

**IN THE MATTER OF BALANCE FARM EYWOOD LANE TITLEY KINGTON  
HEREFORDSHIRE HR5 3RU**

**ADVICE**

**Introduction and background**

1. I am asked to advise Herefordshire Council in relation to Reserved Matters Approval application reference P190122/RM dated 14<sup>th</sup> January 2019 (“the Application”).
2. The Application follows the grant of outline planning permission on 27<sup>th</sup> July 2016 in respect of application reference 160581/O for five 4-bedroom houses at Balance Farm, Titley (“the Site”). All matters were reserved. Condition 1 of the permission requires application for approval of the reserved matters to be made before the expiration of three years from the date of the permission, thus before 26<sup>th</sup> July 2019.
3. The Application seeks approval for access only.
4. It is important to note that the parcel of land at Balance Farm has been divided into two by the applicant with separate applications made in relation to each half. The extant permission referred to above relates to the Western part of the Site. The applicant made an application (reference 162824) for another 5 dwellings on the Eastern part of the Site but this was not determined by the Council and was then refused on appeal on 26<sup>th</sup> July

2017. However, this time the Council's Transportation Manager had raised concerns and requested a traffic speed survey to measure speeds on the B4355 in order to assess the adequacy of the visibility at the junction. In the absence of a survey, it was considered that the increase in traffic arising from the development at the junction would be detrimental to the interests of highway safety. The proposed reason for refusal (as recommended by the Transportation Manager) was as follows:

"The required visibility splays cannot be achieved at the current design speed of 60mph at the access as well as onto the B4355 road. Visibility required at the access according to Manual For Streets requires 2.4m x 63m. This is not achievable in both directions nor within total ownership of the applicant. Consequently the proposal is considered to be detrimental to the interests of highway safety, contrary to policy MT1 of the Herefordshire Local Plan Core Strategy."

5. I pause to note the findings of the Inspector in the appeal. The Inspector noted at DL6 that that access to the Site would be from Eywood Lane, "...a road of restricted width that appears to serve properties within the adjacent Eywood Park..." There was no evidence before the Inspector (see DL7) to suggest that the road is normally heavily trafficked. At DL8 the Inspector described the situation at Eywood Lane:

"8. Eywood Lane bends around Balance Farm and there is a speed limit of 60mph, adjacent to the appeal site. The visibility to the east of the site is considerably restricted by the bend and a tall boundary hedge that is within close proximity of the bend. The visibility to the west is severely restricted by an entrance pillar to Eywood Park and landscaping around it. The Highway Authority have stated that the required visibility splay for an access to the appeal site, based on the guidance of Manual for Streets 2 (2010) should be 2.4m x 6.3m. I have no reason to dispute this."

6. The Inspector then continued to set out (DL9-13) his reasoning and conclusions in relation to highway safety. Given that this is the key issue in this matter (and it was one of the two main issues in the appeal), it is convenient to set this out in full below:

"9. I have no information before [me] to indicate what the available visibility splays would be in both directions. However, based on my observations on site, even though the existing access is reasonably wide, I consider that the available

visibility splays would be significantly below that referred to above. Eywood Lane is not heavily trafficked but the national speed limit is in place on it. Due to its restricted width and the proximity of the bend it would be likely that the majority of cars would be travelling slower than 60mph. Nonetheless, without evidence, such as speed readings, it is not possible to ascertain with sufficient clarity and robustness that the development would achieve a safe entrance and exit from Eywood Lane.

10. The junction of Eywood Lane and B4355 is within close proximity of the site. The B4355 appears to be a relatively busy road and I observed that vehicles were regularly passing the junction. There is a speed limit of 40mph on the B4355 adjacent to the junction. I have no evidence before me to indicate what the available visibility splay to the south-east would be but visibility in that direction is considerably restricted by a bend and boundary treatments. The Highway Authority has stated that the usage of Eywood Lane and its junction with the B4355 should not be increased substantially with the existing 40mph speed limit in place.

11. The appellant has referred to developments that have been granted planning permission in the surrounding area including a barn conversion scheme adjacent to the junction of Eywood Lane and the B4355. Outline planning consent for 5 dwellings has been granted on an adjacent site that would utilise the same access as the appeal site. However, I do not have full details of the circumstances that led to these schemes being accepted. In any case, I am required to determine the appeal on its own merits.

12. Nevertheless, the proposal would substantially increase the traffic utilising the access with Eywood Lane and its junction with the B4355. The B4355 is a well-used thoroughfare with traffic moving at speeds of up to 40mph. As such, I consider that the restricted visibility in a south easterly direction would result in an increased risk to the safety of highway users and as such it would cause significant harm to highway safety.

