

VPI Immingham: Planning Rebuttal Statement of Evidence

May 2025

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Client
VPI Immingham

Our reference
02787

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1. Introduction and Scope of Evidence

- 1.1 My name is Owen Francis. I am Director, Head of Planning Wales at Turley Associates Ltd (Turley). I have been instructed by VPI Immingham LLP as the (**Acquiring Authority**) for The VPI Immingham LLP (Land at Rosper Road) Compulsory Purchase Order 2024 (**"The Order"**). My evidence is focused on the planning merits of the Proposed Development that necessitate the making of the Order by the Acquiring Authority.
- 1.2 The purpose of my Rebuttal is to address the points raised in Mr Wailes' Statement of Evidence (**CD 8.12**) in relation to the S106 Agreement. The fact that I have not addressed each point in the Objectors' evidence does not mean that I agree with it.

2. Rebuttal

- 2.1 I confirmed in my Proof of Evidence (**CD 8.5**) that I was instructed by VPI Immingham LLP on 21 January 2025. I have not been directly involved in the negotiations with any stakeholders on the S106 Agreement. I have not been party to any of the discussions on this matter prior to my instruction.
- 2.2 My understanding of the S106 discussions and negotiations is based on briefings, correspondence and material received from the legal team at Pinsent Masons LLP (“PM”). That team led the negotiations on behalf of VPI Immingham LLP (“VPI”) throughout the S106 process, including with Phillips 66 Limited (“P66”) and North Lincolnshire Council as the Local Planning Authority (“LPA”).
- 2.3 The importance of the S106 in securing Biodiversity Net Gain (“BNG”) as part of the Proposed Development and the agreed position between VPI and the LPA is addressed in paragraphs 8.2-8.8 of my Proof of Evidence (**CD 8.5**). This remains the relevant position. I note that paragraph 8.5 of my Proof of Evidence (CD 8.5) refers to a summary of correspondence pertaining to the negotiations set out at 8.2-8.4 of my Proof of Evidence that was not appended to my Proof of Evidence as an appendix. This summary of correspondence is set out at **Appendix 1** of this Rebuttal Proof of Evidence.
- 2.4 It is my understanding that the comments in Section 7 of Mr Wailes’ Statement of Evidence (**CD 8.12**) are misleading in respect of the S106 negotiations.
- 2.5 From discussions with the legal team at PM, it is my understanding that the timeline of key points in the negotiation of the S106 Agreement is as follows:
 - 2.5.1 In January 2024, P66 requested amendments to the S106 to exclude them from liability for the obligations in the agreement. The PM team responded to advise that it considered it unlikely that the Council would agree to such changes and suggested that instead potential/perceived risks to P66 should be addressed in a separate deed of indemnity between P66 and VPI. This correspondence noted that the draft land option/lease would include the relevant protections for both parties but noted that they had not yet been entered into.
 - 2.5.2 PM provided a draft Deed of Indemnity (“DoI”) to P66 on 19 March 2024. This contained a full indemnity for any and all liabilities that P66 were to incur by virtue of any contributions due by any party under the S106 Agreement.
 - 2.5.3 In April 2024, P66 responded with comments/proposed amendments on 11 April 2024. One of P66’s proposed amendments was to require its approval of any BNG Plan (“BNGP”) submitted pursuant to the S106. P66 proposed that any BNGP should include provision of BNG Units by payment of the Biodiversity Offsetting Contribution only and that the payment of such contribution should be made within 6 months of the plan being agreed.

- 2.5.4 P66 also disagreed with provisions requiring it to obtain a direct deed of covenant from a transferee of the land before being released from liability under the DoI on effecting a disposal. A reciprocal obligation was placed on VPI (i.e. to require VPI not to assign/transfer its rights under the Option Agreement without P66's consent and to procure that any transferee/assignee enter into a direct deed of indemnity with P66).
- 2.5.5 PM returned a revised draft to P66 on 24 April 2024. PM noted (amongst other matters) that it could not agree to the provisions requiring the BNGP to only provide for payment of an offsetting contribution, on the basis that (at that point in time) the Council had made clear that they required the BNG hierarchy to be followed.
- 2.5.6 PM noted that the wording should not be needed in any event, due to the protections afforded to P66 under the DoI, which required VPI to comply with the S106 obligations and indemnify P66 against breaches. The indemnity was also being backed by a right to set off any amounts that remain unpaid by VPI after a period of 28 days from demand against payments due and payable by P66 under the terms of the Energy Supply Agreement.
- 2.5.7 P66 responded on 8 May 2024 to advise that they remained concerned by (a) the burdening of the land on disposal (referred to above) and (b) the potential provision of BNG other than by way of contribution. They asked whether the Council would agree to release P66 from liability under the S106 upon completion of the lease to VPI. This was a point which had been raised previously by P66 and PM had explained that it considered it unlikely that the Council would agree to this. However, to try to move matters forward, PM wrote to the Council to request confirmation of the following:
- Whether they would be willing to include provisions in the S106 which would release P66 from liability upon VPI taking its leasehold interest over the remainder of the site; and
 - Whether they would agree to either: a) the removal of the BNG hierarchy so that the BNG obligations could be met solely through payment of a BNG contribution; or b) wording to enable the developer to satisfy the BNG obligations by payment of a BNG Contribution at its own discretion.
- 2.5.8 PM wrote to P66 on 21 June 2024 to confirm:
- That the Council responded to point (a) by email on 5 June 2024 in which it confirmed that it would look to include both the freeholder and leaseholder in the agreement as responsible for meeting the obligations in full. The Council advised that if VPI and P66 wish to enter into their own side agreement to apportion liability that is a matter for themselves. This is what VPI is looking to achieve through the DoI.
 - That the Council had also responded to point (b) by way of email dated 12 June 2024 in which it confirmed that the BNG hierarchy must remain with

