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23 February 2023

FOR YOUR URGENT ATTENTION

Dear Sirs,

Armada Way redevelopment

1. We are instructed by Alison White. Ms White lives in the centre of Plymouth and is a member of Save the Trees of Armada Way ("**STRAW**").
2. We write in relation to Plymouth City Council's ("**PCC**") proposed redevelopment of Armada Way. We understand that a decision is imminent and are writing to draw your attention to persistent and ongoing failings in relation to these proposals.

Screening and EIA

3. The Town and Country Planning Act 1990 ("**TCPA**"), section 55(2)(b) states that the following operation shall not be taken to be development:

[T]he carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment.

4. You will note that the wording of section 55(2)(b) of the TCPA excludes works that “may have significant adverse effects on the environment”. In a letter of 23 January 2023 to the Environmental Law Foundation you made clear that no screening opinion has been carried out to assess whether the works may have such an effect. Given the scale and nature of the proposed works (26,367 sqm), including the removal of 129 mature trees and other vegetation, extensive drainage works, new footpaths, cycle routes and lighting and serious concerns regarding the conclusions reached in the Biodiversity Net Gain Assessment (as detailed in a report commissioned by STRAW, which will be shared with PCC imminently), it is evident that the development may have significant adverse effects on the environment.
5. Permitted Development rights are set out in the Town and Country Planning (General Permitted Development) (England) Order 2015 (“**GDPO**”).
6. In an email from Claire Sibley to Richard Bara (both of PCC) of 25 October 2022 in response to a pre-planning application, Ms Sibley stated that the “public realm works in relation to the roadway” are permitted development under Schedule 2, Part 9, Class A(a) of the GDPO and “in relation to other works” are permitted development under Schedule 2, Part 12.
7. Article 3(10) of the GDPO states that EIA development is not permitted by the GDPO unless a screening opinion has been adopted or the Secretary of State has given a screening direction.
8. Consequently, even if the proposed development is permitted development, a screening opinion is required where the works amount to EIA development.
9. EIA development is defined at para.2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“**EIA Regulations**”) and includes “Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location”.
10. Schedule 2, para.1.10 (b), under the heading “infrastructure” includes as EIA development:

Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas; (column 1)

Where that development includes more than 1 hectare of urban development which is not dwellinghouse development (column 2 (i))

11. PCC has characterised the proposed works as “one of the biggest and boldest city centre investment projects”¹ and invited people to meet the team behind the “development”.² It involves the redevelopment of a 1 kilometre stretch of the city centre, an area of 26,367 sqm (approximately 2.6 hectares). It also involves the removal of 129 mature trees and other vegetation, extensive drainage works, new footpaths and cycle routes, an amphitheatre and new lighting, among other things. It is self-evidently infrastructure and urban development on a very large scale and well over the thresholds set out in the EIA Regulations.
12. In your letter of 23 January 2023, you referred to case law on the meaning of “urban development project” noting that the phrase is not defined. The EIA Regulations, like the EIA Directive, should be interpreted widely given their wide scope and broad purpose (Case C-72/95, *Kraaijeveld and others*).
13. The Court of Appeal in *R. (Goodman) v London Borough of Lewisham* [2003] Env.L.R.28 held that a determination by a local authority was not restricted to a challenge on the grounds that it is Wednesbury unreasonable:

However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgment. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgment as embodied in Wednesbury simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available. (para.8)
14. The Court also held that “infrastructure project” and “urban development project” are terms of wide ambit and that the examples given in 10(b) demonstrate that “infrastructure” goes far wider than the normal dictionary definition (para.13).
15. Indeed, there is no need to go beyond the dictionary definition of “infrastructure” or

¹ <https://www.plymouth.gov.uk/learn-about-armada-way-regeneration-plans>

² <https://www.plymouth.gov.uk/preparation-work-armada-way-transformation>

“development” in this instance, as any definition would include highways, and the works have been characterised by PCC as maintenance or improvement to the highway.

16. PCC’s letter of 23 January also refers to *R(on the application of Crematoria Management Ltd) v Welwyn Hatfield BC* [2018] EWHC 382 (Admin), which applied *Goodman*. That case involved a crematorium, where the court determined that the Council was entitled to conclude that development in a green belt was not “urban”.
17. There can be no question in this instance as to whether the development is “urban” given its location at the heart of the city of Plymouth.
18. Given the size and scale of the proposed felling, the proposed development is both “likely to have a significant effect on the environment” and is EIA development.
19. A screening opinion is required as a matter of urgency, based on all the requisite information.

