

**IN THE MATTER OF LAND AT BALANCE FARM, EYWOOD LANE, TITLEY,
HEREFORDSHIRE**

OPINION

Introduction

1. I am instructed by Angela Vaughan.
2. My instructions are to advise on whether or not Herefordshire Council (“the Council”) is acting properly by requiring works not identified at the outline planning permission stage (160581).
3. Since my instructions, the Council has in fact refused my client’s application for reserved matters approval of the access.

Background

4. On 25 February 2016, Mrs Vaughan applied to the Council for outline planning permission for the erection of 5 no. four bedroom dwellings on land at Balance Farm, Eywood Lane, Titley, Herefordshire (“the Site”), with all matters reserved. The Site is accessed via the unclassified 91602 road, some 100m to the west of the junction with the B4355.
5. The Transportation Department was consulted on the application. The consultation response, dated 19 April 2016, indicated that the Area Engineer had visited the Site. He commented that there were “No highway implications”. The proposal was said to be acceptable.
6. It would appear that the Parish Council held a public meeting, at which concerns were expressed “about the increase in traffic that would be generated by the proposal with specific regard to the junction of the B4355 and Eywood Lane.” The Parish Council endorsed this concern, specifically relating to the visibility in the Kington direction and the 40mph speed limit within the village. It would further appear that one or more local residents objected to the Council direct on the basis of an increase in traffic fast moving through the village coupled with the visibility at the junction.
7. In the appraisal section of the officer report, the case officer noted the local concern about highway safety but acknowledged that the Transportation Manager raised no objection. He rejected the suggestion of a traffic regulation order to reduce the speed limit in the village. He recommended that planning permission be granted. The Team Leader endorsed the recommendation.
8. On 27 July 2016, outline planning permission was granted subject to conditions. These included conditions 3-4, which, amongst other things, required the approval of

the details of the access before development commenced, the submission to the Council of plans and particulars relating to the access and the carrying out of the access plans and particulars as approved.

9. Self-evidently, it is implicit in the grant of outline planning permission that the Council as local planning authority was satisfied in terms of the impact of the proposed development with respect to traffic volume, traffic speed and the Eywood Lane junction with the B4355.
10. On 6 September 2016, Mrs Vaughan applied to the Council for outline planning permission for the erection of 5 no. dwellings on land to the east of the Site. Mrs Vaughan appealed for non-determination. On 26 July 2017, the Secretary of State's appointed Inspector dismissed the appeal. He or she concluded that the proposed development conflicted with Policy MT1 of the Council's Core Strategy. Part of the rationale for that conclusion was the finding that the proposal would substantially increase the traffic utilising the access with Eywood Lane and its junction with the B4355, and that, taken together with the restricted visibility in a south easterly direction, there would be an increased risk to the safety of highway users and significant harm caused to highway safety.
11. Pursuant to conditions 3-4 of the 27 July 2016 outline planning permission, Mrs Vaughan applied to the Council for reserved matters approval of the access.
12. The Transportation Department responded to the application. It had a concern about the surface and edge treatment of the proposed access, but this concern appears to be one capable of being overcome. The Transportation Department was also satisfied with the proposed 2m x 33m visibility splays at the access point. However, it also

stated that the visibility splays at the junction with the B4355 “falls short”. The signatory (or signatories) concluded that there was “no option” but to recommend refusal “as the proposal adds conflict in the area compromising policy MT1” having regard to details around the B4355 junction, speeds, visibility splay and safe walking.

13. The officer report into the reserved matters application is dated 28 September 2018. It recorded, correctly, that the principle of residential development on the Site has been established as being acceptable by the outline planning permission “and is not to be considered again in detail”. I would go further. The principle of 5 no. four bedroom dwellings was established as being acceptable by that outline planning permission. The officer report found it to be implicit in the outline planning application that access to the Site was to be via the existing access onto Eywood Lane.
14. In the appraisal section, the case officer plainly found the application to be acceptable in terms of the access arrangements from Eywood Lane into the Site and vice-versa.
15. However, the case officer took issue with the application in terms of the junction between Eywood Lane and the B4355. He stated: “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 [on 26 July 2017]...visibility from the junction onto the priority road is limited to the south east in particular...the Transportation Manager raises concerns in respect of visibility to the south east...The junction therefore falls significantly short of providing the levels of visibility required to ensure that safe entrance and exit can be achieved.”

16. The case officer recommended refusal of the application, essentially by reference to the restricted visibility to the south east at the Eywood Lane/B4355 junction and increased traffic flow as a result of the proposed dwellings. It is plain that the Inspector's conclusions formed part of the rationale for the recommendation. Thus: "The conclusions of the Inspector in the appeal relating to the adjacent site...supports this view." The Team Leader endorsed the recommendation.
17. On 28 September 2018, the Council formally refused the application. The reason for refusal reflects the case officer's conclusion and recommended reason for refusal. There is no reference to the point of access to the Site, or to the verge width.

Legal framework

18. Pursuant to article 2(1) of the Town and Country Planning (Development Management Procedure)(England) Order 2015 ("the 2015 Order"), "reserved matters" in relation to an outline planning permission, or an application for such permission, means any of five identified matters in respect of which details have not been given in the application.
19. The five identified matters include "access".
20. Article 2(1) of the 2015 Order defines "access" in relation to reserved matters. Thus: "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 permission has been made."