13. In conclusion, I consider that it has not been demonstrated that a safe entrance and exit from the proposed development can be achieved and that the proposal would cause significant harm to highway safety. It follows that the proposal conflicts with Policy MT1 of the Herefordshire Local Plan Core Strategy (CS). This policy seeks development which, among other things, are [sic] designed to achieve safe entrance and exit.”

(emphasis added)

7. The Inspector in due course found at DL29 that the significant harm to highway safety would significantly and demonstrably outweigh the modest benefits associated with the

scheme, including the contribution to housing supply and the relatively accessible location.

8. In the officer's report relating to application 160581/O it had been stated, by contrast, that "Despite local concern about highway safety, the Transportation Manager raises no objection. It has been suggested that a TRO introducing a lower speed limit in the village should be required. However there is no basis on which to do so as a result of this development. Furthermore the scheme, which would be limited to less than 1000sqm floorspace, does not trigger the need for a S106 agreement."
9. The situation therefore is that whilst the Council approved application 160581/O on the basis that there were no significant highway concerns, the Inspector refused permission for essentially an identical development, and apparently without taking into account any question of intensification of use.
10. The Application is not the first Reserved Matters Approval application that the applicant has made. On 23<sup>rd</sup> April 2018 the applicant made application P181476/RM ("the First Reserved Matters Application") in relation to application 106581/O, again for approval of access details. However, this was refused on 28<sup>th</sup> September 2018.
11. As recorded in the officer's report, the Council's Transportation Manager objected:

"...The access location is close to pillars adjacent to the highway that restricts visibility. The drawing proposes 2m x 33m splays. This is deemed acceptable in this location which is supported by the speed survey, and has been confirmed on site as just being achievable.

If the development were to be deemed acceptable, conditions would be required in relation to the construction, parking, turning and splays.

The traffic generated from the proposed site is deemed to intensify the junction onto the B4355. The visibility at the junction, available within the highway land, looking towards Kington is 42m and crossing 3rd party land, is 55m.

The speed limit in the area is 30mph, the speeds demonstrate the 85%tile speeds in the location are 35.4mph.

The visibility required for the location and taking into account the traffic use, the vis splay needs to be 2.4x distance and 57m plus bonnet length = 60m.

Therefore the junction falls short of the requisite splay.

The location is in walking distance to the PH and the village Hall, the land is within the ownership of the application and no safe verge width is proposed as part of the application.

Due to the details around the junction, speeds, visibility splay and safe walking, I have no option but to recommend refusal as the proposal adds conflict in the area compromising policy MT1.”

12. Points set out in the letters of objection included the following:

“The site uses the same access arrangements as the proposal on the adjacent site which was dismissed on appeal on the grounds of highways safety.”

“The safety of the access arrangements should have been taken into account at the outline stage.”

“The outline permission is flawed as safe access to the site cannot be delivered.”

“The visibility from the site access to the west is restricted by the brick gate pillar of Eywood Park.”

“The incorrect visibility requirements have been applied to the access and do not adhere to the Council’s Highways Design Guide.”

“The traffic speeds are high on Eywood Lane and levels of vehicle movements fluctuate throughout the year with farm traffic.”

“The junction from Eywood Lane onto the B4355 has limited visibility and is unsafe.”

“The development would generate additional traffic which could not be safely accommodated on the local roads.”

13. The report correctly set out the definition of access in the Town and Country Planning (Development Management Procedure) Order 2015 in relation to reserved matters:

“...the accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network; where “site” means the site or part of the site in respect of which outline planning permission is granted or,

as the case may be, in respect of which an application for such a permission has been made.”

14. It also explained that CS policy MT1:

“...relates to the highways impacts of new development, and requires that proposals 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. It also requires...that developments are designed and laid out to ensure that safe entrance and exit can be achieved and that adequate operational and manoeuvring space is available.”

15. The officer went on to say:

“In defining the term ‘access’ in the context of reserved matters, the Procedures Order makes it clear that this should include consideration of the accessibility to the site and how this fits into the surrounding road network. In this case access from the site itself would be provided onto the unclassified Eywood Lane. This is a no-through road to the west, and in order to gain access to the site or to the wider highways network all traffic generated by the development would be required to use the junction between Eywood Lane and the B4355 approximately 100m to the east of the site. Concerns over the suitability of this junction to safely support intensification in use again formed part of the reason for the Inspector’s dismissal of the appeal in relation to application P162824/O. The B4355 in this location is subject to a 40mph speed limit, and visibility from the junction onto the priority road is limited to the south east in particular by the geometry of the road and obstructions on the highways verge. The results of a 7 day speed survey have been provided in support of the application and the recorded 85th percentile traffic speeds are as follows;

