



RIDGE

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PLANNING REBUTTAL
FOR LAND NORTH OF THE
VIADUCT, ADJOINING ORCHARD
BUSINESS PARK, LEDBURY,
HEREFORDSHIRE, HR8 2QY
BLOOR HOMES WESTERN**

June 2020

BLOOR HOMES WESTERN

23 June 2020

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APPENDIX 1: OPINION FROM MARTIN KINGSTON QC

1. DECLARATION

- 1.1. The evidence which I have prepared and provided in this planning proof of evidence is true and is given in accordance with the guidance of the Royal Town Planning Institute. The opinions expressed are my true and professional opinions.
- 1.2. I have visited the appeal site and the surrounding locality.

2. THE REBUTTAL

2.1 This rebuttal has been prepared in response to Cllr Harvey's Proof of Evidence. The rebuttal addresses a number of her points by reference to the relevant paragraph numbers in her Proof of Evidence.

2.2 For the avoidance of doubt, my silence on any points mentioned in Cllr Harvey's Proof should not be taken to be agreement; the focus of this rebuttal is on some of the points I consider to be of particular importance rather than each of every point which she makes in her proof.

Highways Matters

2.3 Throughout the Proof of Evidence Cllr Harvey provides a lot of commentary and opinion on Highways matters. This will be dealt with by the Appellants' Highways Witness (Mr Millington) and has therefore not been commented on within this Rebuttal Statement.

Paragraph 2.5.6

2.4 Here Cllr Harvey makes reference to whether or not the policies are out of date, by reference to paragraph 11(d) of the NPPF and refers to the weight to be given to some of the policies in the Local Plan.

2.5 It is worth clarifying the position in relation to paragraph 11(d) and whether or not it applies. First, it is common ground between all parties that Herefordshire is unable to demonstrate a 5-year housing land supply (although the extent of shortfall is a matter of dispute). The 5-year housing land supply (5YHLS) position covers Herefordshire as a whole and is not broken down to individual settlements. Therefore for the purposes of determining whether or not paragraph 11(d) applies it is irrelevant as to how many dwellings Ledbury is delivering if Herefordshire as a whole is failing to deliver its 5YHLS requirement. The weight to be given to the policies in the Plan is a separate matter. The Town Council agree that the Council are unable to demonstrate a 5YHLS; they also agree that the most important policies for the determination of the appeal are out-of-date (see paragraph 8.1.5 of Cllr Harvey's Proof). It is the appellants position therefore that in the event that it's determined that the appeal doesn't accord with the Development Plan when read as a whole – a position that is contrary to my own evidence - then the tilted planning balance in paragraph 11(d) does apply.

2.6 In terms of weight it is noted that Cllr Harvey states in paragraph 7.1.9 that *"significant weight should be given to policies SS1, SS4, and SS6, MT1 and LD1; and also afforded to the specific Ledbury Place Shaping policies of LB1 and LB2"*.

Paragraph 2.5.7

2.7 It is agreed that the weight to be given to the shortfall is material, and that the greater the shortfall the greater the weight should be given. In the Proof of Evidence of Mr Pycroft, the appellants have

identified less than 3 years supply which should be given very substantial weight. If the LPA's position in terms of 5-year housing land supply were to be correct, then substantial weight should still be given in this instance.

Paragraph 2.5.9

2.8 It is noted that Cllr Harvey considers the site as being a *"site which is suitable, in principle, to come forward to contribute to the delivery of the minimum of 800 new dwellings planned as the sustainable growth deliverable by the town during the current CS/LP period"*.

2.9 What is also clear in the Inspectors Report for the Neighbourhood Plan (CD1.63) is that at paragraph 78, "it is clear that Ledbury can deliver well in excess of the 800 dwelling minimum target, through the delivery of the strategic urban extension and planning permissions alone". At the time of the Examiner's Report for the Neighbourhood Plan (published in October 2018), the appeal proposals had already been in the planning system for 18 months and the Inspector takes account of the allocation when assessing the plan.

Paragraph 4.1.1

2.10 Cllr Harvey acknowledges within this paragraph that there is a need within Ledbury for smaller open market dwellings and affordable housing in this high house price area. The matter of affordable housing and identified need is dealt with in the rebuttal of Mr Stacey, whereby it is set out that nothing less than substantial weight should be given to the delivery of affordable housing for this proposal.