Planning permission required

20. Section 57 of the TCPA requires planning permission for any “development”. As set out above, works for the maintenance or improvement of the highway will be considered “development” if they “may have a significant effect on the environment” (section 55(2)(b)).
21. Since no screening opinion has been carried out and the works may have a significant effect on the environment, the works amount to development and require planning permission.
22. As referenced above, the email from Claire Sibley to Richard Bara (both of PCC) of 25 October 2022 states that the “public realm works in relation to the roadway” are permitted development under Schedule 2, Part 9, Class A(a) of the GDPO, which states:

Permitted development

A. The carrying out by a highway authority—

(a) on land within the boundaries of a road, of any works required for the maintenance or improvement of the road, where such works involve development by virtue of section 55(2)(b) of the Act; or

(b) on land outside but adjoining the boundary of an existing highway of works required for or incidental to the maintenance or improvement of the highway.

[Emphasis added]

23. Part 9, Class A(a) only applies where the works involve development within section 55(2)(b) of the TCPA. Since section 55(2)(b) of the TCPA does not apply, because of the likely significant effect on the environment, Part 9, Class A(a) cannot apply either.

24. Ms Sibley's email also stated that, "in relation to other works" not relating to the road works, these would be permitted development under Schedule 2, Part 12. This is presumably because, as acknowledged in your letter of 23 January 2023, not all the land in question is designated as highways. Consequently, the PCC will not be acting as a highway authority in relation to such land and cannot rely on section 55(2)(b) TCPA or Part 9, Class A(a) GDPO.

25. Schedule 2, part 12, Class A of the GDPO states:

Permitted development

A. The erection or construction and the maintenance, improvement or other alteration by a local authority or by an urban development corporation of—

(a) any small ancillary building, works or equipment on land belonging to or maintained by them required for the purposes of any function exercised by them on that land otherwise than as statutory undertakers;

(b) lamp standards, information kiosks, passenger shelters, public shelters and seats, telephone boxes, fire alarms, public drinking fountains, horse troughs, refuse bins or baskets, barriers for the control of people waiting to enter public service vehicles, electric vehicle charging points and any associated infrastructure, and similar structures or works required in connection with the operation of any public service administered by them.

26. Part 12, A.2 of the GDPO excludes any small ancillary building, works or equipment that are over 4m high. Consequently, any works to structures over 4m high, such as the renovation of the fountain, cannot be considered permitted development under Part 12, Class A(a).

27. Further, given the scale of the works and the extensive re-development proposed, the

works cannot be characterised as small and extend beyond the operation of a public service administered by PCC. Consequently, Part 12 does not apply.

28. In any event, as outlined above, without a screening opinion, permitted development rights under Part 9 and Part 12 cannot be relied upon (Article 3(10) of the GDPO).

29. On either analysis, a planning application is required to proceed with the proposed development. No planning application has been made.

Failure to properly consult

30. Due to the level of opposition to the project, including from our client, STRAW, the Plymouth Tree Partnership, the Woodland Trust, Devon Wildlife Trust, Plymouth Cycling Campaign and the local MP, Luke Pollard, not least because of the likely significant environmental effect of the project and poor cycle path design, PCC passed a resolution on 30 January 2023, which accepted the need for consultation. The resolution stated:

Plymouth City Council calls upon the Cabinet Member for Transport to note its dissatisfaction with the lack of public engagement and suspend tree felling whilst undertaking a meaningful community engagement process [in February, which considers the natural environmental and climate resilience] before finalising the designs for Armada Way. The Council further acts that no work be carried out that could prejudice the survival of the existing trees until the design is finalised. Having undertaken this process and published the results, the Council supports and requests that the Cabinet Member implements that final design quickly to avoid on-going disruption to city centre businesses from the construction works.

