

## Jay Singh

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**From:** Guy Wakefield <GWakefield@ridge.co.uk>  
**Sent:** 06 February 2023 12:22  
**To:** Legg, John; Jay Singh  
**Cc:** paul.instone@appliedtownplanning.com; Tara Maizonnier; Hugh Richards; Skinner, Helen; Tara Maizonnier  
**Subject:** RE: New Material Consideration - 3305934 - Land to the north of Droitwich Spa, Droitwich - LPA Ref 22/00201/OUT  
**Importance:** High

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Dear John,

I write in response to the very late evidence submitted by the Council in respect of the proposed withdrawal of the Regulation 123 List. The Appellant is of the view that this evidence should not be accepted.

It is for the Inspector's discretion to accept new evidence after the inquiry closes. There is no obligation that it be adduced. The Appellant invites the Inspector not to allow the evidence, especially given that this matter was debated at the inquiry.

It ought to be noted that the Council have indicated that the Appellant raised this CIL issue late on the last day of the appeal and that is why they are submitting late evidence. However, that justification is factually incorrect. The issue had been brought to the Council's attention long before the submission of proofs of evidence. Indeed, the planning proof of evidence specifically identified this as an issue at paragraph 3.62, which says:

61. The Appellants' have queried the calculations in respect of the education contributions and are awaiting a response from the Council on this. The query related to the fact that Wychavon's Regulation 123 List identifies that education will be funded through CIL unless otherwise stated. Additional places at Droitwich is not one of the exceptions and so any such provision should be funded through CIL. Indeed, the latest Infrastructure Funding Statement confirms that CIL has been used to fund the expansion of schools. The evidence therefore advises that CIL, including that which arises from the appeal site, will be used to secure additional school places if required, and so it would not in my opinion be fair, reasonable or necessary to pay for this again through a s106 contributions. As such, it is my opinion that no contributions are payable through a s106 even if there is insufficient capacity.

Thus, the Council had been aware that this was a point that they needed to address long before the inquiry. That further underscores why the submission of further late evidence from the Council should be refused.

If, however, this new evidence is accepted, it raises a number of substantive issues which are briefly summarised in this response.

### **The Infrastructure List**

The Inspector will be aware that Regulation 121A of the Community Infrastructure Levy (Amendment) (England (No.2) Regulations 2019 (as amended) requires that LPAs have a published "statement of the infrastructure projects or types of infrastructure which the charging authority intends will be, or may be, wholly or partly funded by CIL" known as an 'infrastructure list'.

Similarly, this requirement is repeatedly set out in the PPG:

- The PPG (23b-003) states “Authorities can choose to pool funding from different routes to fund the same infrastructure provided that authorities set out in infrastructure funding statements which infrastructure they expect to fund through the levy.”
- The PPG (23b-006) states “Authorities should set out in an infrastructure funding statement which infrastructure they intend to fund and detailed the different sources of funding.”
- The PPG (23b-033) states “Infrastructure funding statements must set out:...a report on the infrastructure projects or types of infrastructure that the authority intends to fund wholly or partly by the levy.”

The necessity for the approach to be clearly set out is evident from the PPG (23b-034) which states:

- “The infrastructure funding statement should set out future spending priorities on infrastructure and affordable housing **in line with up-to-date or emerging plan policies**. This should provide **clarity and transparency for communities and developers** on the infrastructure and affordable housing that is expected to be delivered.” (emphasis added)

This clearly recognizes the need for the approach to be transparent and for this to be consistent with up-to-date policies. Accordingly, where any departure from the adopted position is proposed this should be transparently publicised and it is likely to render relevant policies out-of-date.

As discussed at the inquiry, the Council’s ‘infrastructure list’ was set out in the Regulation 123 List, which was prepared in the context of the SWDP and thereby aligned with the Development Plan, and which clearly and transparently sets out that on sites such as the appeal site, CIL would be used to fund educational infrastructure.

The Council has now indicated that it has resolved to withdraw the Regulation 123 List. The effect of this, if the Council act upon this resolution, is that the Council will no longer have an ‘infrastructure list’ and as such will be in breach of the regulatory requirements and national guidance. It is clearly very surprising and concerning that a Council is knowing and deliberately breaching regulatory requirements in order to sustain an argument to this appeal.

Nevertheless, if this course of action is pursued by the Council, it will then fall to a matter of judgment as to how the CIL monies generated should be spent.

### **How should CIL monies be spent**

It is to be expected that public bodies will act in the public interest and in so doing will spend money secured to fund infrastructure on the infrastructure which was intended to be funded.

In this context, it was not contested at the inquiry that:

- The CIL Charging Schedule was approved on the basis that educational infrastructure will be funded using CIL on developments such as that proposed as set out in the Regulation 123 List which the Council relied upon for the purposes of the CIL examination.
- The District Council’s website still sets out that this remains the case, notwithstanding the Council’s resolution as set out in the extract below (dated 6<sup>th</sup> February 2023):

<image013.png>

- Policy SWDP62 of the Development Plan identifies that the approach will be set out within the Developer Contributions SPD which has now been adopted and which also confirms that CIL receipts will be spent in accordance with the Regulation 123 List.
- The District Council has not considered or published a new infrastructure list which sets out any alternative approach.

Additionally, as set out by the Council at the inquiry, for several years CIL monies have continued to be collected with no intent of these being spent on any form of infrastructure, until the Council has decided how these should be spent at some unknown time in the future. During this already prolonged period, developers are being asked to provide planning obligations to fund the infrastructure which should have been funded using CIL, whilst the Council are sitting on an ever-growing pot of unused infrastructure funding. Whilst this is clearly a very undesirable and improper situation, we heard at the inquiry that unsurprisingly as a result, the Council has a more than sufficient reserve of CIL monies to fund the educational infrastructure needed in support of the proposed development and as

such no additional monies are necessary to make the development acceptable in planning terms and would thereby not accord with Regulation 122.

