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Derbyshire County Council
County Hall
Smedley Street
Matlock
Derbyshire DE3 4AG

Attn: Ms Vicky Webb, Senior Planner
Vicky.webb@derbyshire.gov.uk
Planning.representations@derbyshire.gov.uk

By email only

Our ref: [REDACTED]

Email: [REDACTED]

20 April 2022

Dear Officers

CD9/0222/34: Conversion and extension of existing buildings to commercial use, and construction of access drive and car park.

Elvaston Castle Country Park, Borrowash Road, Elvaston, DE72 3EP

1. We are instructed by Elvaston Parish Council who oppose the application as sought by the County Council (which is also the decision maker).
2. We share the Parish Council's serious concerns regarding the adequacy of the County Council's application, in relation to the wider proposals for Elvaston Castle, and the surrounding area. In short, the application documents fail lawfully to address the enabling development as proposed to ensure the viability of the asset, and the wider environmental impacts of the scheme. To approve the application as sought would be unlawful. Given the extent of the errors, we summarise below the key issues for the County Council to address.

A. Enabling Development & Heritage Assets

3. All parties to the scheme seek to ensure that the Council-owned Elvaston Castle (Grade II*), Bartholomew's Church (Grade I), the collection of separately listed buildings (Grade II) and Grade II* Park & Garden are restored and are re-opened to the public. Where the County Council and our client (and the other multiple objectors) differ, is the method by which the 'at risk' listed assets, and the universally appreciated open space may be made viable.

[REDACTED]

4. Elvaston Castle Country Park is currently open to the general public and owned by Derbyshire County Council. However, within the park, St Bartholomew's Church is owned by the Parochial Church Council of the Church of England. The PCC's ownership includes the church, graveyards, and the Harrington Family Vault and the parish council would have expected that the PCC should have been consulted for the proposal.
5. It is known that there is a Masterplan (2018)¹ where the County Council's wider proposals are indicated, however these are not represented in the application. It is not the only element of the Masterplan scheme, but it is its most controversial element, namely the introduction of a new roundabout access road resulting in the permanent loss of 1.03ha of broad leaved & mixed woodland, including veteran trees², within the Grade II* registered park, across a regionally protected geological site to a relocated and expanded carpark, within the setting of the heritage assets, atop an archaeological site and loss of 4.5ha Local Wildlife Site.
6. The proposed new car parks will be sited immediately adjacent to a recognised Local Nature Reserve (LNR), one of only two listed within South Derbyshire District Council current Local Plan and Biodiversity Action Plan (BAP).
7. The County Council's reasoning is summarised as:

'The basis of proposing a new access route into the site has always been primarily driven by the desire to relocate the visitor car park.

a. the proposed location close to the core of the estate will bring visitors directly to the heart of the site, unlocking the full potential of the planned visitor attraction, providing opportunities to generate long-term sustainable revenue and giving purpose to a range of Grade II and II listed buildings to enable their restoration;*

(emphasis added)

8. From surveys conducted by the Elvaston Castle Action Group and the Friends of Elvaston, the following conclusion was reached: At its closest point, the proposed car park will be 177m nearer to the inner courtyard than the existing Fox Covert car park. At its extreme, the proposed overspill car park will be 93m further from the inner courtyard than the existing Fox Covert car park. Visitor surveys conducted within the park show the majority of visitors do not consider walking distance from their vehicles to the core buildings of any relevance to their enjoyment of the park. It should also be noted that both staff and disabled parking is currently located adjacent to the courtyard buildings and the new car park will require disabled visitors to travel further.
9. Despite the repeated references to 'enabling' in the development proposals, which the Council's heritage expert confirms will cause harm to the listed assets, there is a complete absence of any analysis in the Planning Statement, EIA heritage chapter or Heritage Impact Assessment of 'enabling development' or Historic England's 'enabling guidance'³. This makes no sense given that Elvaston Castle's restoration (which is not part of the current application) is explicitly referred to, and the access road and car park extension is advertised as to 'enable' the restoration scheme⁴.

¹ Which was not subject to an EIA assessment.

² Para.5.218 ES Vol. 1

³ Historic England: Enabling Development & Heritage Assets; Historic Environment Good Practice Advice in Planning Note 4 (2020)

⁴ See also the unredacted version of the (outdated) economic assessment as obtained by FoI request.

10. As the County Council will be aware, paragraph 208 of the 2021 NPPF requires that:

'Local planning authorities should assess whether the benefits of a proposal for enabling development, which would otherwise conflict with planning policies but which would secure the future conservation of a heritage asset, outweigh the disbenefits of departing from those policies'.