Paragraph 4.1.3

2.11 It should be noted that Cllr Harvey and the Town Council make it crystal clear that they support the principle of development on the site, specifically setting out that it *"welcomes sustainably planned housing and employment which meets local needs and delivers this in the optimum manner"*. This is an opinion that has been previously been echoed at paragraph 2.5.9 and Cllr Harvey's support in respect of the principle of development is a common theme running through the Proof of Evidence. Furthermore, the delivery of affordable housing is welcomed as is set out at 4.1.1 of the Cllr Harvey's Proof.

Paragraph 4.2.4

2.12 Cllr Harvey refers to the NPPF, stating that paragraph 14 is intended "to protect communities from being overdeveloped where they can evidence they are delivering development locally and are participating positively in the local planning process when their LPA isn't being as successful at doing otherwise." I consider this to be an incorrect interpretation of paragraph 14. Paragraph 14 does seek to protect local communities from, I suggest unplanned development, where a Council is unable to meet its 5YHLS requirement but only where a number of criteria are satisfied. It is only where all

four criteria in the policy are met that paragraph 14 is triggered. Cllr Harvey's interpretation of the policy is very far removed from what the policy actually says.

- 2.13 In this case paragraph 14 doesn't apply for any one of the following reasons: the proposal isn't contrary to the Neighbourhood Plan; or because the Neighbourhood Plan does not contain policies which allocate sites for housing development (as acknowledged by Cllr Harvey at 4.2.3); or because the LPA cannot demonstrate a three-year housing land supply. In terms of conflict with the Neighbourhood Plan, it is material to the determination of the appeal that the Neighbourhood Plan clearly acknowledges and supports the development of the appeal site by virtue of its reference to it as an allocation within the Core Strategy.

Housing Land Supply (Paragraphs 5.1.4-5.1.9)

- 2.14 It is acknowledged that Ledbury has accommodated a higher level of growth than anticipated in the Core Strategy (although it must be acknowledged that this was only a minimum figure).
- 2.15 However, as set out above these permissions were not at the expense of the allocated site which is the subject of this appeal. The applications referenced by Cllr Harvey were granted on the basis that the LPA were unable to demonstrate a five-year housing land supply and at no point did the decision maker suggest these would replace the allocated site (indeed such an approach would have been unlawful). Those sites were determined on the premise that they would come forward in addition to the strategic allocated site.
- 2.16 At 5.1.7 in the proof of Cllr Harvey, reference is made to the Dymock Road decision, and specifically paragraph 72 of the Appeal Decision. Within this decision, the Inspector does not identify an alternative, merely the Inspector is clear that policy LB1 allows for further development to come forward in appropriate locations and through reference to the SHLAA where development may come forward. The point being made by Cllr Harvey is therefore misleading.
- 2.17 It should also be noted that Cllr Harvey questions whether development should now take place to the north of the town with land to the west providing an alternative option. However, the Dymock Road Appeal Decision (CD11.32) is clear at paragraph 62 that

"While new housing is not exclusively to be provided to the north of the settlement, there is good reason for the majority of the dwellings to be located there. Paragraph 4.5.7 of the CS explains that the policy approach for movement in Ledbury is based on reducing the need to travel by private car. This will be achieved by locating new development within walking and cycling distance of existing and new facilities (including the railway station) and improving and extending sustainable transport routes. Furthermore, paragraph 4.5.3 states that the strategy to deliver new homes mainly in a single location is not only economically viable but also limits development mainly to land of medium-low landscape sensitivity, as identified in the SA, and of lesser environmental merit, with regard to agricultural and biodiversity value. I have already found that the proposal would not be in an accessible location and would be harmful to the character and appearance of the area. It seems to me therefore that the strategy to locate the majority of the housing to the north of Ledbury is based on realistic principles".

2.18 Therefore, for the reasons set out above, the assertions made in 5.1.8 of the proof of Cllr Harvey, are incorrect. The subject scheme has been before decision makers for over three years. As the scheme was submitted by a housebuilder on an allocated site, there is a clear intention to develop the site. Equally at the time the Inspector considered the Dymock Road site, the appeal site was due to go to planning committee with a positive recommendation.

