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## BY EMAIL ONLY

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 and write with reference to our previous objection letter (dated 20 April 2022) and the Council's response, dated 6 June 2022, attached for reference.
2. It has come to our attention that 'further information' has since been provided by the applicant following an EIA Regulation 25 request, which provides further and necessary detail of the proposals that was requested by our client, but also as highlighted by Historic England (consultation response 6.5.22), The Gardens Trust (consultation response dated 24.4.22) and the Council's Built Environment officer (consultation response 20.5.22). This is the Parish Council's response to this further information consultation.
3. However, and unfortunately, from our review of the information supplied there remains significant shortcomings of both the rationale of the development, the consideration of options and the assessment of other projects (both at Elvaston and in the surrounding area) that prevents our client, and the public, to fully understand the proposals particularly where there are clear likely significant environmental effects. In the absence of such information to take this application to committee in its current form would be premature.
4. Although we are conscious that expert consultees have raised a range of separate concerns, we are principally focussed on the continuing failure to assess the project as a whole; the absence of viability information; the consideration of access routes (and the influence of other, separate projects) on the proposal. These concerns are summarised below:

## Assessment of the project as a whole

5. First, it is noted and in contrast to the position in the Council's June 2022 response, the Council's officers consider the Masterplan of the scheme and the wider proposals part of the project. The Reg. 25 letter states:

*'Paragraph 3.6 of the ES illustrates that the Council as Country Park owner contemplates the possible carrying out, subsequent to the construction of the development described in the current application ("this development"), of further elements of development at Elvaston Castle that are not part of this development but that were also outlined in the current published Elvaston Castle Masterplan ("the other Elvaston proposals"). The Authority considers that the other Elvaston proposals constitute "existing projects", so as to be amongst "other existing projects" in relation to this development, as referred to in schedule 4 to the Regulations at paragraph 5. It is considered - having regard to the specific characteristics of this development and development of this type (especially the potential to affect the listed heritage assets in the Country Park and the Country Park in general including through increased traffic impacts and visitor numbers) - that there could be "likely significant effects" of this development resulting from the cumulation of effects with the other Elvaston proposals as "other existing projects" that may not be factored into the description of likely significant effects as provided under the submitted ES. This is because the submitted ES lacks specific details concerning the other Elvaston proposals.'*

(emphasis added)

6. However, the information provided by the Council as developer to date fails to fully detail the proposals, the likely impact and how this will influence the design. This has significant implications as, simply put, should the full scheme not be implemented as planned the need for the scale of the development proposed (such as the larger car park) may not be required. In contrast, should the full development be carried forward, there is nothing in the application documents to assess potential impacts, such as the full impacts on the traffic network etc.
7. As a result, there remains discordance between what the application in its planning statement and materials seeks for the application to achieve i.e. the full development of the Masterplan (particularly funding) but, from our initial review, the application still fails to fully appreciate the impacts of any future proposals. As the Council will be aware, the Court of Appeal, see *R (Ashchurch Rural Parish Council) v Tewkesbury Borough Council* [2023] EWCA 101, has recently considered a similar situation where it was emphasised that, in a multi stage project, where parts of a wider project are uncertain, that does not mean there is no wider project at all. The information provided to date does not meet this hurdle and needs to be addressed.

## Access road

8. Our earlier consultation response, and that of other consultees, has highlighted the likely significant impact the proposed impact will have on the Registered Park and Garden and the other heritage assets compared to the existing car parking arrangements. The Council's heritage officer (20.5.22) states:

*'Notwithstanding its perceived remoteness from the Castle and the core buildings, the current car park and its direct access from the*

*B5010 assimilates vehicle parking with a good degree of success. The sinuous layout, broken-up by mature landscaping and sensitive combination of bound- and unbound-surface materials, screened by a grassed mound from views across the showground from Bedford Drive, do not intrude or appear incongruous as a public destination with a high number of visitors and vehicles. The relocation of the car park would need to bring significant advantages over the existing arrangement and provision to justify any harm that might result from new interventions and, presumably, the financial investment. The CH&D Service of DCC agrees with Historic England's recommendation for the provision of further information on the interim and proposed future use of the existing car park, to ensure that the conservation and sustainable use of this part of the RPG is secured.'*

