit of the scheme, since the level provided, ie 5% (24 units) is below that required by policy, I afford it only moderate weight.

- there would be a reduction in the overall quantum of employment floorspace compared with the existing situation. That is mitigated though through delivery of some 1,480 square metres of modern, flexible employment and commercial space, all of which is secured at a rental level discounted to 50% of open market value in perpetuity, helping to meet the needs of local businesses and supporting the Digbeth Creative Quarter. However, since it is provided as mitigation to address a harm that is consequential upon the development, I afford that flexible affordable workspace only limited weight;
- approximately 800-1000 additional residents in the area, a large proportion of which would be likely to be younger residents, a segment of the labour force that Birmingham is trying to attract and retain; (moderate weight)
- GVA benefits estimated as £2.9-£4.3 million for the City Council, some £3.4-£4.9 million for the wider region; (substantial weight)
- future residents are expected to contribute approximately £4.4m per year to the Birmingham economy, supporting 50 FTE permanent jobs; (substantial weight)
- 122-178 gross direct FTE jobs on site from the hotel and flexible business workspace; (moderate weight)
- net biodiversity gains across the site include a significant reduction in the area of the site covered by buildings and hardstanding, soft landscaping in the form of tree-lined walkways through and around the site, courtyard areas and small private gardens of grass and shrubs and a large green (sedum roof); (moderate weight)
- delivery of a new hotel would enhance the supply of business and leisure tourism accommodation, supporting the drive to expand the visitor economy, increasing footfall into Digbeth supporting local businesses, estimated as generating around £5.7 million of expenditure per year with the majority spent in Birmingham and the wider area; (substantial weight)
- provision of a range of uses which will ensure vitality and activity throughout the day, as well as increased natural surveillance to the surrounding streets, enhancing safety and the visual amenity of the site. (moderate weight)

Assessment against the main consideration

11.51 The respective positions of the main parties are instructive in terms of the different approaches each advocate takes to the question of prejudice. The appellant advances a number of arguments which essentially distil to: there is a dispute as to whether this matter is a material consideration and, even if it is, there is no evidence that the development may prejudice delivery. It is suggested that there is no evidence before the Inquiry that indicates that if the

appeal site came forward for development, the south-west Chord might not be able to be constructed or delivered. Rather, to the contrary, the evidence that there is indicates that it would be possible to construct an effective Chord alongside the appeal scheme. On that basis, it is maintained that there is no evidential basis to substantiate the argument that delivery of the appeal scheme might prejudice the delivery of a scheme for the south-west Chord.^[6.10-6.12, 7.2, 7.8, 7.11]

- 11.52 The Council says that the appellant sets an artificially high test and acknowledges that the approach to the identified main issue is a '*multi-faceted issue*' which encompasses a number of different considerations. As set out earlier, I agree with that analysis. The Council goes on to say that it is sufficient that the development '*realistically could be pre-emptive*' to delivery of the Chords - in essence, that an assessment that there is a realistic possibility that the development could block or prevent delivery of the south-west Chord is a material consideration which indicates that permission should not be granted.^[7.3-7.5, 7.9, 7.13, 7.14]
- 11.53 The R6 Party contends that, in the absence of any detail, it does not know whether the appeal scheme will definitely not prejudice the bringing forward of the Chord development and, absent such information, the appeal scheme should not be granted permission.^[6.72, 8.29]
- 11.54 It is agreed by all parties, that the extent of any land take required to deliver the south-west Chord cannot be determined presently with any degree of certainty - the scoping of any detailed, up to date alignment for the Chord is clearly at an early stage, which presents problems with regard to assessing the potential for any prejudice to its delivery, including the possible need for a CPO. In addition, there are the added complications of the potential for additional land take on a temporary basis, to aid the construction process. It is axiomatic that two findings flow from this. Firstly, it cannot be said definitively, at this point in time on the evidence available, that the appeal scheme *would prejudice* delivery of the Chords. That would require evidence and information which is yet to come forward into the public domain. The corollary to that is the finding that neither can it be definitively said, at this point in time on the evidence available, that the appeal scheme *would definitely not prejudice* delivery of the Chords. I am reminded, in this regard, of the traditional aphorism, that absence of evidence is not necessarily evidence of absence.
- 11.55 The Core Documents include at CD7 a number of legal judgements. Those submitted for the Council include the judgement in *Nottinghamshire CC v SSETR & Anor [2002] 1 P&CR 30*,²⁶⁷ where it was held, dismissing the application, that the British Waterways Board test (whereby it is necessary to show on the balance of probabilities that land will be put to an existing use if planning permission is refused for a new competing use) does not extend to cases of competition between alternative potential future uses of land. The judgement confirmed that the possibility of a future use occurring will normally be a material planning consideration, but the weight to be given to it will vary from case to case, for example the national significance of the alternative

²⁶⁷ CD 7.5

project will be important. There was no warrant for putting a gloss on section 70 of the Town and Country Planning Act 1990 by requiring that the desirability of a future use can only be a material consideration if it has a 51 per cent probability of coming about.

- 11.56 Clearly, that case is not directly analogous to this current appeal. Firstly, there was a specific development plan policy in that case which resisted development that would inhibit the construction of a primary school on the appeal site. There is no such policy here. Secondly, there was a direct conflict in that case between the potential education use and the residential development proposed, in that residential development of the site would pre-empt delivery of the primary school on the site - it was a case of either/or. Again, that is not the case here. It is useful though, in confirming that the possibility of a future use occurring is a material consideration and that the national significance of a project will be important. As set out earlier, there is no disagreement as to the importance of the Chords, particularly the south-west chord, as a key part of the Midlands Rail Hub, being a consideration of regional if not national importance. The Chords would also facilitate well advanced aspirations for a new local service on the Camp Hill Line to Kings Norton, serving Moseley, Kings Heath and Hazelwell.
- 11.57 As the Council says, consideration of this matter is multi-faceted.^[7.1] I am in no doubt in this regard, that the issue of a development potentially prejudicing the delivery of large-scale strategic policy objectives of potentially national importance is capable of being a material consideration in this case. The weight to be given to that depends on the circumstances, including the degree and extent of any potential prejudice, the likelihood of that prejudice occurring and the effects of any prejudice. For example, it may be that the appeal scheme could potentially prejudice one of a number of options in terms of the Chord, but would not prevent the Chord development coming forward. On the other hand, and towards the other end of the prejudice spectrum, it may be that the appeal scheme could potentially prejudice the optimal route for the Chord in a situation where there are limited alternatives available.
- 11.58 So, where does the appeal scheme sit on that spectrum? The only engineering based plans available, from the MM2010 Report, show an alignment that avoids conflict with the appeal site and the proposed development, with Mr Moore confirming that, other than a potential need to increase line speed above that considered at the time, the assumptions that informed those alignments are unlikely to be materially different now. Moreover, the constraints on the ground, for instance the location of the nearby canal, the grade II* listed Bordesley Centre, and the existing buildings on the appeal site, all remain the same. Other alignments, whilst indicative, also appear to avoid the appeal site, other than one produced late in the day by the Rule 6 Party in the evidence of Mr Moore, which included retention of Bordesley Station in its present location.²⁶⁸
- 11.59 All the other alignments mooted to date would, it seems, be likely to require the closure of Bordesley Station, with the option to relocate it slightly further to the north-west if required. I recognise that there is a Statutory procedure

²⁶⁸ Appendix B to the proof of Mr Moore

to go through to secure the closure of any station, whether or not it would be re-provided in a different location. There can be no certainty as to the outcome of that process, which would need to take account of any representations received as part of the related consultation process. That said, the previous promoter did not envisage significant problems in that regard. Indeed, the 2017 West Midlands & Chilterns Route Study also includes a statement that Bordesley Station would be removed/ relocated as part of the Chord scheme. Moreover, if it were to be retained in its existing location, it would not meet many of the current requirements for a station designed to modern day standards.²⁶⁹ It is perhaps worth noting the benefits associated with re-provision, including a station designed to modern standards, with good street level access and on-site parking, in a location where planned growth and regeneration will mean that the number of people living and working in the vicinity of the station would increase.

- 11.60 Any widening of the viaduct to accommodate the six-track arrangement described by Mr Rackcliff was confirmed, in all likelihood, as taking place closer to Moor Street Station, beyond the appeal site. The appeal scheme would have no impact on delivery of the Chord in this regard.
- 11.61 An increase in line speed on the Chord above that envisaged in the MM2010 Report would, it seems, necessitate a slacker curve with consequential implications for the location of the 'tie-in' points at each end of the Chord, the most significant being at its southern end where it would impact on the grade II* listed Bordesley Centre. In coming to a view on the loss of that building, an assessment would need to be made as to whether there were reasonable alternatives. I am mindful, in this regard of the Ordsall Chords decision, referred to by the Council,²⁷⁰ where the decision was taken to select an option that resulted in greater impact on heritage assets than an alternative one, on the basis that the scale of the benefits that would be released across Greater Manchester and the North of England by the Chord outweighed the harm to the heritage assets.
- 11.62 Even were it to be held that public benefits outweighed the harm occasioned by loss of the grade II* listed building, the slacker Chord alignment shown at Figure 7 in the evidence of Dr Raiss also shows the northern end of the Chord coming closer to but still avoiding the location of the proposed buildings on the appeal site. Indeed, that would be at a point where proposed Block E (opposite the triangular parcel) and the southern end of Block C to the north of that, are set well back from the Bedford Road frontage, providing some flexibility in terms of the location for the tie-in at the northern end of the chord. I note in this regard that the engineers agree that the options for construction of the Chord (at least with reference to the three preferred alignments in the MM2010 Report) would be enhanced by the appeal scheme when compared to the existing situation.
- 11.63 With regard to the heritage assets in the vicinity of the appeal site, Mr Sweeney confirmed, in answer to my questions at the Inquiry, that even if the scheme would impact delivery of the Chord, the public benefits (set out above) would still outweigh the harm identified to the heritage significance of the

²⁶⁹ Dr Raiss PoE paragraphs 5.6.5-5.6.8

²⁷⁰ CD 5.18

Church. I have no reason to disagree with that and none of the objectors took issue on this point.