Therefore, notwithstanding the proposed withdrawal of the Regulation 123 List, it remains the case that the CIL contributions sought have been justified on the basis that educational infrastructure will be funded using CIL on sites such as that proposed, the Development Plan and SPD confirm that this is the approach which will be adopted, this remains the clear and transparent position of the Council, and the Council has gathered more than sufficient monies to facilitate this. As a public body acting in the public interest, it would therefore be expected that the Council would fund educational infrastructure using CIL. Indeed, to do otherwise would have significant implications for the determination of this appeal as briefly outlined below.

### **The consequences of a departure**

As we heard from the Council at the inquiry, viability is marginal within Wychavon. As such, the consequences of placing an additional financial burden on sites by seeking financial contributions through a s106 agreement in addition to that which was anticipated at the time the SWDP and CIL Charging Schedule were found to be viable, may render the Development Plan unviable and undeliverable, contrary to:

- Paragraph 34 of the NPPF which requires that funding for infrastructure should not undermine the deliverability of the Development Plan.
- Paragraph 58 of the NPPF which requires that the viability of policies is tested at the plan-making stage, rather than allowing new ad-hoc approaches to be introduced without these being subject to viability assessment as the Council has done.
- The PPG (23b-004), (23b-005), (23b-011) which similarly requires that the viability of policies is tested at the plan-making stage.
- Paragraphs 4 and 14 of Securing Developer Contributions for Education which similarly requires that the viability of policies is tested at the plan-making stage.

The proposed new approach of the Council, which departs from the basis upon which the Development Plan and CIL Charging Schedule were found to be viable, will clearly adversely affect the deliverability of the Development Plan. If such a departure were to be entertained, the necessary corollary of this is that less weight should be afforded to the relevant policies of the Development Plan which may be unviable and out-of-date for another reason as a consequence, and greater weight should be afforded to the provision of housing given the adverse impacts on the deliverability of sites.

### **Materiality for the purposes of this appeal**

The Inspector has asked what bearing this new evidence has to the determination of the current appeal. The implications will clearly be different depending upon the Inspector's conclusion on whether or not the educational infrastructure should be funded using CIL or planning obligations, although both are provided for through the blue pencil clause and so neither would act as a constraint on the grant of planning permission.

The Appellant would suggest that the implications are as follows:

- If CIL is to be spent in accordance with the way in which it was justified in accordance with the Development Plan and as set out on the Council's website, then no contributions towards educational infrastructure would be necessary in support of the proposed development.
- If, however a new approach was to be adopted such that educational infrastructure will be funded through a s106 agreement, then this could be facilitated through the blue pencil clause, but the Appellant considers that such an approach would be entirely unreasonable and unjustified, as presumably would the wider public, were they to realise that the funding secured towards educational will no longer be spent on education. Furthermore, as a necessary consequence of such an approach, the weight afforded to the relevant policies of the Development Plan which would be less viable as a consequence must be reduced, and the weight afforded to housing increased owing to the resultant more limited supply of such housing.

I would be grateful if you were to forward these comments on to the Inspector.

Kind regards

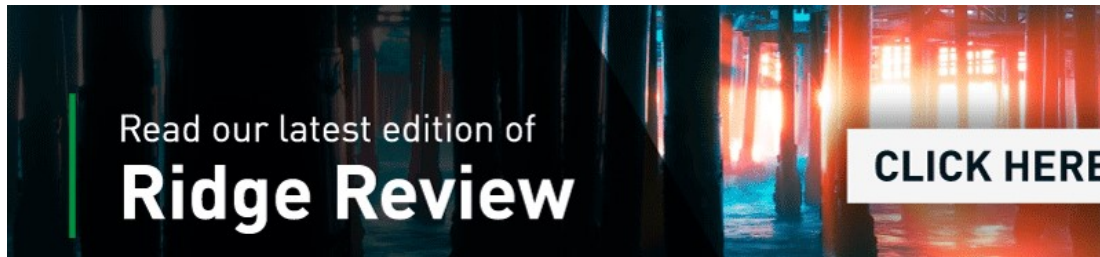
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**Subject:** RE: New Material Consideration - 3305934 - Land to the north of Droitwich Spa, Droitwich - LPA Ref 22/00201/OUT

Good Morning,

Please can the Appellant and the LPA provide brief comments on what bearing the attached report should have on the outcome of the appeal.

The Inspector has requested this information by the 1600 on Monday 06 February 2023.

Kind regards

John

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**John Legg** | Inquiries & Major Casework Team  
**The Planning Inspectorate**

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**From:** Jay Singh <[jay.singh@wychavon.gov.uk](mailto:jay.singh@wychavon.gov.uk)>  
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**Subject:** New Material Consideration - 3305934 - Land to the north of Droitwich Spa, Droitwich - LPA Ref 22/00201/OUT

Dear John

Following the closure of the above Planning Inquiry, new information has come forward that we believe is a material consideration of significant weight that should be brought to attention of the Inspector. Particularly given this matter was specifically raised by the appellant on the final day of the appeal in respect of CIL compliance of the requested S106 Education contributions and the relationship with the Councils CIL Charging Scheme. Please find attached a copy of the report to the district council's Executive Board of 1/2/23. The report sought to formally withdraw the CIL Regulation 123 List from the council's adopted CIL Charging Schedule. The recommendation was supported, and alongside the removal of Reg 123 Lists generally by the 2019 CIL Regulations, the list and supplementary appendix covering Wychavon has now been withdrawn. The appellant has been cross copied on this email and it will be added to the Inquiry Website.

Thanks

Jay Singh

Principal Planning Officer

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