9. However, there is nothing in the further information provided by the Council to review the 'do nothing' approach or a further use of existing facilities but expanded. The Council appears set on its proposed route, regardless of suggestions of alternatives. There needs to be a full assessment of all the alternatives, including the existing routing and amendments to it, for example the suggestion of a one-way system. This has not been assessed. Further of the information that has been provided, there is no clear comparison of the likely significant environmental effects to show this has been considered. Like Historic England and the other heritage consultees, the Parish Council also seeks to understand what the existing car park will be used for, should the new car park be developed.
10. As an example, one clear omission is that the further information supplied under 'archaeology' now confirms that the preferred route would result in:

*'At the northern end, the access road will remove prominent earthwork remains associated with medieval cultivation (asset 47) and later quarrying in the west field to the north of Oak Flat, This will also directly impact sub-surface remains associated with the earthworks.*

11. This impact does not appear to have been considered at the selection stage and in the analysis of alternatives and the likely significant impact. This needs to be addressed in the full assessment of alternatives.

#### Consideration of other projects and the influence on design

12. Further, and as highlighted in our April 2022 letter (paras. 27-30), there remains a lack of consideration of other developments that might influence the design of the access route that is not being highlighted to the public. It is noted that the EIA further information now states:

*'8.34 Consideration has also been given to the provision of a central turning reservation instead of a roundabout to access the park, but this was ruled out as impracticable because of the need to ensure compatibility with Persimmon's proposals for the Triangle development to the south of the B5010.*

*8.35 It was hoped to avoid the installation of street lighting on the new roundabout, but this falls short of highway standards, and street lighting is unfortunately unavoidable.'*

13. This confirms that the access route is being at least influenced by other proposals that are not mentioned at all within the EIA assessment but are clearly affecting the design of the proposal. This is material as, the Council's heritage report confirms, this will have a more detrimental impact on the listed heritage assets. This needs to be addressed, and the Council provide full transparency on what is influencing the choice of access locations and why.

#### Viability

14. Finally, it was refuted by the Council in its June 2022 response that there required to be any consideration of the viability of the project. However, a 'costs benefit analysis has been provided. This is not a viability report and some of the benefits are not understood by the public – what exactly does 'Well being benefits from heritage: £85,920,351' mean? There is no information to explain what this category is and how his figure was reached.
15. As similarly sought by the Council's heritage officer, we reiterate the request for *'robust business planning to ensure that they are sustainable and help to provide the clear and convincing justification required in paragraph 200 of the NPPF for any harms to heritage assets as part of the scheme.'*

#### Handling Arrangements

16. Finally, the Council's letter of 6 June also inferred that handling arrangements for the project, demonstrating the recent caselaw were being considered. Please can these be provided.
17. We would be grateful for your confirmation that this correspondence will be uploaded onto the application's planning portal.

Yours faithfully



**RICHARD BUXTON SOLICITORS**

Enc.: Elvaston Parish Council objection letter, 20 April 2022  
Derbyshire County Council response, 6 June 2022

**ENCLOSURE 1**  
**Elvaston Parish Council objection letter**  
**20 April 2022**

Derbyshire County Council  
County Hall  
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Derbyshire DE3 4AG

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## By email only

Our ref: HLB/ELV1/1

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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.

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)<sup>1</sup> 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 trees<sup>2</sup>, 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'<sup>3</sup>. 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 scheme<sup>4</sup>.

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<sup>1</sup> Which was not subject to an EIA assessment.

<sup>2</sup> Para.5.218 ES Vol. 1

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

<sup>4</sup> 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'*<sup>5</sup>. 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 old<sup>6</sup>. 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:

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<sup>5</sup> Historic England Enabling development guidance para 10

<sup>6</sup> 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”.<sup>7</sup>*

*(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:

10<sup>th</sup> 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.

10<sup>th</sup> 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.