- 11.64 At best, a definitive route for the south-west Chord is a few years away. Even then there is no guarantee that it would proceed, although given its importance to the Midlands Rail Hub and the involvement now of the DfT, it is more likely. Clearly, it would not be in the interest of good planning to eliminate the option of providing the Chord given its importance. However, it is not for the Secretary of State, as the decision-taker in this case, to create a safeguarding policy of his own. Proposals to safeguard land for public purposes are normally set out in the development plan and can have implications in terms of planning blight etc. I recognise that the evolution of the Rail Hub, in particular the importance of the Chords to that, has lagged behind the adoption process for the Birmingham Development Plan, which may explain the absence of any safeguarding policy. That said, as confirmed in the note on chronology provided to the Inquiry at my request,²⁷¹ the Chords have been the subject of discussion from as long ago as 2001. Moreover, there has been no suggestion from Network Rail that there is a need to safeguard any land in relation to delivery of the south-west Chord.
- 11.65 On the basis of the evidence that is before me it seems, on the balance of probability, that any feasible cost-effective alignment is unlikely to differ materially from the routes that have been mooted to date. On that basis, and given the increased flexibility provided by the set back of the buildings at the southern end of the appeal site together with keeping the triangular parcel clear of buildings, I consider that if the development proposed were to go ahead, the ability to construct the south-west Chord would not be lost. In the circumstances that prevail, I find there to be limited potential for prejudice to delivery of the Chords, in particular the south-west Chord, given the scope to accommodate some variation to the general alignment of this end of the Chord. Any potential prejudice would be limited in its extent by virtue of my finding that it would still be possible to build the Chord, albeit the development may have limited potential to affect delivery of the Chord.
- 11.66 I commenced my assessment of the main consideration by setting out the parties' cases and the respective 'tests' each advocated. The Appellant's position relies upon the absence of evidence pointing to the development proposed prejudicing delivery of the Chord. Given the embryonic nature of the scoping exercise, I have concluded that it is not appropriate to rely upon an absence of evidence pointing to prejudice. For that reason, I do not consider the appellant's test to be appropriate.
- 11.67 Similarly, the Rule 6 Party advocated that permission should not be granted unless there is a finding that the appeal scheme would definitely not prejudice the Chord development. For the reasons given, I also reject that test. It is too high.
- 11.68 I made two initial findings at the beginning of my analysis. Firstly, it cannot be said definitively, at this point in time on the evidence available, that the appeal scheme **would prejudice** delivery of the Chords. Secondly, neither can it be

²⁷¹ ID4 – Note setting out the chronology of the Camp Hill Chords

said definitively at this point in time on the evidence available, that the appeal scheme would definitely **not prejudice** delivery of the Chords.

- 11.69 I have therefore looked at the possibility of the appeal scheme prejudicing delivery of the Chords and at the nature and extent of that possible prejudice. For the reasons I have set out, the potential for prejudice is limited and thus, the effect of any prejudice would be similarly limited. I therefore afford limited weight to this matter as a material consideration in my decision-making matrix.
- 11.70 It is clear that the potential presence of the Chords has been considered and taken into account throughout the development process, with input from Network Rail, the organisation tasked with developing the Midlands Rail Hub, including the Chords, with the location of built development on the appeal site having been amended following advice from Network Rail. I find no conflict therefore, with paragraphs 102 a) and b) and paragraph 103 of the Framework. However, to the extent that there is some, albeit limited potential for prejudice, there would be conflict with the strategic objectives reflected in policies TP38 and TP41 of the Birmingham Development Plan and the Area Action Plan. For the purposes of undertaking the planning balance, I shall take that as bringing the scheme into conflict with the development plan as a whole. In such circumstances, determination should be in accordance with the development plan unless material considerations indicate otherwise. The overall package of benefits that I have identified is a material consideration of very substantial weight in the planning balance. In my view, those benefits are of sufficient substance in this case to outweigh the limited harm as a result of the potential prejudice that I have identified as bringing the scheme into conflict with the development plan.

12. RECOMMENDATION

- 12.1 For the reasons set out above, I recommend, on balance, that the appeal should succeed.
- 12.2 That recommendation is made on the evidence before me at the time of the Inquiry, which included the absence of any stated objection in terms, by Network Rail. As noted above, as the current sponsor, the Department for Transport, gave £20 million to Network Rail in July of this year to develop the Midlands Rail Hub (including the Camp Hill Chords) to Outline Business Case level, which would then take the scheme to the equivalent of GRIP3 or RNEP Stage 2. It may be, that at the time of the Secretary of State's decision, the OBC has progressed further. It would be a matter for the Secretary of State to decide whether to refer back to Network Rail and/or the Department for Transport at that time.

Jennifer A Vyse
INSPECTOR

APPENDIX A APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Gary Grant, of Counsel

He called:

Lee White	Managing Director, Stirling Transport
BA(Hons), MSc, FCILT,	Consultancy Ltd
MCIHT, MAPM	
Gerald Sweeney	Planning Director, CarneySweeney
BSc(Hons), DipTP, MRICS,	
MRTPI	

Ms Summerfield (Principal Planning Officer with the Council) also assisted the Inquiry on behalf of the Council during the discussion on possible conditions.

FOR THE APPELLANT:

Sarah Reid, of Counsel

She called:

Jacqueline Mulliner	Managing Director, Terrence O'Rourke Ltd
BA(Hons), BTP(Dist) RTPI	
Dr Mark Raiss	Engineering Director for Europe, Middle East and
FREng	Africa, AECOM
John Trehy*	Technical Director, Terrence O'Rourke Ltd
BA, MCIFA	

* Mr Trehy's evidence, which comprised a written proof and appendices, was taken as read and he was not called to appear at the Inquiry.

FOR THE R6 CONSORTIUM:

Nina Pindham, of Counsel

She called:

David Harris BSc(Hons),	Manager, Transport Strategy & Place
MSc, MCIHT	
Nigel Moore	Technical Director, Mott MacDonald
BSc, CEng, FICE	
Toby Rackcliff	Strategic Lead – Rail Policy, West Midlands Rail
MSc, BSc, BA(Hons) FCILT	Executive

APPENDIX B

DOCUMENTS HANDED UP DURING THE INQUIRY

- ID1 Appellant Opening Submissions
- ID2 Council Opening Statement
- ID3 Rule 6 Party Opening Submissions and Appearances
- ID4 Note setting out the chronology of the Camp Hill Chords
- ID5 Report to Cabinet Member for Transportation and Street Services: Camp Hill Railway Line Study inc Appendix (July 2007)
- ID6 Itinerary for Inspector site visit
- ID7 Centro representations on the pre-submission version of the Birmingham Development Plan and Council comments
- ID8 Additional suggested conditions
- ID9 Closing submissions on behalf of the Council
- ID10 Closing submissions on behalf of the Rule 6 Party
- ID11 Closing submissions on behalf of the Appellant
- ID12 Appellant's skeleton application for costs
- ID13 Council's rebuttal to the costs application

APPENDIX C

CORE DOCUMENTS

NB The Core documents, proofs + appendices and the Planning Obligation etc can be accessed via a dedicated Inquiry web page
https://www.birmingham.gov.uk/camp_hill_inquiry

CD1 – Application Documents	
1.1	Heritage Statement (November 2018)
1.2	AECOM Technical Note (Review of Impact of Proposed Development on the ability to create a Future Railway Link to an acceptable alignment (January 2020)
CD2 – Appeal Documents	
2.1.	Appellant's Statement of Case
2.2	Document 3 lodged with Appellant's Statement of Case: Site of proposed rail spur connecting Camp Hill line with Moor Street line, Birmingham City Council
2.3	Document 5 lodged with Appellant's Statement of Case: Various correspondence from Network Rail to Birmingham City Council in relation to planning application (ref: 2018/09467/PA) (12 February 2019, 03 May 2019, 09 July 2019, and 07 November 2019)
2.4	Document 6 lodged with Appellant's Statement of Case: Extract from the minutes of the Planning Committee meeting on 30 January 2020
2.5	Birmingham City Council's Statement of Case
2.6	Rule 6 Party's Statement of Case
2.7	Statement of Common Ground (agreed 21 August 2020)
2.8	Clarification Note from Birmingham City Council dated 17 July 2020
2.9	Note from Rule 6 party dated 17 August 2020
2.10	Correspondence from Rule 6 party dated 21 August 2020
CD3 – Committee Report and Decision Notice	
3.1	Officer's Report to Planning Committee
3.2	Minutes of Committee Meeting dated 13 February 2020
3.3	Decision Notice
CD4 – Development Plan	
4.1 Birmingham Development Plan (2017)	
4.1.1	Foreword and Introductory Paragraphs
4.1.2	Policy GA1.1
4.1.3	Policy GA1.2
4.1.4	Policy GA 1.3
4.1.5	Policy PG1
4.1.6	Policy PG2
4.1.7	Policy TP20
4.1.8	Policy TP21
4.1.9	Policy TP25
4.1.10	Policy TP27
4.1.11	[not used]
4.1.12	Policy TP30
4.1.13	Policy TP31