31. As set out above, because of the scale and nature of the proposed works a screening opinion and EIA are required. An EIA would require consultation. The duty to consult in relation to plans, programmes or policies relating to the environment is enshrined in Articles 6 and 7 of the Aarhus Convention, to which the UK is party. Article 6 sets out the requirements of consultation in relation to activities likely to have a significant effect on the environment, including:

- a. allowing sufficient time for the public to prepare and participate effectively;
- b. public participation must be at an early stage when all options are open and effective participation can take place;
- c. access to all relevant information, including a description of the significant

- environmental effects of the proposed development;
- d. the ability to submit comments, information, analyses or opinions; and
- e. that due account is taken of the outcome of the public participation.

32. PCC was under a duty to consult and, as a result of its resolution of 30 January 2023 decided to consult.

33. PCC appear to have attempted to by-pass the requirements of consultation by sometimes referring to the process as a “meaningful community engagement” (“**MCE**”). For example, the 30 January resolution referred to a MCE. However, the announcement of the resolution also made on 30 January was headed “Councillors agree meaningful consultation on Armada Way Scheme”.³ Further, the link to the consultation included the phrase “plymouth-consult” and the webpage it linked to was headed “Plymouth Consultation Portal”.⁴ This page begins “On this page you can access all of our consultation events”. The first document on the consultation page was entitled “privacy notice” this states:

For the purposes of the Armada Way Public Realm Works consultation, the Council is collecting the following information: ... Your response to the consultation.

34. Furthermore, the survey for responding was placed by the Council within the “Consultations” page on the website. That page was headed “Consultations”. The page continued: “Consultations give you a chance to have your say and influence decisions before we agree to them”. The page uses the term “consultations” twice more. The box taking respondents to the survey states “take part in our consultations”.

35. Given the nature of the development, not least the fact that this is EIA development and likely to have a significant effect on the environment, the PCC is under a duty to consult. Further, having decided of its own volition to carry out a consultation, it was required to consult lawfully, and therefore fairly, taking into account the Gunning principles (*R v London Borough of Brent, ex p Gunning* [1985] LGR 168).

36. The consultation that took place was neither lawful nor fair. In particular, details of the consultation were announced only 3 days before the consultation began. The in-person exhibition was initially accessible for just 34 hours (only 4 of which fell at the weekend).

³ <https://www.plymouth.gov.uk/councillors-agree-meaningful-consultation-armada-way-scheme>

⁴ <https://plymouth-consult.objective.co.uk/kse/>

Part-way through the consultation, opening hours were extended to a total of 41 hours (6 of which fell on the weekend). The entire consultation, including the online element, ran for just 6 days. Relevant information, including a description of the likely significant environmental effects of the proposed development, was not provided. Advance access to underlying data, which was to form part of a closed-door discussion between PCC and STRAW on 10 February, was refused. A question-and-answer session that was supposed to take place was not carried out and the "Knowledge Hub" referred to on PCC's twitter feed was frequently closed. Inaccurate information was provided during the consultation. For example, PCC representatives were heard by STRAW members telling consultees that replacement trees would be 35-40 cm wide, which is not what the plans propose.

37. It was and is also not clear how any responses to the consultation will be taken into account and whether the consultation has taken place at a sufficiently formative stage given that the 30 January resolution repeatedly refers to "finalising designs" and implementing "quickly" suggesting that there is limited scope for re-consideration and substantive changes. This conclusion is supported by comments made by the PCC design team at the meeting on 10 February with STRAW members, who indicated that it was not possible to save any more trees from removal because of design constraints. These restrictions were not made clear in advance of the consultation and reinforces the view that the consultation was not carried out at a sufficiently formative stage.

38. An extension for the funding deadline should be sought to allow for a lawful consultation in line with the Aarhus Convention.

Funding requirements

39. The proposed development is to be part-funded through the Transforming Cities Fund. This was a central government fund announced in 2017 to "encourage an increase in journeys made by low-carbon and sustainable modes of transport". It also aimed to support cross-cutting priorities, including tackling air pollution.

40. Plymouth was awarded £7.6 million under tranche 1 of this funding and £51.3 million in tranche 2. We understand that the specific conditions attached to the grant of this funding have not been published, despite information requests asking for them.