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<sup>7</sup> 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’<sup>88</sup>*

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’<sup>89</sup>.*

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.

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<sup>88</sup> ES Vol 1 (para. 4.10)

<sup>89</sup> <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 statement<sup>10</sup>:

##### *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 landowner<sup>11</sup>.
  - 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*<sup>12</sup>, 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*'.<sup>13</sup> The application is not a listed building consent, and a separate application is required.

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<sup>10</sup> D&A assessment (November 2021)

<sup>11</sup> 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.

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

<sup>13</sup> 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*’<sup>14</sup>. 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



**Richard Buxton Solicitors**  
Environmental, Planning & Public Law

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<sup>14</sup> Cabinet report ‘Elvaston Castle Masterplan Delivery Programme’ Cabinet report September 2020 p.10

**ENCLOSURE 2**  
**Derbyshire County Council response**  
**6 June 2022**



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Your Ref: HLB/ELV/1

6 June 2022

BY EMAIL ONLY to: [hbrown@richardbuxton.co.uk](mailto:hbrown@richardbuxton.co.uk)  
& [rbuxton@richardbuxton.co.uk](mailto:rbuxton@richardbuxton.co.uk)

Dear Sirs

**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**

I am instructed by the County Council's Planning Service, which is responsible for handling the determination of the above application for planning permission, to write to you regarding your letter of 21 April.

It is appreciated that your letter provides the response on behalf of the Parish Council, which is a statutory consultee in respect of the application. Accordingly, the letter is now included in the documents relating to the application that can be downloaded from the County Council's website, and a copy of this letter is being forwarded for information to the agent acting on behalf of the Council as applicant.

In so far as your letter presents for the County Council's attention as planning authority opinions of and on behalf of the Parish Council on issues of planning and environmental judgement relating to the proposed development that is described by the application, the Service will of course have regard to those opinions in analysing the issues. This analysis will be reflected in the officer report on the application which is to be prepared for presentation to the Council's Regulatory - Planning Committee with a recommendation to it for a decision on the application. The Planning Service will not complete their analysis work in advance of the preparation of the report and will therefore not be offering any substantive comments on the matters of planning judgement in the meantime.

However, your letter includes some submissions that contend that there would be unlawfulness in any determination of the application in this case, and /or the related EIA process, and raises some points concerning factual accuracy. This letter is therefore addressing these submissions and points.

For ease of comprehension, the sub-headings by numerals below correspond to the numbered paragraphs in your letter which my comments immediately beneath are particularly intended to address.

## **2 and 5**

As to the issue you appear to raise of whether or not the application is adequate in respect of how it might “*address the enabling development as proposed to ensure the viability of the asset*”, this type of issue would be examined by the Planning Service before reporting to committee.

The application clearly does not incorporate various elements of possible development relating to Elvaston Castle Country Park that are under the Masterplan published in 2018. However, the County Council as planning authority has no power to control what development is described in any application for planning permission that is submitted to it (whether or not, as in this matter, the application has been made to the County Council on behalf of the County Council as an intending developer, as stipulated by regulation 3 of the Town and Country Planning General Regulations 1992).

## **3 & 4**

The ecclesiastical property containing St Bartholemew’s Parish Church and its churchyard/graveyard by the County Council’s Country Park land is not part of the County Park, and is outside the current application site, but its proximity to the Country Park land under the application site that surrounds it is self-evident. This church property is however within the overall area of the Elvaston Castle Grade II\* registered historic park and garden, as shown on the official plan reproduction at page 5 of the Heritage Statement /Report (as at 20 December 2021), and it is addressed as a specific area under section 17 in that statement.

There is no statutory consultation requirement in respect of the PCC, however the Planning Service has directly notified the application to those who appear to be interested parties through ownership of adjoining and adjacent properties, including the Diocesan office.

## **6 & 7**

The siting of the proposed car parking and access route to it and the stated reasoning you refer to would appear to be points for the consideration of the County Council in the determination of the application. There is therefore no need for any comment to be conveyed now from the Council as planning authority regarding these points.