4.1.14	Policy TP38
4.1.15	Policy TP41
4.2 Birmingham Unitary Development Plan (UDP) 2005 – Saved Policies (2017)	
4.2.1	UDP Saved Policies and Direction Letter (2008)
4.2.2	Policy 3.14/A/B/C/D
4.2.3	Policy 8.19
4.2.4	Policy 8.22
4.3	Big City Plan - Birmingham Curzon HS2 Masterplan for Growth (Birmingham City Council, 2015)
4.4	Big City Plan – Curzon Investment Plan (Birmingham City Council, 2016)
4.5	Affordable Housing SPG (Birmingham City Council, 2001)
4.6	Loss of Industrial Land to Alternative Uses SPD (Birmingham City Council, 2006)
CD5 – Miscellaneous Documents	
5.1	Bordesley Area Action Plan (Birmingham City Council, 2020)
5.2	Camp Hill Pre-Feasibility Report (Mott MacDonald, 2010)
5.3	Historic England Good Practice Advice 1: The Historic Environment in Local Plans (July 2015)
5.4	Historic England Good Practice Advice 2: Managing Significance in Decision-Taking in the Historic Environment (July 2015)
5.5	Historic England Good Practice Advice 3: The Setting of Heritage Assets (December 2017)
5.6	National Design Guide C2: Value Heritage, Local History and Culture (October 2019)
5.7	Conservation Principles for the sustainable management of the historic environment (Consultation draft November 2017)
5.8	Barker, Dr N. 2015 'Heritage assets and their setting: Views from a practitioner' Joint planning law conference Oxford (2015)
5.9	Digbeth, Deritend and Bordesley High Streets (Digbeth/Deritend) Conservation Area Character Appraisal and Supplementary Planning Policies 2009
5.10	<i>[not used]</i>
5.11	<i>[not used]</i>
5.12	<i>[not used]</i>
5.13	<i>[not used]</i>
5.14	Stakeholder Relations Code of Practice – Investing in the Network – Network Rail
5.15	Rail Network Enhancements Pipeline A New Approach for Rail Enhancements (DfT) (2018)
5.16	Railway Group Standards (RGSs) (The Railway Standards and Safety Board) <ul style="list-style-type: none"> • GC/RT 5021 Track System Requirements Issue 3 • GI/RT7016 Interface between Station Platforms, Track and Trains Issue 1 • GLRT1210 AC Energy Subsystem and Interfaces to Rolling Stock Subsystem Issue 2 • GC/RT 5021 Track System Requirements Issue 5

5.17	Rail Industry Standards (The Railway Standards and Safety Board) (RSI's) • RIS-7016-INS Issue 1.1
5.18	Secretary of State Decision and Report to the Secretary of State – Transport & Works Act 1992 – The Network Rail (Ordsall Chord) Order 2015
5.19	West Midlands and Chilterns Route Study and London North Western Route Study (Network Rail, 2017)
5.20	West Midlands Rail Investment Strategy, and Wider Economic Impacts Modelling (West Midlands Rail Executive, 2019)
5.21	Midlands Connect Strategy (Midlands Connect, March 2017)
5.22	Decarbonising Transport (Department for Transport, March 2020)
5.23	Transport Analysis Guidance: The Transport Appraisal Process (TAG) (May 2018) (DfT) Pages 12/13
5.24	+ Pages 3/4
5.25	Treasury Green Book Guidance (Green Book).(Treasury)
5.26	Planning Practice Guidance: Transport evidence bases in plan making and decision taking (MHCLG, 2015)
5.27	Planning Practice Guidance: Planning Obligations (MHCLG, updated September 2019)
5.28	Greater Birmingham and Black Country Housing Market Area (GBBCHMA) Housing Need and Housing Land Supply Position Statement (September 2018)
5.29	Bordesley Centre – Historic England Listing Entry
CD6 – Relevant Appeal Decisions	
CD7 – Relevant Judgments	
7.1	Notes on the judgements from Local Planning Authority (7.2-7.6) and from the Appellant (7.7-7.11)
7.2	<i>Chichester DC v Secretary of State</i> [2019] EWCA Civ
7.3	<i>R (on the application of Samuel Smith Old Brewery (Tadcaster) and other) (Respondents) v North Yorkshire County Council (appellant)</i> On appeal from [2018] EWCA Civ 489
7.4	<i>Stringer v Minister of Housing and Local Government</i> [1971] 22 P&CR 255
7.5	<i>Nottingham CC v Secretary of State for Environment, Transport & Regions</i> [2002] 1 P&CR 30
7.6	<i>Wealdon DC v Secretary of State for Communities and Local Government</i> [2017] EWHC 351 (Admin)
7.7	<i>East Northamptonshire DC v Secretary of State for Communities and Local Government</i> [2014] EWCA Civ 137
7.8	<i>R (Forge Field Society) v Sevenoaks DC</i> [2014] EWHC 1895 (Admin)
7.9	<i>Bohm v Secretary of State for Communities and Local Government</i> [2017] EWHC 3217 (Admin)
7.10	<i>R (on the application of Shimbles) v City of Bradford MDC</i> [2018] EWHC 195 (Admin)
7.11	<i>R (Whitby) v SoSfT & otrs</i> [2016] EWCA civ 444

APPENDIX D**Schedule of recommended conditions based on the list appended to the Statement of Common Ground, the additional conditions at ID8 and the related discussion at the Inquiry****Commencement of development**

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.

Plans

- 2) Unless required otherwise by any of the following conditions, the development hereby permitted shall be carried out in accordance with the following approved plans:

Site plans	
Site Location Plan	P-S001
Existing Site Plan	P-S002
Existing Elevations	E-100
Proposed Site Plan	P-S004 P3
General arrangement elevations	
GA Elevation - West - Zone 1	E-300 P1
GA Elevation - North - Zone 1	E-301 P1
GA Elevation - East - Zone 1	E-302 P1
GA Elevation - South - Zone 1	E-303 P1
GA Elevation - East Inner - Zone 1	E-304 P1
GA Elevation - North Inner 1 - Zone 1	E-305 P1
GA Elevation - North Inner 2 - Zone 1	E-306 P1
GA Elevation - East - Zone 2	E-307 P1
GA Elevation - South - Zone 2	E-308 P3
GA Elevation - West - Zone 2	E-309 P1
GA Elevation - North - Zone 2	E-310 P3
GA Elevation - East Inner - Zone 2	E-311 P1
GA Elevation - East and West Elevation	E-312 P1

GA Elevation – South Inner – Zone 1	E-314
GA Elevation – West Inner – Zone 2	E-315 P1
GA Elevation – West	E-320 P1
GA Elevation – East	E-321 P1
Block elevations	
Block A - Detail Elevation 01	E-350
Block A - Detail Elevation 02	E-351
Block A - Detail Elevation 03	E-352
Block B - Detail Elevation 01	E-353
Block B - Detail Elevation 02	E-354
Block B - Detail Elevation 03	E-355 P1
Block C - Detail Elevation 01	E-356 P1
Block C - Detail Elevation 02	E-357
Block C - Detail Elevation 03	E-358
Block D - Detail Elevation 01	E-359 P1
Block D - Detail Elevation 02	E-360
Block E - Detail Elevation 01	E-361 P1
Block E - Detail Elevation 02	E-362
Block E - Detail Elevation 03	E-363
Block F-G - Detail Elevation 01	E-364 P2
Block F-G - Detail Elevation 02	E-365 P2
Block F-G - Detail Elevation 03	E-366 P2
Central street elevations	
Central Street – North Elevation	E-500

Central Street – South Elevation	E-501 P1
Floor plans	
Ground Floor Plan - Zone 1	P-200 P1
Ground Floor Plan - Zone 2	P-200 P2
Podium Floor Plan - Zone 1	P-201 P1
Podium Floor Plan - Zone 2	P-201 P2
Level 01 Floor Plan - Zone 1	P-202 P1
Level 01 Floor Plan - Zone 2	P-202 P2
Level 02 Floor Plan - Zone 1	P-203 P1
Level 02 Floor Plan - Zone 2	P-203 P2
Level 03 Floor Plan - Zone 1	P-204 P1
Level 03 Floor Plan - Zone 2	P-204 P2
Level 04 Floor Plan - Zone 1	P-205 P1
Level 04 Floor Plan - Zone 2	P-205 P2
Level 05 Floor Plan - Zone 1	P-206 P1
Level 05 Floor Plan - Zone 2	P-206 P2
Level 06 Floor Plan - Zone 1	P-207 P1
Level 06 Floor Plan - Zone 2	P-207 P2
Level 07 Floor Plan - Zone 1	P-208 P1
Level 07 Floor Plan - Zone 2	P-208 P2
Level 08 Floor Plan - Zone 1	P-209 P1
Level 08 Roof Plan - Zone 2	P-209 P2
Level 08-18 Floor Plan - Zone 1	P-210 P1
Level 19-20 Floor Plan - Zone 1	P-211 P1

