

**IN THE MATTER OF
THE TOWN AND COUNTRY PLANNING ACT 1990**

**AND IN THE MATTER OF
LAND AT KINGDOM AVENUE,
WESTBURY.**

OPINION

1. I am asked to advise Wiltshire Council in respect of three questions arising from consideration of an application for gas-fired electricity generation units at Kingdom Avenue, Westbury. I set these questions out below.

Given the Council's resolution to seek to make Wiltshire carbon neutral by 2030, paragraph 186 of the NPPF, core policy 55 of the WCS and the Council's Air Quality Strategy 2019-2024, is the Council required to rely upon the DEFRA Toolkit to calculate the financial contribution required from the Developer based on the NO2 increases expected within the AQMA for Westbury as a result of this development?

2. No. The Council is not required to use the DEFRA Toolkit.
3. First, I would observe that the predicted NO2 impacts in the Wesbury AQMA is not concerned with the Council's carbon-neutral pledge.
4. Secondly, for the question of air quality impact, neither adopted development plan nor the NPPF is directory as to what methodology may be used to assess any financial contribution to mitigate adverse impacts on the AQMA.

5. Thirdly, far from being obliged to use the DEFRA Toolkit, the Council may consider that the Toolkit is not apt for the purpose of calculating a financial contribution in respect of mitigating impact on the AQMA. This is because the calculation through the Toolkit may be entirely unrelated to the necessary mitigation measures identified to respond to the increased NO₂ levels predicted in the Westbury AQMA (either too high, or, indeed, too low). By Reg 122 of the CIL Regulations, any contribution sought and secured in the s.106 obligation must meet the statutory test of necessity.

If the Council is not required to rely upon the DEFRA Toolkit calculations but nevertheless seeks to require payments of a financial contribution – can the Council do so, relying upon the requirements of CP 55 and paragraph 186 of the NPPF and rely upon the calculation based upon individual contribution being the sum of £23,333.31 or is it open to the Council to seek a contribution for this development taking into consideration the Council’s Air Quality Strategy 2019-2024?

6. The Council is entitled to require a payment to contribute to the mitigation strategy within the AQS, or other Action Plan, or a bespoke set of measures, if it is satisfied that, without those mitigation measures, the development would have an unacceptable impact on air quality such that planning permission would be refused. What those measures will be will potentially vary with different levels of impact, and should be devised on the basis of the best available evidence.
7. I do not comment on the actual calculation of the sum mentioned; I merely observe that the principle is to identify the mitigation measures required to mitigate the additional NO₂ contribution within the AQMA, and then costed, with a fairly related contribution to those costs being sought. I understand that is the approach that has been taken

If the Council seeks a contribution – would the Council then be required to set out exactly what measures will be undertaken using the contribution?

8. Only within reason.
9. First, there needs to be a connection between the monies sought and the mitigation measures to be undertaken, just as there needs to be a connection between the mitigation measures and the impact otherwise predicted. For example, it would be inappropriate,

if the impact concerns NO2 to institute mitigation in respect of, say, Particulates. To that extent, therefore, it must be identifiable that the monies will go to measures relevant to the predicted impact.

10. Secondly, however, it is perfectly appropriate for the relevant measures to be a package, with contributions from a number of sources being pooled to enable that package to be delivered. The development would be asked to make its proportional contribution to that package, rather than need to point to a specific identified measure within that package that its contribution will be spent on.
11. The overriding principle in play is that the development is only being required to pay a fairly related contribution to a set of mitigation measures which are relevant to the impact otherwise predicted, and without which planning permission would have to be refused.

CHRISTOPHER BOYLE QC

11th February 2022

Landmark Chambers,
180 Fleet Street,
London,
EC4A 2HG.