## **8**

Whilst your reporting under this paragraph on survey conclusions has been noted, the Planning Service has not been provided with any documentation of the surveys to which you refer. I suggest therefore that the Parish Council or yourselves arrange for all that documentation that you would regard as relevant to be sent as soon as possible to: the

Planning Service, County Hall, Matlock, Derbyshire DE4 3AG or by email to [planningrepresentations@derbyshire.gov.uk](mailto:planningrepresentations@derbyshire.gov.uk) .

## **9 to 16**

Any weighing by the planning authority, as referred at paragraph 208 of the NPPF, of any such benefits for heritage assets as are there mentioned against any such disbenefits as are there mentioned, would need to reflect whatever relevant information might be available to it regarding the nature of such benefits, and disbenefits. Consideration of any alternative means of delivering such beneficial outcomes could be relevant to such an exercise, as the Historic England Guidance reflects.

'Enabling development' is not a statutory concept, so there does not appear to be any provision by which any deficiency there might be regarding material available to a planning authority in respect of how a development might be accredited as 'enabling development', would either relieve it from being required to determine, or preclude it from determining, any valid application for permission in respect of that development.

## **12**

There has not so far been any report received by any committee of the County Council regarding the development under this application. Presumably, your reference to a committee report is meant to be a further reference to the September 2020 report to the Cabinet on the Masterplan.

## **12 & 13**

The Council as planning authority will of course, in any report on the application, endeavour to ensure the accuracy of any financial information which it might contain.

## **17 to 19**

Whilst the County Council as planning authority is aware of the NPPG paragraphs on 'Viability and decision taking', including Paragraph: 010 Reference ID: 10-010-20180724, it is not clear how these paragraphs could relate to the application in this case, as you seem to contend. Nor is it clear how the provision of an economic viability assessment by the applicant might assist in the determination of the application (except perhaps if an assessment was specifically commissioned in respect of the applicant's references to the development proposed in the application being "enabling development" with regard to the security of heritage asset conservation).

The NPPF provision to which these NPPG paragraphs are cross-referred is NPPF Paragraph 57, which is concerned with planning obligations and the tests under regulation 122 of the CIL Regulations. Whilst the next paragraph in the NPPF paragraph 58, might also appear to be a national policy driver for the guidance under these paragraphs, it is only concerned with circumstances in which "up-to-date policies have set out the contributions expected from development".

In summary I cannot see where there is any legal requirement, nor any expectation contained in national policy or guidance, for any specific type of viability assessment to be provided in a case such as this. If you can identify such a requirement or expectation, please can you refer me to it specifically.

#### **20 to 26**

The 2018 Masterplan was produced by the Council solely as the owner and operator of the Country Park; it is not any part of the local development framework, nor is it any kind of planning authority document, nor was it supporting any actual planning application proposal. There was therefore no basis at the time of its production for requiring any environmental assessment screening or statement in respect of it.

I am not able to comment here on your observations in these paragraphs concerning the need to avoid 'project splitting' for EIA, leading to your submission under para. 26. that the development under the current application is an integral part of an inevitably more substantial development which should be considered for the purposes of EIA in its entirety. This submission will however be addressed before any report to committee on the development covered by the current application is finalised by the Planning Service.

#### **14, & 27 to 29**

Since SDDC is the planning authority faced with determining the Persimmon Homes sports ground application DMPA/2019/111912, the County Council is, obviously, not directly concerned to address any issue as to whether the development under that application would be functionally dependent on the construction of the roundabout element of the development proposed under the current application before the County Council nor any other issue of EIA in relation to the determination of that application.

However, none of the development under this current Elvaston Castle application proposal (including the roundabout), nor any of the other development outlined in the Masterplan, appears to be functionally dependent on the construction of the development proposed in the sports ground application or anything similar. It is not made so by any potential for the roundabout construction to be partly funded by any financial contribution from the intending sports ground developer (e.g. if required by planning obligation).