Level 21 Floor Plan - Zone 1	P-212 P1
Level 22 Floor Plan - Zone 1	P-213 P1
Level 23 Floor Plan - Zone 1	P-214 P1
Level 24 Floor Plan - Zone 1	P-215 P1
Level 25 Roof Plan - Zone 1	P-216 P1
Unit types	
Unit 1 – Studio Type 1	P-250
Unit 2 – 1 Bed Type 1	P-251
Unit 3 – 1 Bed Type 2	P-252
Unit 4 – 1 Bed Type 3	P-253
Unit 5 – 1 Bed Type 4	P-254
Unit 6 – 1 Bed Type 5	P-255
Unit 7 – 1 Bed Type 6	P-256
Unit 8 – 1 Bed Type 7	P-257
Unit 9 – 1 Bed Type 8	P-258
Unit 10 – 2 Bed Type 1	P-259
Unit 11 – 2 Bed Type 2	P-260
Unit 12 – 2 Bed Type 3	P-261
Unit 13 – 2 Bed Type 4	P-262
Unit 14 – 2 Bed Type 5	P-263
Unit 15 – 2 Bed Type 6	P-264
Unit 16 – 3 Bed Type 1	P-265
Unit 17 – 3 Bed Type 2	P-266
Unit 18 – 4 Bed TH Type 1	P-267 P1
Sections	

Section AA	X-100 P1
Section BB	X-101 P2
Section CC	X-102 P1
Section DD	X-103 P1
Section EE	X-104
Section FF	X-105 P1
Section GG	X-106 P1
Section HH	X-107 P1
Site wide floor plans	
Ground Floor Plan	P-0G0 P2
Podium Floor Plan	P-0P0 P2
Level 01 Floor Plan	P-001 P2
Level 02 Floor Plan	P-002 P2
Level 03 Floor Plan	P-003 P2
Level 04 Floor Plan	P-004 P2
Level 05 Floor Plan	P-005 P2
Level 06 Floor Plan	P-006 P2
Level 07 Floor Plan	P-007 P2
Level 08 Floor Plan	P-008 P2
Level 09-18 Floor Plan	P-009 P2
Level 19-20 Floor Plan	P-019 P2
Level 21 Floor Plan	P-021 P2
Level 22 Floor Plan	P-022 P2
Level 23 Floor Plan	P-023 P2

Level 24 Floor Plan	P-024 P2
Roof Plan	P-0R0 P2
Other plans	
Development Zones Plan <ul style="list-style-type: none"> • Zone A = Block D and its environs on all other plans • Zone B = Block B and its environs on all other plans • Zone C = Blocks F & G and their environs on all other plans • Zone D = Block E and its environs on all other plans • Zone E = Block A and its environs on all other plans • Zone F = Block C and its environs on all other plans • Car Park = the triangular surface car park 	(06)P-S001

PRE-COMMENCEMENT CONDITIONS

Site Remediation

- 3) No development shall commence (except clearance of existing buildings and areas of hardstanding) unless and until a Remediation Strategy to deal with the risks associated with contamination of the site has been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved Strategy which shall include, but is not confined to, the following components:
- a) a site investigation scheme, based on previous phase I and phase II site appraisals and the Land Contamination Summary submitted with the application, to provide information for a detailed assessment of the risk to all receptors that may be affected, including those off-site;
 - b) the results of the site investigation and the detailed risk assessment referred to in a) and, based on these, an options appraisal and Remediation Strategy giving full details of the remediation measures required and how they are to be undertaken;
 - c) a verification plan providing details of the data that will be collected, in order to demonstrate that the works set out in the Remediation Strategy in b) are complete and identifying any requirements for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action.

Sustainable Drainage (Submission of Scheme)

- 4) No development shall take place until a surface water drainage scheme for the site, based on sustainable drainage principles and an assessment of the hydrological and hydro-geological context of the development, has been

submitted to and approved in writing by the local planning authority. The scheme shall demonstrate that there would be no seepage to the Canal or its feeder, which should be protected. The scheme shall be implemented in accordance with the approved details before the development is completed and thereafter maintained in accordance with the provisions of condition 22 below.

Construction

- 5) No development shall commence until a Construction Environmental Management Plan (CEMP) has been submitted to and agreed in writing by the local planning authority. Development shall thereafter be carried out in accordance with the approved CEMP which shall remain in force for the construction period. The CEMP shall include, but is not confined to:
 - i) site management arrangements, including on-site storage of materials, plant and machinery; on-site parking and turning provision for site operatives, staff, visitors and construction vehicles; and provision for the loading/unloading of plant and materials within the site;
 - ii) demolition/construction/delivery hours;
 - iii) measures to mitigate the impact of noise at nearby residential premises, including noise control devices;
 - iv) measures to control the emission of dust and dirt during construction;
 - v) a construction waste management plan that identifies the main waste materials expected to be generated by the development during demolition and construction, together with measures for dealing with such materials so as to minimise waste and to maximise re-use and recycling;
 - vi) location of access/exit points on the site for construction traffic;
 - vii) the erection and maintenance of signage at all vehicular exits from the construction site advising drivers of preferred approach and exit routes to the site; and
 - viii) a crane management and protection plan.
- 6) Prior to commencement of development a scheme to protect the trees identified for retention in the submitted Arboricultural Impact Assessment (AECOM, Rev. 2, November 2018) or that are on adjoining land, during the construction process shall be submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved scheme. As part of that, no concrete mixing, storage of oil, cement, bitumen or chemicals, no trenches or pipe runs for services or drains, and no alteration of surfaces or ground levels shall take place within 1 metre of the furthest extent of the canopy of any tree or group of trees identified for retention or that are on adjoining land. These measures shall apply for the duration of the construction phase and until all equipment, machinery and surplus materials have been removed from the site.
- 7) No development shall take place, including any works of demolition, until a Construction Employment Plan has been submitted to and approved in writing by the local planning authority. Development shall thereafter be carried out in accordance with the approved Plan, which shall remain in

force for the construction period. The Plan shall provide for a minimum 60 Person Weeks of employment per £1million spend on the construction of the site for New Entrants whose main residence is in the Local Impact Area identified by Birmingham City Council's Employment Team, or an alternative source agreed by the Council, provided always that each New Entrant is suitably qualified for the relevant role. The opportunity can be as an 'apprentice', 'graduate', 'new entrant (job start)', or 'work placement'.

Breeding Birds

- 8) No removal of vegetation or demolition of buildings or structures that may be used by breeding birds shall take place between 1 March and 31 August in any year unless a suitably qualified ecologist has previously undertaken a detailed check for active birds' nests immediately before clearance/ demolition works take place and has provided written confirmation that no birds would be harmed and/or that there are appropriate measures in place to protect nesting bird interest on site. Any such written confirmation shall be submitted to and approved by the local planning authority prior to the works commencing.

Noise Insulation

- 9) No development shall take place in a Development Zone (as defined on plan No (06)P-S001 PL) other than Zone B and the Car Park, until details of a scheme of noise insulation for that Zone, including the specification of glazing and façade treatment, has been submitted to and agreed in writing by the local planning authority.

The facades to the buildings in Zones A, C, E and F shall be constructed to the design specification set out in the memo dated 25 October 2019 contained within the AECOM Composite Acoustic Report dated 6 November 2019.

The facade to the building in Zone D shall be constructed to the design specification set out in the memo dated 1 November 2019 contained within the AECOM Composite Acoustic Report dated 6 November 2019.

Development shall be carried out in accordance with the approved details for each Zone, with the measures installed to be retained thereafter.

Fume Extraction and Odour Control

- 10) No development shall take place in Development Zones B, D, E and F (as defined on plan No (06)P-S001 PL) until details of extract ventilation and odour control equipment for the ground floor non-residential uses within that Zone, including any details of any noise levels from fixed machinery, noise control, and external ducting has been submitted to and approved in writing by the local planning authority. Extraction from commercial cooking facilities shall be to roof level. Development shall be carried out in accordance with the approved details for each Zone, with the approved measures to be installed and operational prior to those premises being brought into use. The approved measures shall be retained and maintained thereafter.

EARLY STAGE AND PRE-OCCUPATION CONDITIONS

Materials/Detailing

- 11) Notwithstanding any indication on the approved drawings, no above ground works within any Development Zone (as defined on plan No (06)P-S001 PL) other than the Car Park, shall take place until the following full architectural and specification details (at a scale of 1:10) and samples where relevant, have been submitted to and approved in writing by the local planning authority:
- i) windows: overall design, glazing bar and frame dimensions and arrangement, materials, reveal, opening mechanism, handles, latches and locks;
 - ii) external doors: overall design, dimension of frames/architraves, arrangement of materials and individual components and members, materials, reveal, opening mechanism, handles, latches and locks;
 - iii) roofs: finish and fixing
 - iv) rainwater goods: design, location, materials, finish and fixing; and
 - v) masonry: position, form and bonding.

Development shall be carried out in accordance with the approved details/samples.