Given the application entirely lacks any reference to enabling development, and does not include the castle restoration, or a listed building consent application for the conversion of the Grade II listed assets, there is insufficient information to address this policy.

11. Further, the Historic England's Guidance is clear that, *'It is not in the public interest to pursue enabling development if there are alternative means of delivering the same outcome for the heritage asset, such as other sources of public or private investment'*⁵. The Guidance Note goes on to detail the type of assessment that should be provided, of the whole scheme, should an enabling development application be made:

1: Carry out a condition survey of the heritage asset or assets in need of conservation repairs. This assessment usually informs a conservation statement or conservation management plan which establishes the importance of the asset as a whole and the part played by subsidiary elements. It will identify a desired reasonable level of conservation that will sustain the asset in the long term;

2: Undertake an options analysis comprising an assessment of alternative solutions by which the asset's future might be secured.

3: Carry out an assessment of the cost of repairs and how future maintenance liabilities might be met. Different scenarios may need to be costed;

4: Make an assessment of the market value of the heritage asset in current and repaired condition. The conservation deficit may then be calculated;

5: Draw up a detailed scheme design for the preferred option;

6: Produce a development appraisal that demonstrates the financial contribution the development will make to the conservation of the heritage asset;

7: Create a delivery plan that demonstrates how the heritage benefits will be secured in a timely manner

The County Council, as developer and decisionmaker, has failed to provide an up to date and detailed scheme as required by the Historic England Guidance. To the Parish Council's knowledge, the 'repair's report' is over a decade old⁶. The Parish Council is not aware of a *conservation statement or conservation management plan*, nor a market value for each heritage. To the best of our knowledge, the last conservation management plan was completed by Jones Lang Lasalle in 2018. Chapter 11 detailed a conservation deficit of £5,180,890 and we do not believe a further analysis or updated figures have been provided. It is also notable, from reviewing the 10 September 2020 cabinet minutes that the access road is described as follows:

⁵ Historic England Enabling development guidance para 10

⁶ Elvaston Castle delivery programme cabinet minutes 10.9.20

Funding Strategy

The estimated £35m funding required for the Masterplan Phase One Delivery Programme falls under three categories:

1. Infrastructure to unlock the potential of the Estate including the new access, car park, services/utilities and other elements, such as drainage.

2. Repair of historic buildings – there is a large “conservation deficit” as the Council has not invested significantly in keeping buildings in good repair for many years. As landowner, the Council has a responsibility to do this regardless of any future use.

3. Invest to save – significant investment is required in order to generate income including a new café; conversion of buildings and spaces to create commercial retail/office spaces and events; and introduction of new facilities that visitors will pay to use such as adventurous play.

The first two categories arguably require investment from funding streams that do not need to be repaid as they do not, in themselves, directly generate income that could be described as “invest to save”.⁷

(emphasis added)

12. On this basis, and contrary to how it is reported in the planning statement, the committee report implies the access road and carpark is not considered to generate any funds to assist the restoration of the assets. It is therefore, on the Council's own information that the access road will not 'enable' the future preservation of the heritage assets. It is also understood, and different to what was reported to Cabinet in 2020, there is currently no external funding sources available to restore the heritage assets, so is further undermined. We are instructed this is so despite statements (which we are instructed are incorrect) by County Councillors to the contrary. And we note:

10th September 2021 – email to the Friends of Elvaston from Tom Goshawk, Interim Head of Place, D2N2 Local Enterprise Partnership, confirmed the LEP will not be in a position to grant future capital funding to Derbyshire County Council for Elvaston Castle infrastructure projects.

10th January 2022 – email to the Friends of Elvaston from Lesley Owen-Jones of the National Lottery Heritage Fund provided the following comment: “Again, I can assure you that the National Lottery Heritage Fund board has not committed any funding to Elvaston Castle. The only way that an applicant can secure the maximum amount is by making a successful application for a delivery grant following the completion of a development phase. The board does not make “in principle” or tacit approvals for any funding outside of our published application and assessment procedures.”

13. The latter point is highly pertinent as both Derbyshire County Council and the Elvaston Gardens Trust have, over the last four years, continued to state that the NLHF have insisted on the building of a new access road and relocation of the car park before agreeing to fund Elvaston Castle Country Park in any way.