Re. 28, it is not clear how the same ownership of the majority of land could be an issue that should have been addressed in the Design and Access Statement, since it would not generally be a substantive planning consideration. The only possible relevance of this factor that I can conceive in principle would be as regards whether respective development proposals were so interdependent as to require EIA as one project, but it would be only one of a number of possible factors in respect of such a question.

#### **31 to 33.**

A corresponding listed building consent application has in fact been submitted for listed building consent, to South Derbyshire District Council. This application, reference number DMPA/2022/0318, has been validated and the documentation relating to it can be viewed

from the SDDC website, and via this link: <https://southderbyshirepr.force.com/s/planning-application/a0b8d000001VpfzAAC/dmpa20220318?tabset-ba98d=2>

### **34 to 38, 47, & generally**

With regard to the process of EIA, the Planning Service on behalf of the Council as planning authority is as usual considering the issue of the sufficiency of the Environment Statement documentation which has accompanied the application to date, having regard to the advice and representations received from statutory consultees and others, including the representations in your letter. If it finds that there are any deficiencies in the statement in relation to the requirements of the 2017 Regulations, the agent for the County Council as applicant will be notified accordingly, and you would then be informed accordingly.

### **40 to 42**

The County Council's ongoing arrangements provide an extensive separation of its functions as planning authority in determination of applications (including the associated Environmental Impact Assessment function) from its functions as an intending developer and applicant for planning permission, as well as ensuring objectivity in the determination of applications. In particular:

- The Council's Regulatory Planning Committee is established as provided by with Article 9 in its adopted Constitution under the Local Government Act 2000, with responsibility (inter alia) for carrying out "*non-executive functions relating to town and country planning and development control as set out in the Local Authorities (Functions and Responsibilities) (England) Regulations 2000*". By Article 9, no members of the Council's Cabinet can also be a member of the committee.
- As provided by Article 9 of the Constitution all serving members of the committee are required to abide by the 'Code of Good Planning Practice' at Appendix 20 to the Constitution ("the Code") and to have undertaken training in accordance with the Code. The Constitution including its appendices is accessible from the County Council website, and via this link: <https://democracy.derbyshire.gov.uk/ieListDocuments.aspx?CId=218&MId=335&Ver=4&Info=1>
- As stated in the introduction to the Code, it "*sets out the behaviour and practices the County Council expects should be observed in deciding applications made for planning permission and for associated planning approvals. It includes the normal process for those applications which are reported to the Council's Regulatory Planning Committee, so that the Council's expectations and practices for both Members and Council Officers can be clear to all. These determinations can often be highly controversial. This Code of Practice is designed to be fair both to applicants and to other people to ensure that the Council makes impartial decisions in the interests of the community at large.*"

- The Code affirms, at paragraph 1.5: *“Planning applications submitted by the County Council for its own development will be treated in the same way as those by others in terms of the assessment of the proposal in relation to the policies of the development plan and other material planning considerations.”*
- The divisional structure of the County Council’s Department of Place includes a division known as the Planning Service under the management of a senior planning officer known as the Head of Planning Services (currently David Arnold, MRTPI).
- The Service covers the handling or commissioning of all ‘development control’ application matters which the Council is responsible for determining as local planning authority. This includes including all relevant steps for the interrelated EIA process as required by regulation 26 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, as well for any assessment required for Habitats Regulations assessment, and the preparation of such reports as are required to enable the committee to decide on those planning applications that have not been delegated to the Head of Planning Services to determine.
- The Scheme of Delegations within Appendix 1 under the Council’s Constitution records the types of applications that are specifically delegated for the Head of Planning Services to determine, as follows:
  1. *To determine applications for:*
    - (a) *planning permission for County Matter development;*
    - (b) *planning permission for development which the Authority itself proposes to carry out; and*
    - (c) *for replacement conditions to regulate permissions for existing Mineral Working Sites as provided for in the Environment Act 1995 at Schedule 13 (initial review) and Schedule 14 (periodic review), where the proposal under the application is considered by the Head of Planning Services to be (1) in accordance with the Development Plan and any relevant supplementary planning documents and emerging Development Plan policy (2) unaffected by any significant objection\* to the application.*