Affordable Housing

- 12) No part of the development hereby permitted shall be occupied until an affordable housing scheme has been submitted to and approved in writing by the local planning authority to secure 24 residential units within the development as affordable housing, to be provided as discount market sale units in accordance with the definition within Annex 2 of the National Planning Policy Framework (or any future guidance that replaces it). The scheme to be submitted shall include details of the following:
- a) the location of the discount market sale units, which shall comprise 11 x one bedroom units, 11 x two bedroom units, 1 x three bedroom unit and 1 x townhouse (with a parking space for the townhouse) (or other such mix as may be agreed in writing by the local planning authority) and the proposed specification, which shall be no less favourable than the open market residential units;
 - b) the terms on which an affordable housing unit will be disposed of at no more than 80% of open market value, which shall include covenants imposed on future purchasers to ensure that the future ownership and selling price of the relevant unit shall be controlled so that the units remain as affordable housing in perpetuity;
 - c) provisions to ensure that each affordable housing unit:
 - i) is first offered for sale to and for exclusive occupation by persons on the Council's register of persons who cannot afford to buy properties generally available on the open market who shall own and occupy the relevant unit as his or her or their sole residence, and then;
 - ii) after three months of the relevant unit being completed, marketed and available in accordance with paragraph i) above, any relevant unit without an unconditional contract for sale having

been entered into may also be offered for sale to, and for exclusive occupation by, a single person with a gross annual income not exceeding £30,000 or two persons with a gross annual income not exceeding £45,000 (or, following a review in accordance with the Council's policy, for the time being such other figure specified by the local planning authority) who shall own and occupy the relevant unit as his/her/their sole residence;

- d) details of the marketing of the units to be undertaken with the relevant cascading of any criteria for a purchaser of an affordable housing unit; and,
- e) suitable exclusions for a mortgagee or chargee in possession, or any receiver (or administrative receiver) appointed thereby (or any successors in title thereto) of an affordable housing unit.

Development shall be carried out in accordance with the approved details and the affordable housing units shall be retained in accordance with the approved scheme.

- 13) No open market residential units in any Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied until the affordable housing units in that Zone have been completed and made available in accordance with the approved affordable housing scheme pursuant to Condition 12 above.

Affordable Workspace

- 14) No part of Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be occupied until an Affordable Workspace Marketing Strategy for the 1,480sqm commercial floorspace approved for A1, A2, A3, B1, B2, B2 and D1 uses within that Zone, has been submitted to and approved in writing by the local planning authority. The Strategy to be submitted shall include details of the following:
 - a) how the affordable workspace will be marketed, including proposed marketing channels;
 - b) the proposed general leasehold terms to be offered to potential workspace providers including:
 - i. indicative fit out to shell and core finish with frontage – (meaning constructed to shell and core standard (in accordance with such building regulations requirements applicable at the time), being construction of the base structure and foundations, installation of beams, columns, floor slabs and roof structure, provision of the building envelope with exterior walls, exterior glazing, roof and area separation walls, lighting, heating, hot water, drainage and sanitation);
 - ii. indicative details of the service charge which shall be calculated in accordance with the RICS service charge code of practice and limited to a fair proportion of the costs associated with the services provided to the building as a whole; and
 - iii. the costs associated with the use and maintenance of the affordable workspace and the proposed rent levels, which shall not exceed 50% of open market value; and

- c) a timetable for marketing of the affordable workspace to potential providers.

Marketing and occupation of the affordable workspace shall be undertaken thereafter in accordance with the approved Strategy.

- 15) No part of Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be occupied until an Affordable Workspace Management Plan for the 1,480sqm of commercial floorspace approved for A1, A2, A3, B1, B2, B2 and D1 uses within that Zone, has been submitted to and approved in writing by the local planning authority. The Management Plan shall include the following:
- i) any proposed workspace provider;
 - ii) the proposed size and specification of the units within the affordable workspace;
 - iii) arrangements for letting the affordable workspace to a workspace provider on terms which provides for sub-letting or other occupational arrangements:
 - for start-ups or SME tenants only (SME being a business that has fewer than 50 employees and either a turnover of up to £10 million or a balance sheet total of up to £10 million);
 - at a rent of no more than 50% of open market value; and
 - any service charge; and
 - iv) arrangements for allowing the occupation or leasing of any part of the affordable workspace at a rent of no more than 50% of open market value on a rolling temporary basis (each temporary sub-letting not to exceed three months).

Thereafter, the affordable workspace provided shall be managed and let in accordance with the approved Management Plan.

- 16) No more than 75% of the open market residential units in any relevant Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied until the affordable workspace for that Development Zone has been practically completed to shell and core finish (meaning constructed to shell and core standard in accordance with such building regulations requirements applicable at the time, being construction of the base structure and foundations, installation of beams, columns, floor slabs and roof structure, provision of the building envelope with exterior walls, exterior glazing, roof and area separation walls, lighting, heating, hot water, drainage and sanitation) with a frontage and is available for occupation in accordance with the approved Affordable Workspace Marketing Strategy and Affordable Workspace Management Plan for that Development Zone.

Bird and Bat Boxes

- 17) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/ brought into use until bird nest boxes and bat boxes have been

installed in that Zone in accordance with details that have previously been submitted to and approved by the local planning authority. The details to be submitted shall include the design, locations and post-installation maintenance arrangements. Once implemented, the bird and bat boxes shall be retained and maintained thereafter in accordance with the approved details.

Energy Centre

- 18) No part of the development hereby permitted shall be occupied unless and until the Energy Centre as shown on the approved plans has been installed and is operational.

Noise Attenuation

- 19) No residential unit within Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be occupied until a scheme of noise insulation between the ground floor commercial premises and/or plant/parking/energy centre (where relevant) and the upper floor residential units in that Zone, in accordance with current standards, has been implemented in accordance with details that have previously been submitted to and approved in writing by the local planning authority. The measures installed shall be maintained thereafter.

Mechanical Ventilation

- 20) No development within Zones A, C, D, E and F (as defined on plan No (06)P-S001 PL) shall be brought into use/occupied unless and until a scheme of mechanical ventilation for the buildings in that Zone have been installed in accordance with details pursuant to the specification set out in the memo dated 31 October 2019 contained within the AECOM Composite Acoustic Report dated 6 November 2019, which shall previously have been submitted to and approved in writing by the local planning authority. The measures installed shall be maintained thereafter.

Air Quality

- 21) No residential unit hereby permitted within any Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied before 1 January 2023 unless otherwise agreed in writing by the local planning authority.

Sustainable Drainage (Operation and Management)

- 22) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/ brought into use until a Sustainable Drainage Operation and Maintenance Plan for the sustainable drainage scheme secured for that Zone by condition 4) above (including arrangements for adoption by an appropriate body and any other arrangements to secure the operation and maintenance of the scheme throughout its lifetime) has been submitted to and approved in writing by the local planning authority. The approved drainage system shall be operated and maintained thereafter in accordance with the approved Plan.

Landscaping

- 23) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/brought into use until soft and hard landscaping for that Zone has been provided in accordance with details that shall previously have been

submitted to and approved in writing by the local planning authority. The details to be submitted shall include, but are not confined to:

- i) finished levels or contours and sections through the public spaces;
- ii) hard surfacing materials;
- iii) minor artefacts and structures such as seating, raised planters, bollards and lighting, including luminance levels;
- iv) fully annotated planting plans to a scale of 1:100, showing locations of individually planted trees, shrubs, hedges and areas of grass, including 15 metre high trees on the Coventry Road frontage as referred to in the Pedestrian Level Wind Microclimate Assessment (dated 3 April 2019);
- v) planting schedules, noting species (particularly pollinator friendly planting), plant sizes and proposed numbers and densities where relevant, paying particular attention to the planting to mitigate the effects of the wind, and the green wall/planter shown on the plans to the south of Block G; and
- vi) details of a programme of implementation.

The hard and soft landscaping provided pursuant to this condition shall be retained thereafter. Any trees or shrubs which, within a period of five years from the completion of the development die, are removed or become seriously diseased or damaged, shall be replaced in the next planting season with others of similar size and species.

Contamination/Verification Report

- 24) If, during development, contamination not previously identified is found to be present at the site, then no further development shall be carried out until there has been submitted to and approved in writing by the local planning authority an amendment to the Remediation Strategy secured by condition 3 above, detailing how this unexpected contamination will be dealt with. Thereafter, the development shall be implemented in accordance with the approved amended Remediation Strategy.
- 25) With the exception of the Car Park, no Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied unless and until a Verification Report demonstrating completion of the works set out in the approved Remediation Strategy for that Zone pursuant to conditions 3 and 24 above, and the effectiveness of the remediation, has been submitted to and approved in writing by the local planning authority. The Report shall include the results of sampling and monitoring carried out in accordance with the approved verification plan, to demonstrate that the site remediation criteria have been met. It shall also include a scheme for the long-term monitoring of pollutant linkages, maintenance and arrangements for contingency action, as identified in the verification plan, and for the reporting of this to the local planning authority. Development shall be implemented in accordance with the measures set out in that scheme.

Highways/Parking

- 26) No Development Zone (as defined on plan No (06)P-S001 PL) shall be occupied/ brought into use until a package of highway measures for that Zone has been submitted to and approved in writing by the local planning authority and the approved measures are completed in

accordance with the approved details. The package of measures shall include (where relevant) removal of redundant footway crossings and laybys and the provision of new laybys, the new one-way access road linking Camp Hill to Bedford Road, and associated footways.