Paragraph 6.7.1

2.19 Within this paragraph Cllr Harvey makes the assertion that all four access options should have been considered. The response is best answered by reference to a Legal Opinion prepared by Martin Kingston QC (Appendix 1) (instructed by myself and received at the time of the application being determined) which at paragraph 24 of his Opinion states:

“Given that the ES confirmed the preferred option (a single vehicular access from Bromyard Road) would not have any significant adverse environmental impacts consideration of alternatives was neither necessary nor reasonable. However, the developer has studied the transport implications of the alternative access arrangements, as suggested by the Council, in the ES (Chapter 7). It concludes that “the alternative options do not offer a significant betterment in terms of traffic related environmental effects” (paragraph 7.1.9 of the ES, see also section 7.10 of the ES and paragraph 7.10.27 in particular). I note these conclusions are supported by the local highway authority who in their consultation response (18th July 2019) ...”

Paragraphs 6.9.1- 6.9.12

2.20 This section provides the background to the proposed access, which whilst useful, what is most relevant as the principal consideration in the determination of the acceptability of the access for the development is the wording of the now adopted Local Plan/Core Strategy. The exact wording of policy LB2 is set out below and what is abundantly clear is that the development plan neither specifies nor suggests where the access should be provided. Indeed there was no challenge to the Local Plan on this basis and as is set out at 6.2.1 the Local Plan Inspector has left the issue of where the access is to be located to the application process.

“Provision of satisfactory vehicular access arrangements, the details of which will be determined at the planning application stage”

2.21 When considering all of the background information included by Cllr Harvey, the most up-to-date position and that which carries full weight in the determination of the appeal is that it is for the application process to decide where the access should be located.

Section 6.10

2.22 In terms of community engagement, it is acknowledged that local residents would prefer vehicular access to be from the Hereford Road. However, as identified above neither the Local Plan Inspector nor the adopted Core Strategy seek to prescribe where the vehicular access into and out of the site

should be taken. It is the view of Mr Millington and the LPA that the access proposals are appropriate and compliant with policy.

Sections 7 and 8

- 2.23 Sections 7 and 8 of Cllr Harvey's Proof of Evidence deal with the planning balance and summary. In my Proof of Evidence, I conclude that the proposal is consistent with the Development Plan when read as a whole. The benefits of bringing forward an allocated strategic site in a Local Plan which has consistently struggled to meet its five-year housing land supply would significantly and demonstrably outweigh any harm the decision taker might find existing in this instance.
- 2.24 Notwithstanding the above, as I set out earlier in my evidence I take the view that the tilted planning balance applies, should it be determined that the proposal is not in accordance with the Development Plan when read as a whole.

APPENDIX 1

Opinion from Martin Kingston QC

IN THE MATTER OF

LAND TO THE NORTH OF THE LEDBURY VIADUCT

ADVICE

Introduction

1. I am instructed by Ridge and Partners LLP on behalf of Bloor Homes Western in relation to the access arrangements/transport assessment concerning the proposed development of land to the north of the Ledbury Viaduct (“the site”) for up to 625 dwellings (up to 40% affordable housing), approximately 2.9ha of Class B1 use, the restoration of a canal which runs through the site, public open space and ancillary works (“the development”). An application seeking outline planning permission with all matters reserved save for access for the development has been submitted to Herefordshire Council (“the Council”). .
2. As I have previously advised in relation to this site I do not propose to set out the background facts in detail here. It suffices to note the site is allocated under policy LB2 of the Herefordshire Core Strategy (adopted 16 October 2015), and is known as the Ledbury SUE. The Ledbury Neighbourhood Plan 2018-2031 (made 11 January 2019) also relies on the site being delivered to justify the approach set out within the Plan, though I note the Neighbourhood Plan points out “[t]his site was opposed by the Town Council and the community” on page 22 before going on to use the quantum of development proposed on the site to justify a cautious approach to the delivery of further housing in the area (“*there is no desire in the town for a quantum of development significantly greater than that proposed by the Core Strategy*”).