*\* In this specific delegation “significant objection” means: an objection, which is on at least one relevant planning ground which is not capable of being overcome by amendment and/or the imposition of appropriate conditions and/or planning obligations].*
- The Code also provides at 1.9: *“The role of the Head of Planning Services and planning case officers in producing any report on an application for a Committee decision is to provide the Committee Members with sufficient professional and impartial advice and information and assistance to enable them to make a well informed and reasoned decision on the application which is in the public interest”.*

- The Code goes on to provide at 1.10: “*The County Council endorses the Royal Town Planning Institute (RTPI) Code of Conduct and in particular that RTPI members shall not make or subscribe to any statements or reports which are contrary to their own professional opinions. All officers in the Authority attending to planning matters are expected to act in accordance with the RTPI Code of Practice whether or not they are RTPI members. Members of the Council should respect those professional responsibilities at all times*”.
- For those applications to be decided on by the committee itself, the Service is thus responsible for handling or commissioning all the work in preparation for that decision-making by the committee, including that which is required for the production of such reports by the EIA steps contained in the EIA Regulations at regulation 26.
- This work is handled or commissioned by officers of the Service who have appropriate understanding of EIA. They are able to obtain specialist professional assistance when needed from practitioners such as qualified ecologists, archaeologists, heritage and landscape professionals. The selection and engagement of such practitioners is either through external sources or through the County Councils own specialist Conservation, Heritage and Design Service. This selection and engagement is under the control of the Service in all cases. This arrangement is understood to be effective to avoid any involvement in the planning authority EIA work by practitioners who are or have been working on the matter on behalf of the Council as applicant or intending developer.

These arrangements as I have outlined above are considered to be effective to ensure that there is the appropriate functional separation between the Council as applicant and the Council as decision-maker as required by regulation 64(2) as well as being effective at promoting the objectivity required by regulation 64(1). They are also considered also to be sufficient in respect of regulation 10 of the 1992 Regulations, by which no determination of an application to which regulation 3 applies can be made by any committee which is responsible (partly or wholly) for management of the land and buildings concerned, or any officer whose responsibilities include any aspect of that management

The judgment of Holgate J in *London Historic Parks and Gardens Trust v Secretary of State for Housing Communities and Local Government* [2020] EWHC 2580 (Admin) is nevertheless currently receiving our attention generally as regards its contribution to the general issue of what may be required for demonstrating compliance with regulation 64.

Notwithstanding the general issue, it is clear from the application and EIA documentation in this case that the County Council as applicant and intending developer has subsequent to the Cabinet meeting in September 2020 brought forward the proposal through an external professional agent who has engaged external specialist consultants (apart from the engagement of highways authority officers in respect of the proposed roundabout and access drive and the assessment of alternatives document at Appendix 4.1 to the Environmental Statement). This arrangement is considered to further ensure

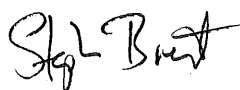
effective functional separation in this case as between the Council as applicant and intending developer, and the Council as planning authority.

**42 & 43**

There is no 'interplay' such as your client appears to perceive which involves the Planning Service. Excepting such vague and unspecified assertions as you convey in these paragraphs, neither I nor the Planning Service know of any active promotion of the project by councillors beyond the consideration of the September 2020 Cabinet report to which you refer, nor of any promotion by officers "across various committees", nor of any statements by local councillors or by any members of the Regulatory Planning Committee concerning the viability of the proposal. We are also otherwise unaware of any private meetings between action group members and Cabinet members.

The work of the Service towards the determining of this application would not anyhow be liable to be affected by any promotional activity or any statements by members regarding the project. However, to enable me to appreciate how any reports of statements or promotional activities which the Parish Council may know of might possibly have generated concerns as to the ability of the Council to act fairly as decision maker for this application, I should be grateful if you could provide me as soon as possible with whatever more specific details the Parish Council may have of such statements and activities.

Yours faithfully,



Stephen Brent  
Senior Solicitor, Legal and Democratic Services