the emphasis on the developer providing some, if not all, BNG units. The Council email suggested that if on site mitigation or off site offsetting is not available, BNG units should be purchased from a third party. The email also agreed to the retention of reference to a BNG contribution being payable where other options are not available within the necessary timescales for delivery of the development, at a price of £22,000 per unit (index linked).

- 2.5.9 The PM email to P66 also noted that the Council's confirmed position on the above points aligned with that previously communicated to P66 in respect of DoI. PM noted that it hoped the clear position from the Council would result in all parties being able to move forward with agreeing both the S106 and associated indemnity to secure the planning permission.
- 2.5.10 P66 contacted VPI shortly thereafter to note its concern that the Council's position on inclusion of the BNG hierarchy had changed. PM responded to advise that the Council's position had not changed from that which was previously outlined to P66. PM also noted again that P66 would be adequately protected under the terms of the DoI in the event of breaches.
- 2.5.11 In July 2024, P66 requested some further information regarding the BNG assessments that had been carried out by VPI and this was provided to them by PM. P66 continued to raise concerns about potential ongoing liability in the event that the BNGP provides for offsite delivery of BNG, as opposed to payment of a contribution. PM highlighted to P66 that the draft S106 provided that, in the event of offsite delivery, a new S106/conservation covenant would be required to bind the relevant mitigation land to the obligations in the S106. Once the new S106/conservation covenant was agreed, the BNG obligations in the current S106 would be released. P66 requested some further amendments to the S106 to make it clearer that the owner/developer would be released from obligations under the current agreement once the offsite BNG had been secured under a separate agreement/covenant.
- 2.5.12 There followed a period of further negotiation between July – November 2024. Each time PM thought it had secured changes that would satisfy P66's concerns, P66 would again raise concerns on the ongoing risk where BNG is satisfied other than by payment of a contribution.
- 2.5.13 In November 2024, PM reached out to the Council to explore some alternative routes forward, including (a) adding further protections to P66 in the agreement itself so that it would only be responsible for breaches it caused, (b) securing the BNG requirements through condition (removing the need for a S106 agreement prior to grant of planning or (c) excluding P66 as a party to the Agreement.
- 2.5.14 The Council responded in the same month, noting that the planning officer had been in direct discussion with P66 and to note that it would be willing in this instance to agree to remove the BNG hierarchy from the S106 to provide

certainty that the BNG obligations would be satisfied by way of payment of a contribution.

- 2.5.15 PM agreed the revised wording with the Council to reflect this position and then wrote to P66 to notify it of the Council's change in approach on 13 December 2024.
- 2.5.16 P66 responded to PM on 7 January 2025 with some minor changes to the Agreement which PM shared with the Council. P66 also advised that it would need to revisit the DoI given the time that had passed since it last looked at this. PM sent follow up emails to see if all parties could now move to engrossments. This included the email at **Appendix 2** of this Rebuttal Proof of Evidence, which explained how P66's previous concerns regarding the DoI had now been addressed.
- 2.5.17 P66 emailed VPI on 5 February 2025 to confirm the focus of its legal resource will be on the CPO and that no further comment on the DoI would be provided.
- 2.6 The PM account of negotiations details up to 12 months of negotiations on the S106 to try and meet P66's requirements. Alongside this, PM (on behalf of VPI) was also negotiating a DoI to adequately protect and indemnify P66 in the event of a breach of the S106 obligations by VPI.
- 2.7 My understanding of this account of negotiations confirms the position summarised in my Proof of Evidence. That is, there remains no S106 planning agreement signed by P66 and VPI despite prolonged discussions and negotiations. It is evident that this situation is of commercial origin and not related to an insurmountable planning impediment.
- 2.8 Despite this, the LPA, to date, has not been willing to issue the planning permission in the absence of the signed S106 Agreement because the landowner (P66) has not agreed to be party to the S106 Agreement.
- 2.9 As stated in the conclusions of my Proof of Evidence (**CD 8.5**), the Order will unlock this position. That is, it will allow VPI Immingham LLP to acquire the site, enter into the S106 Agreement itself (as landowner) and for the LPA to grant planning permission. There is no planning impediment to stop this being the case. It is only the commercial position of P66 that is delaying the S106 and the grant of planning permission.
- 2.10 As the confirmation and implementation of the Order would result in VPI becoming the only landowner of the Order Land, there would be no requirement for P66 to enter into the S106 Agreement and consequently, planning permission would be granted, thus removing any perceived impediment that a lack of planning permission before confirmation of the Order represents.

3. Statement of Truth

- 3.1 This statement of evidence has been prepared and provided for this inquiry by me and I confirm that the facts stated in my proof are either within my own knowledge or, where indicated, reflect the advice that I have received. The opinions that I have expressed represent my true opinion.

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