3. Taking these components of the development plan in turn, policy LB2 provides:

“Policy LB2 - Land north of the Viaduct

Development proposals north of the viaduct in Ledbury will be expected to bring forward the following to achieve a sustainable mixed use urban extension of the town:

- *a comprehensively planned, mixed use development of around 625 new homes, at an average density of around 40 dwellings per hectare, comprising a mix of market and affordable house sizes and types that meet the requirements of Policy H3 and the needs identified in the latest version of the Herefordshire Local Housing Market Assessment;*
- *around 3 hectares of employment land, restricted to Use Class B1;*
- *a target of 40% of the total number of dwellings to be affordable housing;*
- *land and contributions to facilitate a restored canal to be delivered in partnership with the Herefordshire and Gloucestershire Canal Trust;*
- *a new linear informal park to link to the existing town trail, riverside walk, recreational open space and existing allotments;*
- *the provision of developer contributions towards any identified need for new/improved community facilities/infrastructure improvements. This shall include a new 210 place primary school within the development (or an expansion of the existing primary school) and new recreational open space, play, indoor and outdoor sport facilities;*
- *provision of satisfactory vehicular access arrangements, the details of which will be determined at planning application stage;*
- *appropriate mitigation to safeguard the amenity of future occupants from unacceptable levels of noise and to safeguard the continued operation of existing businesses adjoining the area;*
- *development of bespoke, high quality and inclusive design, including accommodation that will meet the needs of older persons and that contributes to the distinctiveness of this part of Ledbury and respects the setting and significance of the listed viaduct and the Malvern Hills Area of Outstanding Natural Beauty;*
- *safeguards to ensure there is no adverse impact on water quality and quantity in the River Leadon;*
- *new walking, cycling and bus links from the urban extension directly to the town trail and riverside walk under the viaduct, the railway station and town centre to create linkages to nearby development and existing community facilities;*

- *sustainable standards of design and construction; and*
- *a comprehensive sustainable urban drainage system which includes measures such as rain gardens and swales to manage ground and surface water drainage and safeguard against any increased flood risk.”*

4. It can be seen that the policy requires the access to be “sustainable” and “satisfactory” (insofar as the latter relates to vehicular access). It leaves details to be provided at planning application stage. Other relevant policies in the Core Strategy are policies SS4 and MT1. Policy SS4 provides:

“Policy SS4 – Movement and transportation

New developments should be designed and located to minimise the impacts on the transport network; ensuring that journey times and the efficient and safe operation of the network are not detrimentally impacted. Furthermore, where practicable, development proposals should be accessible by and facilitate a genuine choice of modes of travel including walking, cycling and public transport.

Development proposals that will generate high journey numbers should be in sustainable locations, accessible by means other than private car. Alternatively, such developments will be required to demonstrate that they can be made sustainable by reducing unsustainable transport patterns and promoting travel by walking, cycling and public transport.

Proposals to provide new and improved existing public transport, walking and cycling infrastructure will be supported. Where appropriate, land and routes will be safeguarded as required in future local or neighbourhood development plans and developer contributions, which meet the statutory tests, sought to assist with the delivery of new sustainable transport infrastructure, including that required for alternative energy cars.

Herefordshire Council will work with the Highways Agency, Network Rail, bus and train operators, developers and local communities to bring forward improvements to the local and strategic transport network to reduce congestion, improve air quality and road safety and offer greater transport choices, including the provision of the following major schemes:

- *ESG Link Road (safeguarded route) and Transport Hub;*
- *Hereford Relief Road;*
- *Leominster Relief Road;*
- *Connect 2 Cycleway in Hereford;*

- *Park and Choose schemes; and*
- *other schemes identified in the Local Transport Plan and Infrastructure Delivery Plan.*

Proposals which enable the transfer of freight from road to rail will be encouraged. Development proposals incorporating commercial vehicular movements that could detrimentally impact on the environmental quality, amenity, safety and character of the surrounding locality will be expected to incorporate evidence demonstrating how the traffic impacts are to be mitigated.”