41. In the Council meeting of 30 January 2023, Johnathan Drear of PCC set out the design requirements and constraints, including "most critically of all, the need to meet the DfT

LTN1/20 design guidance for the new cycle provision within the scheme".⁵ Mr Drean subsequently stated at the meeting that the scheme complies with LTN 1/20.⁶

42. Core design principles of LTN 1/20 include the following:

- a. Cycle networks should be planned and designed to allow people to reach their day-to-day destinations easily, along routes that connect, are simple to navigate and are of consistently high quality;
- b. Cycle routes should be at least as direct – and preferably more direct – than those available for private motor vehicles;
- c. Not only must cycle infrastructure be safe, it should also be perceived to be safe;
- d. Comfortable conditions require routes with good quality, well-maintained smooth surfaces, adequate width for the volume of users, minimal stopping and starting and avoiding steep gradients;
- e. Neither cyclists or pedestrians benefit from unintuitive arrangements that put cyclists in unexpected places away from the carriageway;
- f. Routes involving extra distance or lots of stopping and starting will result in some cyclists choosing to ride on the main carriageway instead because it is faster and more direct, even if less safe. [Emphasis added]

43. The summary principles of LTN 1/20 also state that "On urban streets, cyclists must be physically separated from pedestrians and should not share space with pedestrians. Where cycle routes cross pavements, a physically segregated track should always be provided." Further, "cycle infrastructure should be designed for significant numbers of cyclists, and for non-standard cycles. Cycle tracks should ideally be 2 metres wide in each direction or 3 to 4m (depending on cycle flows) for bidirectional tracks though there may have to be exceptions". Table 5-2 provides for "absolute minimums" of 2 or 2.5m depending on the level of usage where there are "constraints". In addition, "Cycle routes must flow, feeling direct and logical. Users should not feel as if they are having to double back on themselves, turn unnecessarily, or go the long way round."

44. The proposed scheme is not compliant with the LTN 1/20 for a number of reasons. In

⁵ <https://www.youtube.com/watch?v=Rvaok7HsXc4> at 1:52

⁶ Id., at 2.15

particular, the cycle route does not allow people to reach day-to-day destinations more easily. They are not direct. This is because the cycle route has been specifically designed to slow cyclists down by introducing a chicane. As such, it is also not intuitive.

45. The reason for needing to slow cyclists down is due to another breach of the LTN 1/20, because the space is shared with pedestrians, with numerous crossings for pedestrians and without adequate segregation and demarcation. In particular, the cycle route is frequently in close proximity with play spaces for children, which undermines the safety of all users and is likely to result in frequent stopping and starting for cyclists.
46. Further, the route is unlikely to be perceived as safe given the narrow width (2.3 metres) of what is a two-way cycle path and the fact that in places it borders an immediate drop into water.
47. The 2.3m width is inadequate for a two-way cycle path, particularly since there are no constraints that can justify having to limit the scheme in this way. Even if constraints can be justified, the likely peak hour cycle flow of this city centre location would be over 300 per hour. As such 2.3m falls below the "absolute minimum", which is 2.5m (Table 5-2).
48. The width of the track, particularly combined with the chicanes, is likely to make the path unsuitable for certain types of bikes, including cargo bikes, recumbents and trailers.
49. It was for many of these reasons that the scheme was not supported by Plymouth Cycling Campaign. Indeed, we understand Plymouth Cycling Campaign were told by the designers of the scheme that it is not suitable for commuters or those on a longer journey. As such, this undermines the purpose of the Transforming Cities Fund scheme, including encouraging people to greener modes of transport and improving air quality.
50. The scheme is not compliant with the funding conditions and must be revised.

Action required and information sought

51. In light of the above, PCC is urgently required to:
 - a. Conduct a screening opinion;
 - b. Bring forward a planning application for the proposed development;
 - c. Carry out a lawful consultation in relation to the proposed development; and

d. Revise the cycle route to ensure that that any decision complies with conditions of funding under the Transforming Cities Fund.

52. Under the Environmental Information Regulations 2004, PCC is asked to provide the following as a matter of urgency:

- (i) An up-to-date map of Armada Way showing highways land; and
- (ii) All information showing any terms or conditions that funds provided by central government under the Transforming Cities Fund are subject to.

53. Please also disclose as a matter of urgency information previously requested by Hilary Kolinsky of STRAW for the Armada Way mitigation planting proposal with canopy cover calculation.

Period for reply

54. Please confirm safe receipt. We understand a final decision on the proposed development is imminent. **Please reply substantively before any final decision is taken and in any event by 2 March 2023.**

Yours faithfully,

Harrison Grant Ring

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