- 27) No development within Development Zones A, B, D, F and the Car Park (as defined on plan No (06)P-S001 PL) shall be occupied or brought into use until visibility splays have been provided at the junction of the access(es) with the public highway within that Zone in accordance with details that have previously been submitted to and agreed in writing by the local planning authority. Once provided, the visibility splays shall thereafter be retained and kept clear of any obstruction.
- 28) Development Zones C, D and F and the Car Park (as defined on plan No (06)P-S001 PL) shall not be occupied or brought into use until car and cycle parking has been constructed, surfaced and marked out in accordance with details that shall previously have been submitted to and approved in writing by the local planning authority. The parking provided shall be retained thereafter for its intended purpose.
- 29) No residential unit in Zone D (as defined on plan No (06)P-S001 PL) shall be occupied unless and until a parking management strategy (including management of disabled/parent and child spaces) has been submitted to and approved in writing by the local planning authority. The car park shall thereafter only be operated in accordance with that approved strategy.

Electric Charging Points/Photovoltaics/Green and Brown Roofs

- 30) Prior to the occupation of any residential unit in Zone D (as defined on plan No (06)P-S001 PL) 12 electric car charging points within the basement car park shall be installed and thereafter retained.
- 31) No part of Development Zones A, D and F (as defined on plan No (06)P-S001 PL) shall be occupied or brought into use until the photovoltaics shown on the approved plans have been installed and brought into use. The photovoltaics shall be retained and maintained thereafter.
- 32) A scheme for the provision and ongoing maintenance of green and/or brown roofs on the flat roofs of the blocks within Development Zones A, D and F (as defined on plan No (06)P-S001 PL) including identified biodiversity benefits, shall be submitted to and approved in writing by the local planning authority prior to the block reaching roof level. Development shall be carried out in accordance with the approved scheme prior to first occupation of the relevant block and shall be retained and maintained thereafter in accordance with the approved details.

POST-OCCUPANCY CONDITIONS

Retail Floorspace

- 33) The total floorspace permitted to be used for uses falling within Use Classes A1 to A3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (or in any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order) shall not exceed a total of 1,480 square metres gross external area.
- 34) No single unit permitted to be used for uses falling within Use Classes A1 to A3 of the Schedule to the Town and Country Planning (Use Classes) Order

1987 (or in any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order) shall exceed 387 square metres gross external area.

Affordable Workspace

- 35) The affordable workspace in Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall be provided, operated and occupied in accordance with the approved Affordable Workspace Marketing Strategy and Approved Affordable Workspace Management Plan for that Development Zone for the lifetime of the development.

Removal of Permitted Development Rights

- 36) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development)(England) Order 2015 as amended (or any order revoking and re-enacting that Order with or without modification) the floorspace hereby approved for A1, A2, A3, B1, B2, B8 and D1 uses shall not be used for any residential uses within Use Class C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended, (or in any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order with or without modification).
- 37) Notwithstanding the provisions of Schedule 2, Part 1, Classes A and B of the Town and Country Planning (General Permitted Development) (England) Order 2015, (or any order amending, revoking and/or re-enacting that order, with or without modification) no enlargement, improvement or other alteration of any dwellinghouse approved within Zone C (as defined on plan No (06)P-S001 PL) or its roof, shall be carried out.
- 38) Notwithstanding any indication on Plan P-215 P1 (Level 24 Floor Plan, Zone 1) or any other plan hereby approved, no satellite antenna, apparatus or plant of any sort (including structures or plant in connection with any use for telecommunication systems) shall be installed on the building shown as Block A.

Retained Trees

- 39) No tree identified for retention in the submitted Arboricultural Impact Assessment (AECOM, Rev. 2, November 2018) shall be removed without the prior written approval of the local planning authority. The application for approval shall include provision for a replacement tree in the same location, including details of size and species, a maintenance schedule and a timetable for implementation. Development shall be carried out in accordance with the approved details.

Boundary Treatment

- 40) No boundary treatment within and surrounding each Development Zone (as defined on plan No (06)P-S001 PL) (including security to the Car Park where relevant) shall be installed other than in accordance with details that have previously been submitted to and approved in writing by the local planning authority. The details to be submitted shall include plans showing the locations of existing, retained and proposed new boundary treatments

and scaled drawings indicating the positions, height, design, materials, type and colour of the proposed boundary treatments.

Plant and Machinery (Cumulative Noise)

- 41) The rating level ($L_{Ar,T}$) for cumulative noise from all plant and machinery at the development hereby permitted shall not exceed 5 dB below the background level (L_{A90}) at any noise sensitive premises, as assessed in accordance with British Standard 4142:2014+A1:2019 (or any subsequent guidance or legislation amending, revoking and/or re-enacting BS4142 with or without modification).

Hours of Operation/Deliveries

- 42) No deliveries shall be taken at or dispatched from the non-residential premises within Development Zones D, E and F (as defined on plan No (06)P-S001 PL) outside the hours of 07.00 and 19.00 on Mondays to Saturdays or the hours of 09.00 and 19.00 on Sundays and Bank/Public Holidays.
- 43) The non-residential premises within Development Zones D, E and F (as defined on plan No (06)P-S001 PL) shall only be open for customers between the hours of 0700 and 0300 on any day.

-----END OF SCHEDULE-----



Ministry of Housing, Communities & Local Government

www.gov.uk/mhclg

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.



Ministry of Housing,
Communities &
Local Government

8 March

Our ref: APP/P4605/W/20/3250072

Mr M Steinbrecher
Winckworth Sherwood
Minerva House
5 Montague Close
London SE1 9BB

Dear Sir,

**LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 AND 320
APPEAL BY APPEAL MADE BY EUTOPIA LAND LIMITED (C/O EUTOPIA
HOMES LIMITED)
AT 193 CAMP HILL, BIRMINGHAM B12 0JJ
APPLICATION: REF 2018/09467/PA**

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying his decision on the appeal as listed above.
2. This letter deals with your client's application for a full award of costs against Birmingham City Council. The application as submitted and the Council's response are recorded in the Inspector's Costs Report, a copy of which is enclosed.
3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.

Phil Barber, Decision Officer
Planning Casework Unit
Ministry of Housing, Communities & Local Government
3rd Floor, Fry Building
2 Marsham Street
London, SW1P 4DF

Tel 0303 444 2853
Email: PCC@communities.gov.uk

4. The Inspector's conclusions are stated at CR 4.1-4.9. He recommended that your client's application for a full award of costs be refused.
5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in his report and accepts his recommendation. Accordingly, he has decided that a full award of costs against the Council, on grounds of 'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.
6. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
7. A copy of this letter has been sent to Birmingham City Council.

Yours faithfully

Phil Barber
Authorised by the Secretary of State to sign in that behalf

This decision was made by officials on behalf of the Secretary of State under delegated powers.



Costs Report to the Secretary of State

by Mrs J A Vyse DipTP DipPBM MRTPI

an Inspector appointed by the Secretary of State

Date: 7 December 2020

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

APPEAL MADE BY

EUTOPIA LAND LIMITED

AGAINST

BIRMINGHAM CITY COUNCIL

Inquiry opened on 6 October 2020

193 Camp Hill, Birmingham B12 0JJ

Appeal Ref: APP/P4605/W/20/3250072

File Ref: APP/P4605/W/20/3250072
193 Camp Hill, Birmingham B12 0JJ

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Eutopia Land Limited (c/o Eutopia Homes Limited) for a full award of costs against Birmingham City Council.
- The Inquiry was in connection with an appeal against the refusal of planning permission for redevelopment of the site to provide 480 homes, a hotel (Use Class C1), and flexible business/commercial units (Classes A1, A2, A3, B1, B2, B8 and D1), together with car parking, landscaping and associated works, including an energy centre to provide for combined heat and power and plant to serve the development.

Summary of Recommendation: That the application for an award of costs be refused.

1. The Submissions for the Appellant¹

- 1.1 This is a full application for costs made in accordance with the Planning Practice Guidance (Costs) (Paragraph: 049 Reference ID: 16-049-20140306). The Guidance sets out the following:

What type of behaviour may give rise to a substantive award against a local planning authority?

Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing ... or by unreasonably defending appeals. Examples of this include:

- *preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.*
 - *failure to produce evidence to substantiate each reason for refusal on appeal.*
 - *vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.*
- ...
- *not reviewing their case promptly following the lodging of an appeal against refusal of planning permission ... as part of sensible on-going case management.*

- 1.2 The Council's behaviour has been unreasonable in the present case causing significant loss to the Appellant in having to deal with unsubstantiated objections through the Inquiry process. The criteria for a full award of costs are therefore made out in this case.
- 1.3 Firstly, the Council has failed to "produce evidence to substantiate each reason for refusal".