5. Policy MT1 provides:

“Policy MT1 – Traffic management, highway safety and promoting active travel

Development proposals should incorporate the following principle requirements covering movement and transportation:

- 1. demonstrate that the strategic and local highway network can absorb the traffic impacts of the development without adversely affecting the safe and efficient flow of traffic on the network or that traffic impacts can be managed to acceptable levels to reduce and mitigate any adverse impacts from the development;*
- 2. promote and, where possible, incorporate integrated transport connections and supporting infrastructure (depending on the nature and location of the site), including access to services by means other than private motorised transport;*
- 3. encourage active travel behaviour to reduce numbers of short distance car journeys through the use of travel plans and other promotional and awareness raising activities;*
- 4. ensure that developments are designed and laid out to achieve safe entrance and exit, have appropriate operational and manoeuvring space, accommodate provision for all modes of transport, the needs of people with disabilities and provide safe access for the emergency services;*
- 5. protect existing local and long distance footways, cycleways and bridleways unless an alternative route of at least equal utility value can be used, and facilitate improvements to existing or provide new connections to these routes, especially where such schemes have been identified in the Local Transport Plan and/or Infrastructure Delivery Plan; and*
- 6. have regard to with both the council’s Highways Development Design Guide and cycle and vehicle parking standards as prescribed in the Local Transport Plan - having regard to the location of the site and need to promote sustainable travel choices.*

Where traffic management measures are introduced they should be designed in a way which respects the character of the surrounding area including its landscape character. Where appropriate, the principle of shared spaces will be encouraged.”

6. The Neighbourhood Plan makes no comment on what the community’s wish for the site’s access arrangements are, other than noting that development generally should enable elderly residents easy access to facilities.
7. It should be noted at this point that the highways aspects of a previous iteration of the development led to an objection from the Council on highways grounds. Those instructing updated the Transport Assessment (“the TA”), and, amongst other steps, prepared two further Technical Notes dated 3 May 2019 and 17 May 2019 and drafted a revised and more detailed Travel Plan dated 26 March 2019.
8. The development will be accessed by a single point of access off the roundabout at Bromyard Road (the B4214) to the north, including a new signalised junction. Local residents, however, have expressed a strong desire that access is taken from the south (off the Viaduct). At present only pedestrian/cycle access is proposed between the site and the Viaduct.
9. In its screening decision, the Council confirmed that its conclusion that the development was EIA development was partly based on the transport implications of the development.
10. The scoping decision then goes on to require an extensive list of factors to be assessed in the environmental statement (“the ES”), including the consideration of alternative vehicular access at Hereford Road, a through road to Bromyard Road, and a single entry from Hereford Road. It also requests full consideration of the implications of each of these alternative access arrangements on ecology / diversity; the landscape; the propensity of people to use modes of transport other than the private motor vehicle; the setting of the Grade II listed Viaduct; and the physical deliverability of the canal.

11. In light of the above, I am asked to advise on:

- a) Whether the TA and associated mitigation measures satisfactorily address the requirements of the development plan;
- b) Whether the mitigation measures are necessary and appropriate (as set out in section 7 of the TA);
- c) Whether the Transport chapter of the ES satisfactorily addresses the requirements of the scoping opinion relating to transport;
- d) Whether, if relevant, any failings are material to the Council's consideration of the ES; and
- e) As the ES concludes that no alternative is likely to cause significant environmental effects, whether the decision to propose access off Bromyard Road is legally robust.

Advice

12. I propose to answer the questions posed above in two sections: the TA and the ES.

Transport Assessment

13. As a matter of principle, the questions of whether the TA (in conjunction with the Travel Plan dated 26 March 2019 and two Technical Notes dated 3 May 2019 and 17 May 2019) complies with the development plan and whether the mitigation measures are necessary and appropriate are matters for the Council to assess as a matter of planning judgment.

14. I need not set out the relevant legislation in any detail. The duty to determine planning applications in accordance with the development plan unless material considerations indicate otherwise as set out by section 38(6) of the Planning and Compulsory Purchase Act 2004 will be well known to those instructing. Here the development plan comprises the Core Strategy and the Neighbourhood Plan. The policies regarding transport in the latter are very general and the TA confirms the accessibility of the site to local services and facilities. The sustainability of the location will be improved by way of the mitigation measures that are proposed. I will therefore focus on the question of compliance

with relevant Core Strategy policies.

15. Policy LB2 only specifies that access to the site must be “satisfactory” in terms of vehicular access. Under policy SS4, the location of the site must be sustainable (or made so by way of mitigation). The development provides new walking and cycling links from the site directly to the Town Trail and Riverside Walk under the Viaduct. These links are within 300m of bus stops with relatively frequent services and within 500m of the railway station with excellent links to other urban centres. In compliance with policy SS4, the development includes significant measures which will promote travel to the Town Centre by means other than the private car. It is designed to minimise the impacts on the transport network. The proposed mitigation measures (physical improvements to the local highway network and the Travel Plan) ensure that journey times and the efficient and safe operation of the network will not be detrimentally impacted in an unacceptable way. The proposal clearly takes on board all of the requirements of policy MT1 and goes beyond those requirements in that existing local footways will be improved.