South-eastbound towards Kington – 35.4mph

North-westbound towards Presteigne – 34.2mph

No plans have been formally submitted with the application in relation to the visibility achievable from this junction. Whilst the Authority is satisfied that visibility to the north is adequate, the Transportation Manager raises concerns in respect of visibility to the south east and advises that the maximum splay achievable within the highway extents (and without being reliant on 3rd party land) is 2.4m x 42m. Based upon the recorded traffic speeds and the nature of

the highway however, it is also advised that the required visibility splays for the recorded traffic speeds would be 2.4m x 60m in accordance with the standards of Manual for Streets 2. The junction therefore falls significantly short of providing the levels of visibility required to ensure that safe entrance and exit can be achieved.”

(emphasis added)

16. It was concluded:

“The current reserved matters application seeks approval of the proposed access arrangements to the site granted outline approval for five dwellings under outline permission P181476/O. The 2015 Procedures Order outlines that access as a reserved matter should include consideration of the accessibility to and within the site in terms of the positioning and treatment of the access and circulation routes and how these fit into the surrounding access network. In this instance, the proposed access arrangements would be reliant on the use of the junction between Eywood Lane and the B4355 which offers severely restricted levels of visibility to the south east. In combination with the increase in traffic which would occur as a result of the additional dwellings, it is considered that this arrangement would pose an increased risk to the safety of highways users and as such would cause significant harm to highways safety in the locale. The conclusions of the Inspector in the appeal relating to the adjacent site (APP/W1850/W/17/3168668) supports this view. The proposal would thus be in conflict with policy MT1 of the Core Strategy in terms of the need to ensure that safe entrance and exit can be achieved and to demonstrate that the local highway network can absorb the traffic impacts of the development without adversely affecting the safe and efficient flow of traffic. Conflict in relation to the advice set out in Chapter 9 of The Framework is also identified for the same reason, and paragraph 109 in particular, which directs that development should be refused on highways grounds if there would be an unacceptable impact upon highways safety or if the residual cumulative impacts on the road network would be severe, is applicable in this case. No proposals have been put forward in mitigation for the severe impact which has been identified, and indeed the Council is not convinced that any such solution exists. Accordingly, there is no option but to recommend the application for refusal for the reason set out below.”

(emphasis added)

17. The First Reserved Matters Application was refused for the reason that it had failed to demonstrate that the local highway network can accommodate the traffic impacts of the development without adversely affecting the safe and efficient flow of traffic on the

network, particularly with regards to the sub-standard visibility available at the junction of Eywood Lane and the B4355 and the intensification in use of this junction that the proposal would give rise to.

18. The Council therefore refused the First Reserved Matters Application for highway safety reasons, in line with the Inspector's own conclusions in relation to application 162824, but in contrast to the approach taken in 160851/O in which no sustainable objection was found on highway safety grounds.

19. The applicant argues, on the basis of a legal opinion submitted to the Council, that in considering these matters in relation to access the Council has re-opened matters going to the principle of the development which were a matter for the outline stage only, and that the Council did not act lawfully in refusing the First Reserved Matters Application.

20. On the other hand, it has been submitted on behalf of a local resident in a letter from Marches Planning dated 1<sup>st</sup> February 2019, that:

“Although it is now clear that permission 160851 was granted on the basis of erroneous advice from a highways officer who has now retired, the Council cannot query the principle of the development as long as the permission remains alive. However, if it were to allow the development to proceed, it would do so in the knowledge that it would be endangering the public.”

21. The letter goes on to argue that the Council should use its powers under section 97 of the Town and Country Planning Act 1990 (“the 1990 Act”) to revoke the outline planning permission.

### Advice

22. I expect it is likely that if the Council proceeds to approve the Application, those represented by Marches Planning will seek to challenge the decision by way of judicial review. Yet, if the Council refuses the Application, equally it can be expected that the applicant will seek to challenge that decision. The Council is therefore in somewhat of a situation of ‘damned if you do, damned if you don’t’.