¹ ID12 and ID11

- 1.4 Mr Sweeney gave the planning evidence on behalf of the Council to the Inquiry. He expressly confirmed that, in light of the evidence before the Inquiry, his professional opinion was that planning permission should be granted. Accordingly, the Council has failed to produce any evidence whatsoever to support its case that planning permission should be refused. To the contrary, the Council's own evidence at the Inquiry was that planning permission should be granted.
- 1.5 Further, it is clear that the Council's case is based upon *vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis*, contrary to the requirements of the PPG.
- 1.6 The Council's reason for refusal was based on the premise that the "*proposed development may prejudice the delivery in terms of its construction of operation, the South West Camp Hill Chord*". There is no evidence before the Inquiry to substantiate that reason for refusal, and nothing beyond a "*vague, generalised*" assertion, which is not based on any objective evidence, that it "*may*" do so. In particular, it was expressly accepted by Mr White for the Council that:
- i. There is no evidence before the Inquiry that indicates that if the appeal site comes forward for development, the south-west Chord might not be able to be constructed or delivered.
 - ii. To the contrary, the evidence indicates that it would be possible to construct an effective Chord alongside the appeal scheme.
 - iii. The argument that the appeal scheme might prejudice the delivery of the Chord was therefore "*speculative*", "*theoretical*" and there was "*no evidential basis*" to substantiate the argument that such prejudice might occur.
 - iv. There was no evidence, in any event, that it would be viable or feasible to deliver an alignment for the Chord across the appeal site.
- 1.7 Mr Sweeney also expressly confirmed that he did not have any objective evidence or analysis to substantiate an argument that there was even the potential for prejudice at the slightest end of the scale. He therefore expressly confirmed that there was nothing more than a "*vague or generalised*" concern that it might do so, contrary to the requirements of the PPG. It was on that basis that Mr Sweeney accepted that his professional opinion was in fact that planning permission should be granted.
- 1.8 It is therefore clear, on the basis of the Council's own evidence, that an award of costs is justified, having regard to the examples of unreasonable behaviour set out in the PPG.
- 1.9 Following Mr Sweeney's concession that permission should be granted, the Inquiry adjourned early, and the Council had the afternoon and evening to review its case, and could have taken the opportunity to withdraw it. The Council failed to do so, notwithstanding the fact that it no longer had a witness to support the proposition that planning permission should be refused. The failure to review its case promptly, as part of sensible ongoing case management, is a further example of unreasonable behaviour set out in the PPG.

1.10 In any case, the Council's failure to review its position is symptomatic of the unreasonable attitude that it has adopted throughout its consideration of this application. This was a case where, unusually, the professional Officer of the Council (Interim Director of Inclusive Growth of the Council) expressly advised the Members of the Planning Committee, in open session, that:

"the basis in which to refuse this application is virtually very slim"

and that to withhold consent,

"wouldn't be a reasonable position from the planning point of view".²

1.11 In short, this was a case where the Council's own professional Officers not only advised Members that planning permission should be granted, but also that there was no sound evidential basis to withhold planning permission, and that to do so would be not be reasonable. Members had no technical or evidential basis before them upon which it would have been reasonable for them to take a different view, there was no objection from the statutory consultee, and no evidence has been submitted through the appeal process to recover the situation. This is clearly an application which should have been permitted and the Council's behaviour is wholly unreasonable.

1.12 In conclusion, the Council's own witness accepted that the refusal of planning permission is not justified and that there is no positive, objective evidence that justifies refusal of planning permission in this case. The Council's case is wholly unsupported by evidence, is based on generalised, vague assertions as to potential impact, and it has failed to substantiate its reason for refusal or argument that planning permission should be refused. It is clear that this is a case justifying a full award of costs against the Council, in accordance with the guidance of the PPG.

2. The Response by the Council³

2.1 This response relies on the following paragraphs of the PPG:-

Paragraph: 028 ID:16-028 parties normally meet their own expenses

Paragraph: 030 ID:16-030 pre-requisites of a costs award

Paragraph: 031 ID:16-031 this is a substantive costs application

Paragraph: 040 ID:16-040 what is a full award of costs?

'A full award of costs means the party's whole costs for the statutory process, including the preparation of the appeal statement and supporting documentation. It also includes the expense of making the costs application.'

Paragraph: 049 ID:16-049 what type of behaviour may give rise to an award against a local planning authority?

- *preventing or delaying development which should clearly be permitted,*

² Ms Mulliner PoE Appendix 13

³ ID13 and ID9 as supplemented by oral submissions at the event.

having regard to its accordance with the development plan, national policy and any other material considerations

- *vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis*

Paragraph: 050 ID:16-050 when might an award of costs not be made against a local planning authority?

'where local planning authorities have exercised their duty to determine planning applications in a reasonable manner, they should not be liable for an award of costs.'

- 2.2 This response draws from, but does not repeat the matters set out in the Council's closing submissions, in terms of approach to the merits.
- 2.3 The written evidence for the Council plainly crosses the threshold to resist a costs application. The premise of the application is not accepted, with both Mr White and Mr Sweeney producing relevant written evidence to substantiate the reason for refusal at issue.
- 2.4 The possibility of frustrating the Chords scheme arises in the event that the processes underway reveal prejudice – given the location of the appeal site, this is a **real** possibility. What the answer in cross-examination showed, was that this prejudice is future prejudice, not currently identifiable prejudice. However, it nonetheless potentially impacts on the Chords as part of the transport network. This is reflected in the answer of Mr White in re-examination and other evidence in the case. The answer of Mr Sweeney was, based on the cross-examination, that no objective evidence of present prejudice can be shown. The Inspector's own notes will show exactly what was said. The case of the Council is that the potential for prejudice remained. Not simply because, as asserted by Ms Reid in her closings, that there remains the possibility of having both schemes alongside each other, but because an optimal scheme which could lead to conflict remains open as potential outcome. That has not been addressed in the evidence of the appellant because it simply cannot be. Given that potential prejudice, and given the responses of Network Rail, makes the position of the Council in this case a justifiable one and not a costs case. Having accepted the premise of the question, the concession was made. However, the case for the Council is that future potential prejudice suffices and in the current circumstances takes this outside of a case for a costs award.
- 2.5 The position of the Council was the result of position taken by Network Rail in correspondence, as has been amply explored by the Council at the Inquiry. The position left by Network Rail raised obvious and objective residual uncertainty, which did not lend itself to making clear and categorical statements. That is a response to the vague assertions point, because it is simply not possible to make definitive statements about which one cannot be definitive. However, that does not remove it, in these particular circumstances, from being evidence, because insofar as there was a residual basis for saying there was potential impact, that has been objectively explained by reference to the relevant processes in a way that has been incapable of being answered by Dr Raiss. Mr White did show, through evidence, a process that could lead to prejudice. At its highest, the case for the Appellant is that the Council was not able to

demonstrate that the prejudice would result in implications for the appeal site. In other words, that was not able to demonstrate that the potential for not being allowed alongside each other could arise. Clearly that is a potential outcome and it is not a 'case' for that reason alone.

- 2.6 The criticism that the evidence is speculative is unjust, as all evidence of future events speculates. The evidence presented by Mr White speculates in an informed and objective way, having regard to relevant technical guidance. In other words, it substantiates the position of the Council. It is not simply a case of Mr White bowling up to an Inquiry thinking this, but is not prepared to explain why. He said, I think this, I have explained why I think this is the position and, when asked some very carefully and well-targeted questions in cross-examination, he was unable to answer those questions. However, that does not make it a costs case, because the residual potential remains. We are in this position because of the uncertainty created by the Network Rail responses.
- 2.7 The evidence provided by the Appellant itself shifted during the course of the case, and was notable for Dr Raiss distancing himself from the alignment first put forward by AECOM, preferring the earlier MM2010 material – which itself was said by the author not to support the position taken by AECOM (evidence of Mr Moore called by the Rule 6 Party). This includes reliance on the MM2010 Report and designing 'on the hoof', to explain how Bordesley Station could be retained. So the evidence from the Appellant recognised a need to meet and deal with issues of substance during and throughout the Inquiry. If this was a costs case, there would not have been that requirement. The fact is, that had to be explained in terms of it being a recognised matter to be dealt with. Dr Raiss attempted to deal with it. It was elaborated upon more greatly by the conflict between the Rule 6 Party's evidence and the Appellant's, but the point is that there were points that needed to be dealt with, including at the Inquiry itself, which demonstrates that this is not a costs case.
- 2.8 Not following the advice of Officers does not mean that you are in the realms of unreasonable behaviour, providing you can provide a reasoned explanation as to the basis of the case put forward by the Council.
- 2.9 The evidence in respect of an effective Chord which may be possible, does not address whether such a Chord could robustly emerge from the RNEP process and GRIP process, or important scheme parameters such as line speed, which could lead to future prejudice once the Network Rail work is complete. Neither Miss Reid's closing, nor the evidence of Dr Raiss, deal effectively with the line speed issue. The outcome of the optioneering process, which will result from the assumptions put into the Network Rail work, is not known. There could be a design speed of 40-50 mph, and there could be a case that the grade II* listed Bordesley Centre could be in question. To say otherwise is to defy the possibility that that is the case. It is a clear and recognisable possibility and it is not unreasonable to advance that possibility. It has not been excluded, because we simply do not know what the position will be. So again, another reason why the position taken by the Council in this case is not unreasonable. Network Rail correspondence has expressly left open line speed, land take and alignment in a way that leaves clear scope for prejudice. It is that which has led to this Inquiry. This has been explained in the written evidence for the Council and the

position of the Council in respect of concession from Mr Sweeney is set out in Closing. This is, was, and remains a reasonable position to take.