16. Where adverse impacts are identified the TA proposes mitigation that will mitigate that impact. In terms of capacity issues, the TA confirms that mitigation measures will improve affected junctions such that the highway network impacted by the development will operate at capacity and the residual cumulative impacts on the road network would not be severe. The mitigation will also significantly improve road safety (most notably at the Bromyard Road junction where there is a history of accidents relating to collisions between pedestrians and vehicles).

17. The other main issue appears to be the potential severance of the development from Ledbury. A large number of mitigation measures are proposed to resolve this issue. Sustainable transportation routes will be improved to Ledbury: two footway/cycleway underneath the Ledbury Viaduct will be constructed, a new footway/cycleway along Hereford Road will be constructed, two toucan crossings will be put in place (one at Ballard Close and another at the west of Hereford Road), which will improve the attractiveness and safety of the route

for pedestrian, the Hereford Road/Bromyard Road/Homend junction will be signalised and a pedestrian crossing will be constructed (as noted above it should be noted this is a significant betterment given the history of accidents at this junction), and finally the Ledbury Town Footpath will be linked to the site, widened and improved.

18. It follows that the developer has taken on board issues that had been previously identified by the highways authority in its consultation response dated 2 July 2018 (relating to the previous submission version of the scheme). Although compliance with the development plan is a matter for the Council, it appears mitigation measures satisfactorily address the requirements of the development plan and are based on evidence of the projected impacts of the development, making them both necessary and appropriate.

Environmental Statement

19. As the request for a scoping opinion was made on 23 March 2016 the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the 2011 Regulations”) apply (by s.76(2)(a) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, (“the 2017 Regulations”). This brings reg. 3(4) of the 2011 Regulations into play (“[p]rohibition on granting planning permission or subsequent consent without consideration of environmental information”). This regulation prohibits the Council from granting planning permission without first taking all “environmental information” into account. “Environmental information” is defined by reg. 2(1) as follows:

“the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development.”

20. “Environmental statement” is defined by reg. 2(1) as:

“a statement (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but^[L]_[SEP](b) that includes at least the information referred to in Part 2 of Schedule 4;...”

21. Part 1 of Sch. 4 provides (so far as relevant):^[L]_[SEP]

“1. Description of the development, including in particular—

- (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;*
- (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;*
- (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.*

2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

^[L]_[SEP]*4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from—^[L]_[SEP]*

- (a) the existence of the development,^[L]_[SEP]*
- (b) the use of natural resources,^[L]_[SEP]*
- (c) the emission of pollutants, the creation of nuisances and the elimination of waste,^[L]_[SEP]*

and the description by the applicant or appellant of the forecasting methods used to assess the effects on the environment.^[L]_[SEP]

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment...”

22. Part 2 of Sch. 4 requires (again so far as relevant): [L¹]_{SEP}”... [L¹]_{SEP}2. *A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.* [L¹]_{SEP}3. *The data required to identify and assess the main effects which the development is likely to have on the environment.* 4. *An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects*”. [L¹]_{SEP}

23. Thus, it can be seen that unless reg. 3(4) is complied with the decision would be amenable to legal challenge. Does this mean the 2011 Regulations require that the full transport and environmental implications of all alternative accesses are set out in the ES and duly taken into account in the decision? The answer in my view is no. The 2011 Regulations clearly state that decision makers may only request such environmental information as is “reasonably required” (reg. 2(1) confirming the extent of the information needed in the ES under Part 1 of Schedule 4); this includes only the outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects (paragraph 4 of Part 2 of Schedule 4). An assessment of the full environmental implications of each of the main alternatives is not required under the 2011 Regulations.