14. The parish council believes that the county council will be seeking a developer contribution from Persimmon Homes towards the cost of the new roundabout on the B5010 as it will facilitate the entrance to The Triangle, Boulton Moor sports field complex and allotments proposal. The functional interdependence has been highlighted to local SDDC councillors and the SDDC planning department, but so far ignored.

⁷ Ibid p. 10-11

15. Finally, there is nothing in the application to demonstrate how the acknowledged harm to the heritage assets (along with other environmental harms) are to be outweighed by the enabling works. It is noticeable that there is no reference in the Heritage Impact Assessment to the other limited heritage benefit of the scheme:

'to start reversing damage to the historic landscape around the lake, which is suffering from excessive erosion, damage to historic Grade II listed structures and root compaction as a result of the intensity of foot traffic to the castle from the existing car park'⁸⁸

In the absence of any expert comment, it is queried whether there are any realistic heritage benefits (in the absence of listed building consent application) of this application

16. In short, the approach to heritage assets in the context of enabling development is unlawful and needs to be rectified prior to any decision being taken.

B. Lack of viability assessment

17. Enabling works aside, the viability of the scheme, and separately the entire Elvaston Castle estate, is central to the scheme's proposal. As the County Council will be aware, Government guidance requires that '

'any viability assessment should follow the government's recommended approach to assessing viability as set out in this National Planning Guidance and be proportionate, simple, transparent and publicly available'⁸⁹.

18. There is a real need, not just as the scheme is contrary to the local plan policies, but also as the proposal entirely uses public funds, that the viability of the scheme is publicly accessible. It is therefore necessary that viability for the application and the entire proposal is provided for public scrutiny and in the form prescribed by the guidance, including land purchase and infrastructure build costs.
19. In the absence of a publicly available viability assessment, compiled as required by the NPPG, including an executive summary any such approval of the current scheme would be unlawful.

C. Failure to conduct EIA for entire Elvaston Castle Masterplan

20. The 2018 'Masterplan' for the Elvaston Castle scheme was not subject to an EIA screening or wider assessment. The absence of such a screening or assessment is inexplicable. The current proposal is part of a wider scheme involving, and facilitating, restoration and conversion of Elvaston Castle, restoration of the historic lake and formal gardens, commercial use of the Home Farm site, holiday lodges, weddings, events, camping, equestrian use and an advertised significantly greater number of visitors. This is a clear case of 'project splitting' or 'salami slicing' to which the Courts have considered in detail.
21. As the County Council will be well aware, the starting point is correctly to identify the "project" for the purposes of the EIA Directive. The relevant tests for determining this are set out in *R v. Swale Borough Council ex parte RSPB* [1991] 1 P.L.R. 6 and by the Court of Appeal in *Burridge v Breckland District Council* [2013] EWCA Civ 228.

⁸⁸ ES Vol 1 (para. 4.10)

⁸⁹ <https://www.gov.uk/guidance/viability> (Paragraph: 010 Reference ID: 10-010-20180724)

22. In *Swale*, Simon Brown J. held at 16E that in considering the likely environmental effects of a proposed development for the purposes of the EIA Directive and Regulations:

The proposals should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the Regulations by piecemeal development proposals”

23. *Burridge* was a challenge to the grant of two interlinked planning permissions. One application was for a biomass renewable energy plant and the other was for a combined heat and power plant about 1.1km away. They were to be connected by an underground gas pipe to carry the fuel between the two sites. The Court held that this should have been treated as a single “project” for the purposes of EIA. Pill L.J. held, at [41]:

“...The two proposed developments were functionally interdependent and can only be regarded as an “integral part” of the same development. They cannot be treated otherwise than as a single project or development and were actually considered by the committee on the same day and on the basis of cross-referenced reports. The geographical separation of something over 1km does not, in my judgment, defeat that, particularly given the link provided by the pipeline.”

24. This approach is consistent with the approach of the CJEU in seeking to ensure that the splitting of what is in reality a single project into more than one planning application did not entail any reduction in the scrutiny afforded by the EIA Directive. In *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* [2008] ECR I-6097, AG Kokott said at paragraph 51 of her Opinion:

“Lastly, the objective of the EIA Directive cannot be circumvented by the splitting of projects. Where several projects, taken together, may have significant effects on the environment within the meaning of Article 2(1), their environmental impact should be assessed as a whole. It is necessary to consider projects jointly in particular where they are connected, follow on from one another, or their environmental effects overlap.”

(emphasis added)

25. The CJEU agreed saying, at [48]

“the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take into account the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment.”