3. The Appellant's Counter Response⁴

- 3.1 Whether or not the written evidence of the Council plainly crossed the threshold to resist the application for costs is not the point. The examples of unreasonable behaviour in the PPG relate to unreasonably defending appeals. The Council's written evidence did not come up to proof and it was on that basis that Mr Sweeney conceded, in cross-examination, that planning permission should be granted.
- 3.2 It is not simply a case of identifying an impact, even if that could be established. The PPG is concerned with whether a reason for refusal is substantiated, which involves the exercise of planning judgement, weighing any impact against the benefits in the planning balance. Following cross-examination, the Council has no evidence whatsoever, either professional or from Members, to support the proposition that planning permission should be refused. That is not a reasonable position to pursue. The impacts identified in the Council's closings and in the costs rebuttal are not based on any objective evidence and are unreasonably put.
- 3.3 For the reasons set out the Appellant's closings, the Council's suggestion that there is a real possibility of prejudice is not consistent with the evidence given. Mr Sweeney was specifically asked about what objective evidence he had to support an argument that there was even a suggestion of potential prejudice at the slightest end of scale. He could not point to any. It is not just the absence of demonstrable prejudice, it is the absence of any evidence as to potential prejudice. Having listened to the evidence as it emerged during the Inquiry, Mr Sweeney conceded that planning permission should be granted. That clearly justifies this application for costs.
- 3.4 In relation to the position of Network Rail, the Appellant relies on its closings to deal with the point made, but the points put do not assist the Council. The agreed position was that there was no objection from Network Rail. Even if its response was equivocal, which is disputed, the local planning authority was the decision maker. It had a duty to assess the evidence available to it and come to a decision. Mr Sweeney listened to all the evidence at the Inquiry and was taken through the Network Rail responses. At the end of that, he conceded that planning permission should be granted. The professional Officer who wrote the committee report, and the Interim Director of Inclusive Growth, expressly dealt with those consultation responses and advised Members that the evidential basis for resisting the application was slim and that it would be unreasonable from a planning perspective to do so. Irrespective of what Network Rail says, there is an independent duty on the local planning authority to use its planning judgement. All of the evidence now is that planning permission should be granted. The Council's continued opposition on this basis is therefore unreasonable.
- 3.5 It is suggested that criticism of the Council's evidence as speculative is unjust. However, Mr White accepted in terms that the evidence was speculative. Not,

⁴ Oral submissions at the event

as suggested by Mr Grant, because it was speculating in an informed way, but because as Mr White expressly accepted in cross-examination, that there was no objective evidence in his written submissions to support the allegation of prejudice/potential prejudice. Again, even that were wrong, Mr Sweeney listened to that evidence and still agreed that planning permission should be granted, underscoring the fact that the Council has no evidence now to suggest the contrary.

- 3.6 Both the AECOM report and the MM21010 Report demonstrated that an effective scheme for delivery of the Chord could be developed alongside the appeal site, underscoring the fact that the Council had no evidential basis for concluding that there would be prejudice/potential prejudice occasioned by the appeal scheme. The AECOM report was specifically requested by Officers following deferment of the application by Members. The parameters for that work were determined by the Council and, as accepted by Mr White, there was no technical challenge to its conclusions.
- 3.7 The point about the station was not material to the Council's case in the written evidence of Mr White and takes the Council's case no further either. It only materialised when the Rule 6 Consortium produced, very late in the day, an alignment which passed through the appeal site, showing the station as being retained. In any case, the agreed evidence of Mr White was that he had no evidence to contradict the proposition that it would be possible to retain the station in situ and construct an effective scheme for delivery of the Chord.
- 3.8 In relation to process and optioneering, it is not good enough to assert that there might be some unidentified future prejudice, at some unidentified point in the process, for some unidentified reason that is wholly unsubstantiated by evidence to the Inquiry now. The point about line speed takes the Council's case nowhere, as there is no evidence before the Inquiry that the proposition now advanced is even a possibility. In any event, even if the proposition were correct, that was not enough to convince Mr Sweeney. There is no evidence to substantiate the Council's position that permission should be refused.
- 3.9 In cases where Members depart from the advice of professional Officers, there needs to be an evidential basis for so doing. This is not a case where the evidence has pulled in different directions. The Council's professional planning Officer and the Interim Director recommended that permission should be granted, with the Interim Director pointing out that failure to do so would be unreasonable given the paucity of objective evidence to support that position. The Council instructed Mr White to defend the appeal, but he was unable to point to any objective evidence that took his case beyond speculative generalised assertions to substantiate the impact that he identified. Mr Sweeney was similarly instructed. He listened to all the evidence and came to the view in cross-examination that, in his professional view, planning permission should be granted.

4. Inspector's Conclusions

- 4.1 The Planning Practice Guidance advises that, irrespective of the outcome of an appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

- 4.2 Members of the Council's planning committee rejected the advice of the planning Officer and the Interim Director of Growth that permission should be granted, with three reasons for refusal cited on the Decision Notice. Reasons 2 and 3 relate to the absence of a mechanism to secure the provision in perpetuity of the affordable housing and affordable workspace offer. As set out in the Statement of Common Ground, it was a matter of agreement that those matters could be addressed by a planning obligation and the Council did not pursue that matter at appeal. The fact that it was later agreed that the matter could be dealt with by conditions were the appeal to succeed, has no bearing on the costs application and no unnecessary or wasted expense was incurred in that regard. That leaves the first of the reasons for refusal, which informed the main consideration in the substantive Report.
- 4.3 Messrs White and Sweeney, who appeared for the Council, produced relevant written evidence to the Inquiry to substantiate the reason for refusal at issue. The application for costs stems, in essence, from the answer of Mr Sweeney to a question put during cross-examination when he accepted that, having heard the evidence as it emerged during the Inquiry planning permission should, in his professional opinion, have been granted. However, that answer needs to be considered in the broader context of what went before in terms of questioning and in light of the nature of the main consideration in the circumstances that prevail in this finely balanced case.
- 4.4 As captured by the Statement of Common Ground, the various facets of the matter in dispute as:
- 'whether the appeal scheme could preclude delivery of the Camp Hill Chord and whether 'any potential' for prejudice to its delivery, insofar as it may present a design constraint on the project, is a material consideration such that planning permission should be refused.'*
- 4.5 During cross-examination, Mr Sweeney had previously accepted that, based on the evidence of Mr White and Mr Moore to the Inquiry, there was no *objective* evidence of prejudice to delivery of the Chords which might bring it into conflict with the development plan. I was on *that* specific premise that he expressed the view that planning permission should have been granted. That, in my view, misses the point in light of the difficult position in which all parties to this appeal find themselves, absent any meaningful engagement at the Inquiry by Network Rail in terms of any detailed design or construction information, and given the stage that the business case for the Rail Hub and the Chords is at.
- 4.6 In particular, I am mindful that the answers of others, particularly of Mr White, were more nuanced than implied in the proposition put to Mr Sweeney by Miss Reid. For instance, whilst Mr White confirmed in re-examination that he had accepted that the prospect of the appeal site being required to facilitate delivery of the Chords was theoretical, he also referred to the other alignments in a similar vein, explaining that one could not realistically move from theoretical impacts until the process had reached the 'Developed' RNEP stage gate, at which point one would have an alignment in sufficient detail to be able to make specific choices about land issues, environmental impacts, costs and constructability, which basket of matters would need to be weighed against the benefits of the scheme. That stage is some two years away yet. He also

confirmed in re-examination, that one could not rule out the scheme affecting the Chord at this stage.

- 4.7 Each of the three main parties to the appeal took a different approach to the question of prejudice in this case. Unsurprisingly, the question put to Mr Sweeney was based on the arguments that informed the Appellant's approach, as set out in the main Report. The Council's position was that the Appellant's approach set an artificially high test, arguing that a proper approach was '*multi-faceted*', encompassing a number of different matters, maintaining that it is sufficient that the development '*realistically could be pre-emptive*' to delivery of the Chords. As can be seen from the main Report, I largely agree with that.
- 4.8 Given the stage that development of the Chords is at, it simply cannot be said definitively, at this point in time on the evidence available, that the appeal scheme *would* prejudice delivery of the Chords. This is because, given that a final route alignment is yet to be duly arrived at, no such evidence can be shown. That would require evidence and information which is yet to come forward into the public domain. The corollary to that, is that neither can it be definitively said, at this point in time on the evidence available, that the appeal scheme would definitely not prejudice delivery of the Chords. Given that conundrum, it seems to me that what Mr Sweeney's concession did not do was materially undermine the case made by the Council to the Inquiry. His answer was simply a response to the narrow point put to him.
- 4.9 Mr Sweeney fully appreciated that reliance on vague, generalised assertions can amount to unreasonable behaviour as defined by the Planning Practice Guidance. In this case however, the possibility of frustrating delivery of the Chords arises in the event that the processes currently underway reveal prejudice. That is a legitimate concern to hold. What the answer in cross-examination showed, was that any potential prejudice is future prejudice, not currently identifiable prejudice. Given the regional if not national importance of the Chords scheme, it was not unreasonable for the Council to make the case that it did, a case that could not, in the circumstances, rely on anything other than theoretical implications directly associated with the potential tie-in point of the northern end of the Chord. In that respect, they were not vague or generalised. I found them to be well-articulated, notwithstanding that the Council could not, for obvious reasons, draw on objective evidence to support its case. I am reminded, in this regard, of the traditional aphorism, that absence of evidence is not necessarily evidence of absence. I consider that the concession made by Mr Sweeney was not unreasonable in the circumstances that prevail in this case. The concerns of the Council were clearly and objectively explained and I am satisfied that no wasted or unnecessary expense has been incurred in this regard.

5. Recommendation

- 5.1 For the reasons set out above, I recommend that the application for an award of costs be refused.

Jennifer A Vyse
INSPECTOR



Ministry of Housing, Communities & Local Government

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RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.