24. Given that the ES confirmed the preferred option (a single vehicular access from Bromyard Road) would not have any significant adverse environmental impacts consideration of alternatives was neither necessary nor reasonable. However, the developer has studied the transport implications of the alternative access arrangements, as suggested by the Council, in the ES (Chapter 7). It concludes that “*the alternative options do not offer a significant betterment in terms of traffic related environmental effects*” (paragraph 7.1.9 of the ES, see also section 7.10 of the ES and paragraph 7.10.27 in particular). I note these conclusions are supported by the local highway authority who in their consultation response (18th July 2019) state:

“The proposed four arm roundabout junction is considered to be satisfactory arrangement in line with core strategy policy LB2 and the

junction capacity analysis of this junction supports this. An emergency access on Bromyard Road is also now provided to the south of the main access.

The highway authority considers that the applicant has provided satisfactory justification for this within the TA and also within the Technical note – Response to HC comments version 5 dated 16/16/2019, within which it is confirmed that, and in the view of the highway authority, successfully demonstrated that:

- 1. The provision of a single point of access complies with the relevant policy guidance;*
- 2. The development could be accessed by emergency vehicles or other road users should an accident or other event block the site access; and*
- 3. Providing a single point of access does not result in an unacceptable impact on the capacity of the highway network that could not be mitigated against.*
- 4. In highway capacity terms the proposed access arrangements can accommodate the anticipated level of traffic associated with the proposed development.*

With specific reference to point 1 above, the Applicant has considered the potential to provide a vehicular access beneath the Grade II listed viaduct, and this has been discussed by them with Network Rail as a third-party landowner. Bloor Homes have advised that “ as a responsible developer, they are unable to provide such a vehicular access due to the physical constraints presented; the significant health and safety risk to the operational railway line and to the development itself both during construction and once open to traffic; the prohibitive technical measures that would be necessary to reduce that risk; and the adverse impact of this infrastructure on the wider built and natural environment of the site.”

It is noted that the majority of the traffic arriving / departing the site will pass along the Bromyard Road, and as such the operation of the wider highway network and specifically the Bromyard Road / Hereford Road / The Homend junction is critical to the successful delivery of the scheme. As set out above this has now been demonstrated as acceptable.”

25. The scoping opinion requests that the “full” environmental impacts of each alternative access arrangement on (1) ecology / diversity (I assume this is meant to say biodiversity); (2) the landscape; (3) the propensity of people to use modes of transport other than the private motor vehicle; (4) the setting of the Grade II listed Viaduct; (5) the physical deliverability of the canal. Chapter 7 of the ES

does not include these details (the need to consider highway safety and capacity was also listed but these issues are considered for the alternative access arrangements in Chapter 7). The question is, therefore, whether each of these topics must be assessed in detail for each alternative access when the developer does not propose to take any of these alternatives forward and the ES assessment demonstrates that the preferred option is acceptable..

26. In my view the answer is no. Full details of the environmental impact of reasonable alternatives are not necessary under the 2011 Regulations: only the “outline” of that alternative is required, and an indicative explanation setting out why that alternative was not taken forward (taking into account the environmental effects). The last criteria does not, to my mind, require full details of those environmental effects to be set out – that would be perverse when only a general outline of the main alternatives and an indication of the reasons underlying the preferred choice are required.
27. Thus, there is no basis in the legislation for the requirement to carry out such a significant amount of work for access arrangements which the developer has no intention of taking forward and in which the preferred option is appropriate in terms of it not having a significant environmental impact and complying with the relevant policy.
28. There is no basis in the case law for the inclusion of this information either. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin) Carnwath LJ (as he then was) surveyed the extant case law on the consideration of alternatives to the development proposed and said:

“14. The cases reveal a long-running debate among planning lawyers (going back at least to Rhodes v Minister of Housing and Local Government [1963] 1 All ER 300) as to the relevance of alternative sites to the consideration of individual planning applications. There have been numerous examples of attempts to overturn decisions on the grounds that the decision-maker has refused permission on one site by reference to the merits of another; or alternatively has granted permission without regard to the merits of another. There has also been some debate as to how far, if alternative sites are deemed

relevant at all, it is necessary for those relying on the argument to identify specific alternatives.

15. It is not surprising that such challenges have generally failed. Common sense suggests that alternatives may or may not be relevant depending on the nature and circumstances of the project, including its public importance and the degree of the planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgment for the decision-maker, involving no issue of law.