26. The County Council’s application is littered with references to this application ‘enabling’ (albeit in the wrong context) the wider development proposal for Elvaston but has failed to examine the entire proposal as a single project for EIA purposes. The application as submitted by the Council is ‘*integral part of an inevitably more substantial development*’, and therefore should have been considered for the purposes of EIA in

its entirety. The failure of the Council to do so at the Masterplan stage is a fundamental, and unlawful, flaw.

D. No EIA assessment of the road scheme

27. The case law referenced above is also apposite for the County Council's failure to screen controversial new access and roundabout junction as part of a wider Elvaston Castle scheme. As referred to in the Design & Access statement¹⁰:

Roundabout Junction/Access to Principal Highways

A roundabout junction is proposed on the B5010 in a position that respects the importance of the adjacent Principal Roads Network and need to accommodate heavy peak-time flows associated with it; is compatible with a proposed development of Sports and Community Facilities to the south of the B5010 (Application DMPA/2019/1119 currently being considered by South Derbyshire District Council...'

28. What the Design & Access statement, and the wider EIA fails to address is:

- a. The relocation of the roundabout access point for the sports centre (previously further to the East).
- b. That the land proposed as the new access route for Elvaston Castle, and the majority of the land as part of the application DMPA/2019/1119 currently under consideration by SDDC, is owned by the same landowner¹¹.
- c. The location of the roundabout in this location will result in a loss of veteran trees at both sites. *This* was not the case at the current existing car park or the original access point for the sports facility.
- d. Application *DMPA/2019/1119*¹², oddly and inexplicably, has been negatively screened for EIA purposes.

29. As, similar to Burridge the presence of a roundabout access as part of the current application with a spur to another development is clearly in the same territory as Burridge where "...*The two proposed developments were functionally interdependent and can only be regarded as an "integral part" of the same development*'.

30. For this reason, the application is flawed and requires reassessment.

E. Absence of listed building consent application

31. The planning statement refers to '*This planning and Listed Building application seeks to facilitate this future*'.¹³ The application is not a listed building consent, and a separate application is required.

¹⁰ D&A assessment (November 2021)

¹¹ The majority of the land as listed in the site plan for the application DMPA/2019/1119 is in the freehold ownership of JSC Farming Limited & Central Land Holdings Limited (title no. DY376081, accessed 10.4.22). The land to which the proposed access road for the current application will cross, title no. DY362412 (accessed 10.4.22), is also under the ownership of JSC Farming Ltd.

¹² Approval of reserved matters for access, layout, scale, appearance and landscaping of outline permission ref. 9/2015/0998

¹³ Para. 5.62

32. Further, given that most of the proposals seek to convert listed buildings, rather than any development, clearly a listed building consent is required to be decided concurrently with the impugned application. As the limited benefits of the scheme are almost entirely reliant on obtaining listed building consent, rather than planning permission, it is incorrect to proceed in deciding this application in the absence of any such application.
33. To consider the application, in the absence of the concurrent consideration of listed building consent of the multiple heritage assets is unlawful.

F. Consideration of alternative access routes

34. The absence of any viability assessment is more surprising given the statutory consultees request for costed alternatives to the current proposal: As the Garden Trust (scoping opinion statutory consultation response) requests in their letter of 6 July 2021:

'...We have downloaded the few online documents for the proposed new road, car parking and layout, and whilst these are helpful, should this proceed to a formal planning application, we would need to understand why this solution is the preferred one for Derbyshire CC. For example, we would query the need for an extremely expensive and almost certainly intrusive new road and roundabout running partially through the Grade II registered park and garden (RPG) before running parallel to the western edge of the RPG when access is already available to the north'*

(emphasis added).

35. SDDC as Local Planning Authority also requested more detail regarding alternative access routes stating that it was their view that improvements to existing infrastructure would have less environmental effect than the construction of a proposed new route. But such consideration of the current access route (costed or otherwise) exists as part of the County Council's application, despite the explicit request of a statutory consultee. Further, in its consideration of alternatives, the EIA fails to consider any access option (a 'do nothing' approach or otherwise) as part of its consideration.
36. In the parish council's response to scoping, Elvaston Parish Council disagreed with all assertions that the proposed new access road and roundabout scheme was the most economically viable or the most effective considered option citing the existing road infrastructure and car park which has successfully served the park for over fifty years and with historic annual visitor figures far in excess of those proposed.
37. As most recently articulated by Thornton J in *London Historic Parks And Gardens Trust v Minister of State for Housing & Anor* [2022] EWHC 829 (Admin):

130. The principles on whether alternative sites are an obviously material consideration which must be taken into account are well established. Where there are clear planning objections to development then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it (Trusthouse Forte v Secretary of State for the Environment (1987) 53 P & CR 293 at 299-300).