23. It is argued in the legal opinion supplied to the Council that the officer has misquoted the definition of access in the Development Management Procedure Order. On a proper reading of the officer's report, I do not agree. Neither do I really follow the argument based on the word "these" in the definition. I do not think that the officer erred in that regard.
24. However, the opinion is clearly correct in noting that a local planning authority may not refuse to approve a reserved matters application on grounds going to the principle of the development itself and which are already implicit in the grant of outline permission, although I would not necessarily accept that the facts and circumstances in the caselaw referred to are applicable to the current situation. In particular, in the *Lewis Thirkwell* case cited, it was found the urbanisation objected to stemmed not from the subsequent details submitted but from the outline planning permission itself, but on the facts of that case it was far more obviously a case of going back on the principle of what had already been granted. I have considered whether the Council might properly argue that all matters were served in application 160851/O and that now the stage of the technical assessment of the access has been reached, safe access onto the main highway network simply cannot be achieved. However, I consider that the applicant would have a highly arguable case that the issue of traffic generation must be considered to have been fixed at the outline stage, given that a specified number of 4-bedroom houses was what was proposed. Further, that the issue of safety concerns arising from the B4355 junction were properly to be dealt with at the outline (principle of development) stage and cannot be revisited at the reserved matters stage.
25. The Council is left in a situation where one application (160851/O) was approved with no highway safety concerns raised, but another virtually identical one, relating as it does to the other half of the same site and involving a proposal for the same number of houses (which as such might almost be referred to as the 'twin' application), was refused precisely due to highway safety concerns. The Inspector in 162824 essentially ignored the issue of intensification of use of the access points/junctions by virtue of the extant approval in 160851/O and so in my view it would be hard to explain away the Inspector's approach on that basis. There has simply been a polar opposite approach taken in respect of the two applications.

26. Clearly, there are serious safety concerns about the junction which were sufficient to lead both the Inspector and the Council (by the time of the second outline planning application in 162824) to conclude that the development should not be permitted. This does logically point to the prospect of a revocation of the outline permission in 160851/O. I would agree with the view expressed in the letter from Marches Planning that the conditions required in order for the Council to exercise its power to revoke the outline permission are present. Section 97 of the 1990 Act ('power to revoke or modify planning permission or permission in principle') provides as follows:

“(1) If it appears to the local planning authority that it is expedient to revoke or modify-

(a) any permission (including permission in principle) to develop land granted on an application made under this Part, or

(b) ...,

the authority may by order revoke or modify the permission to such extent as they consider expedient.

(2) In exercising their functions under subsection (1) the authority shall have regard to the development plan and to any other material considerations.

(3) The power conferred by this section may be exercised-

(a) in the case of planning permission that relates to the carrying out of building or other operations, at any time before those operations have been completed;

(b) in the case of planning permission that relates to a change of the use of any land, at any time before the change has taken place.

(4) The revocation or modification of planning permission for the carrying out of building or other operations shall not affect so much of those operations as has been previously carried out.”

27. On the face of it, it would be appropriate to revoke (or modify) the outline permission, because it has become clear that due to the access arrangements for the development at the Site, the development will be likely to place highways users in danger. I understand that, unfortunately, modification (presumably by way of the imposition of a condition requiring works to the B4355 junction) is unlikely to be a practical option because due to third party land ownership it is not actually possible to improve the junction with the B4355. It may be that it is still possible for this avenue to be explored. One can predict, however, that a third party landowner would demand from the applicant a share of the

development value of the land in return for allowing land to be used to improve the junction in order to make the development acceptable in planning terms.

28. However, I do not agree that compensation under section 107 of the 1990 Act ('compensation where planning permission or permission in principle is revoked or modified') would not be payable to the applicant upon revocation of the outline permission because the applicant has not commenced work. That would be to ignore the wording of sections 107(1)(b) and 107(3) which clearly envisage the payment of compensation due to depreciation in the value of the land without the planning permission.

29. The Supreme Court in *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34 held that in considering whether to exercise its discretion to revoke under section 97, one of the material considerations that the authority has to take into account is the cost of the compensation that it might have to pay under section 107.

30. I do not know what the figures would be if the permission was 'merely' modified, requiring in turn a negotiation with the third party landowners in this case.

31. It seems to me then that the Council faces a moral dilemma. If it approves the Application, then (aside from a judicial review challenge being brought) the development will be permitted to proceed despite the known highway safety concerns. Yet the legal position points to approval being the appropriate action.

32. I should say that I would imagine that any application for judicial review may struggle to obtain permission to proceed in the face that the Council would be said to be 'fixed' with the principle of the development permitted in application 160851/O.

### Conclusion

33. In conclusion, it does not appear to me to be expedient to consider revoking or modifying the outline permission as a first option. Legally, the appropriate route seems to be to approve the Application on the basis that at the time of the consideration of application 160851/O, the Council did not take any point about highway safety and

cannot reopen that issue now. If those instructing would like to discuss any issues arising from my advice, they should not hesitate to contact me.

Kate Olley  
Landmark Chambers  
21<sup>st</sup> February 2019