*16. A useful starting-point is the judgment of Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P&CR 293, where he sought to summarise the effect of the cases:*

‘There has been a growing body of case law upon the question when it is necessary or at least permissible to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site....These authorities in my judgment establish the following principles:

(1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.

(2) Where, however, there are clear planning objections to development upon a particular site 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.

*(3) Instances of this type of case are developments, whether of national or regional importance, such as airports...coal mining, petro-chemical plants, nuclear power stations and gypsy encampments...Oliver LJ's judgment in *Greater London Council v Secretary of State for the Environment* [52 P&CR 158] suggests a helpful though expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material...*

‘comparability is appropriate generally to cases having the following characteristics: first of all, the presence of a clear public convenience, or advantage, in the proposal under

consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development or at least only a very limited number of permissions.'

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices...and superstores...

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong...'

17. I have highlighted the words 'relevant or at least permissible' and 'relevant and indeed necessary', because they signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is necessarily relevant, so that he errs in law if he fails to have regard to it.

18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (Tesco Stores Ltd v Secretary of State [1995] 1WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

29. *Trusthouse Forte* was distinguished in *South Cambridgeshire DC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 1010 on the basis that it was a Green Belt case, but its reasoning has subsequently been used by the courts to guide decision-making when a party submits that consideration of alternative sites was a material consideration. The issue was also considered in *R (Forge Field) v Sevenoaks District Council* [2014] EWHC 1895 (Admin), where Lindblom J stated (at paragraph 84) "[a] local planning

authority does not normally need to take into account alternative sites for the development it is considering. Where, however, there are clear planning benefits associated with the development but also clear objections to it, the authority may have to consider whether there is a more appropriate site for it”

30. As there are no clear planning (or, more to the point, environmental) benefits of the alternative accesses they do not constitute “material considerations” for the purposes of the Council’s decision on whether to grant planning permission for the proposed development.
31. It follows from the above that the ES is compliant with the 2011 Regulations.
32. A common area of challenge to EIA development is consideration of cumulative effects; it warrants some attention here. The ES rightly considers in-combination/cumulative effects of other committed development in the area (including the specific development the Council requested was taken into account after it was allowed on appeal, land south of Leaden Way). I agree with the conclusion in the TA that the proposed development at Dymock Road does not satisfy the PPG’s definition of development that ought to be taken into account as part of an in-combination/cumulative impact assessment (as set out in the TA at 8.3.7), though this may need to be revisited if the development is approved contrary to both expectations and the development plan. Strictly as a legal matter that is not required – there must be a clear end-point to the assessment of in-combination effects - but it is a proposal for a large quantum of development, so there would be an evident impact, and it would eliminate the possibility of objectors trying to take the point in a legal challenge.
33. The mitigation measures are based on all predictable in-combination effects on top of traffic forecasts for the affected highway network as at 2031 (as a worst case scenario, that is, taking account of the anticipated growth of traffic without taking account of the mitigation that would be required in connection with the development that comprises that growth). There is no legal error in the consideration of in-combination/cumulative effects.

Conclusion

34. The question of whether the TA and associated mitigation measures satisfactorily address the requirements of the development plan is primarily a matter for the Council to judge. As a matter of law, however, there is no clearly identifiable conflict with the development plan. Again, the question of whether the mitigation measures (as set out in section 7 of the TA) are necessary and appropriate is again a matter for the Council to judge, taking into account all relevant factors. As the TA sets out justification (and the evidence underlying that justification) for each aspect of the mitigation proposed I foresee no issue with the appropriateness of the proposed mitigation measures.
35. The transport chapter of the ES (Chapter 7) satisfactorily addresses the requirements of the scoping opinion relating to transport. Insofar as it does not include full details of the environmental impact of each of the alternative access arrangements, that is not required by the 2011 Regulations nor according to the jurisprudence on the consideration of alternatives. It is, moreover, unreasonable to require such extensive work to be carried out for alternatives to the development which are not proposed and offer no significant advantage over the preferred option. As the ES concludes that no alternative is likely to cause significant environmental effects, and that none offers significant betterment in transport terms, the decision to propose a single vehicular access off Bromyard Road (with a secondary access for emergency vehicles) is legally robust.
36. I trust that I have addressed the queries posed by those instructing. If anything further arises please do not hesitate to contact me in the usual way.

Martin Kingston QC
No5 Chambers
12th August 2019

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