38. Where there are significant adverse effects in the application as proposed, and in the absence of full costed alternatives as requested by a statutory consultee where an access currently exists, this proposal, if granted would be unlawful.

G. Decision making arrangements and pre-determination

39. As the County Council is both the decision maker and developer, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 Pt 12 reg.64(2) applies. Reg. 64(2) requires that the decision maker has to ensure that there is a functional separation, when performing any duty under the Regulations, between the persons bringing forward a development proposal and the persons responsible for determining it.
40. Holgate J set out in *London Historic Parks and Gardens Trust v Secretary of State for Housing Communities and Local Government* [2020] EWHC 2580 (Admin) (para. 94) independence requires that: -
- (i) The functions of the competent authority under the EIA Directive be undertaken by an identified internal entity within the authority (including any officials assisting in those functions) with the necessary resources and acting impartially and objectively;*
 - (ii) The prohibition of any person acting or assisting in the discharge of those functions from being involved in promoting or assisting in the promotion of the application for development consent and/or the development;*
 - (iii) The prohibition of any discussion or communication about the Holocaust Memorial project or fund, or the called-in application for planning permission between, on the one hand, the Minister of State determining the application and any official assisting him in the discharge of the competent authority's functions and, on the other, the Secretary of State or any official or other person assisting in the promotion of the project or the called-in planning application or any other member of the government; and*
 - (iv) The prohibition of any person involved in promoting or assisting in the promotion of the application for development consent and/or the development from giving any instructions to, or putting any pressure upon, any person acting or assisting in the discharge of the functions of the competent authority, or from attempting to do so, in relation to those functions.*
41. We cannot see any handling arrangements that meet the requirements of reg.64(2) and the independence requirements as stipulated in the judgment of Holgate J, please can these be provided. Any decision made in the absence of such a scheme would be unlawful.
42. Furthermore, as we are informed by our client of the involvement of councillors and officers across various committees are actively promoting the project, we query whether the requirements of independence will be met. It may be, given the interplay of all parties at the Council in the promotion of this scheme, that in the absence of a planning application with the benefit of clear handling arrangements it is impossible for the County Council to fairly act as decision maker in these circumstances. Please provide in any response how, given the interaction, independence of the decision maker is possible.
43. Local councillors and members of the Planning Regulatory Committee have incorrectly stated that the proposed scheme is the only viable option (minuted at Elvaston Parish Council and Draycott and Church Wilne Parish Council meetings). Incorrect statements have been minuted concerning external funding. At private meetings held

between action group members and council Cabinet members, the irrefutable statement has been made that “the new road is non-negotiable and will happen” and if the council’s plans are thwarted in any way, then the leader of the council stated that “the estate will be offered for sale to a private developer”.

H. Further issues

44. Given the fundamental issues with the application, we have not delved into the additional policy issues regarding the construction on Green Belt, the disregard to the PPG guidance on veteran trees, the construction of a carpark on a nature reserve and the rational, and policy compliance, of constructing a carpark on land with a ‘high probability’ of flooding. These have been separately addressed in the multiple other objections from concerned residents and users of Elvaston Castle. However, should the Council not withdraw the application pending the issues raised above, we will seek instructions to address the further flaws in the County Council’s proposal.

I. Conclusion

45. The Parish Council’s objective is to ensure a sustainable future for Elvaston Castle and Estate, enabling the restoration of the listed heritage assets which, by the County Council’s own admission, it has *‘has not invested significantly in keeping buildings in good repair for many years’*¹⁴. The Parish Council strongly believes that the approach currently taken by the County Council will harm, rather than improve, these important heritage, environmental and community assets.

46. As set out in the above letter, the application is beset with a litany of issues which, in its current form, would make any consideration, and subsequent approval, unlawful. Given the clear interconnection with other schemes in the same area, these need to be reviewed as part of the full-scale consideration of the project in line with the EIA requirements.

47. The application also needs full assessment as to its enabling, viability and full consideration of alternatives to minimise the harms which are clear weigh firmly in the balance of refusing this proposal. We request confirmation by return that this application will no longer be considered by the County Council.

Yours faithfully

A large black rectangular redaction box covers the signature and name of the sender.

¹⁴ Cabinet report ‘Elvaston Castle Masterplan Delivery Programme’ Cabinet report September 2020 p.10