21. It has been said that development orders such as the 2015 Order are to be construed in a broad or common sense manner: English Clays v Plymouth Corporation [1973] 1 WLR 1346, 1351 *per* Goulding J.
22. As can be seen, the definition of “access” includes the words “and how these fit into the surrounding access network”. Read in a broad or common sense manner, the word “these” refers back to “the positioning and treatment of access and circulation routes”.
23. A local planning authority is not entitled to refuse to approve a reserved matters application on grounds going to the principle of the development itself and which are therefore already implicit in the grant of the outline planning permission.
24. The case of Lewis Thirkwell Ltd v Secretary of State [1978] JPL 844 is an early illustration of this familiar proposition. Outline planning permission had been granted for 23 houses, subject to a condition that an existing public right of way remained undisturbed unless stopped up or diverted. The developer subsequently applied for the approval of details. The local planning authority refused the application, and the Inspector dismissed the appeal on the ground that the proposal would disturb the existing amenities. The High Court quashed the Inspector’s decision. Willis J endorsed the agreed proposition that, in granting outline planning permission, the local planning authority had “sold the pass” in relation to the right of way and if the development of the area with 23 houses was to take place its existing rural character was bound to be affected or urbanised. As the Judge put it, the local planning authority had given outline permission “from which they were not entitled to resile”. The Inspector was not entitled to take into account the urbanisation of the right of way

as a relevant factor in dismissing the appeal, since that urbanisation stemmed not from the subsequent details but from the outline planning permission “which had to be accepted”.

25. Proberun Ltd v Secretary of State¹ (1991) 61 P&CR 77 is also apposite. The Secretary of State granted outline planning permission despite a conclusion that the land was connected to the public highway by a narrow unmade track and that the junction between the two was patently sub-standard. The developer subsequently applied for reserved matters approval of the access. It did not propose to alter the position of the junction, because that could only be done by leaving the land forming the site and within its control. On appeal, the appointed Inspector concluded that the proposed access and junction details did not reach the required standard and he dismissed the appeal. The High Court quashed the Inspector’s decision, and the Court of Appeal dismissed the local planning authority’s appeal against that quashing order.
26. In R v Newbury DC, ex p Chieveley PC [1997] JPL 1137, the High Court endorsed the general approach as explained in Proberun Ltd before adding that its application must depend on the circumstances. Much will depend, said the Court, on the scope of the matters left open by the outline permission. In the case of an outline planning permission for residential development of a defined area, with all matters reserved, including numbers and form of housing, the Court concluded that questions of traffic generation were not irrelevant in fixing the form of access. Proberun Ltd merely showed that any limitations imposed at the reserved matters stage cannot be such as to nullify the principle of residential development. As a matter of chronology, the traffic

¹ Also known as Medina BC v Proberun Ltd.

issues in Newbury were not finally addressed by the authority before the issue of the outline planning permission. In the circumstances, the officers were wrong to advise the authority that traffic generation was not open to discussion at the reserved matters stage.

Discussion

27. Unlike the example canvassed in Newbury, the outline planning permission in the present case *is* specific as to the number of houses.
28. Moreover, and again by contrast with Newbury, the traffic and highway safety issues in the present case *were* finally addressed by the Council before the issue of the outline planning permission. As recorded above, the case officer (and the Team Leader) were cognisant of the traffic and highway safety issues prior to 27 July 2016 as indeed was the Transportation Department. The Council concluded that they did not give rise to grounds for refusing the application for outline planning permission. To adopt the language of Lewis Thirkwell Ltd, it can be said that the Council “sold the pass” in relation to the impact of the proposed development in terms of the intensification of use of the Eywood Lane/B4355 junction when it granted outline planning permission. In any event, the Court in Newbury concluded that questions of traffic generation were in the circumstances of that case not irrelevant in fixing “the form of access”. But the Council has no issue with “the form of access” in the present case. Its concern is with a junction some 100m away from the Site. So I cannot see how Newbury assists the Council.

29. The Eywood Lane/B4355 junction is outside the area of land granted outline planning permission and it would appear that the south east of the junction at least is outside my client's control.
30. As recorded above, the definition of "access" in the 2015 Order is referable to accessibility *to* and within *the site* in terms of the positioning and treatment of access and circulation routes and how "these" [*plural*] fit [*singular*] into the surrounding access network. The officer report misquotes the 2015 Order in the body of the report. It asserts, wrongly, that the 2015 Order makes it clear that "access" in the context of reserved matters should include consideration of the accessibility to the site "and how this [*singular*] fits [*plural*] into the surrounding road network." Rather than focusing on the positioning and treatment of access and circulation routes and how *these* fit into the surrounding access network, the case officer erroneously focuses on accessibility more generally including access *from* the site. Moreover, and despite the definition of "site" within the definition of "access," the case officer's consideration erroneously strays beyond the site to consideration of the Eywood Lane/B4355 junction some 100m to the east of the Site.
31. What is more, the case officer erroneously takes into account the adverse conclusions of the appeal Inspector despite the existence of the outline planning permission and despite the fact that the appeal Inspector was considering different proposed development on land different from the Site. In so doing, the Council made the same essential error as the Inspector in the Lewis Thirkwell Ltd case. In my opinion, the Council was not entitled to take into account the intensification of use of the Eywood Lane/B4355 junction as a relevant factor when refusing the reserved matters

application, since that intensification stemmed not from the subsequent access details but from the outline planning permission “which had to be accepted”.

32. The Council’s rejection of the reserved matters application on the grounds that it did not include any plan to improve visibility to the south east at the Eywood Lane/B4355 junction to the standard required by the Transportation Department (which would require works outside the Site and on land outside my client’s control) is, I would contend, as erroneous an approach as the Inspector’s approach in Proberun Ltd.
33. In short, and in the light of all the above, my conclusion is that the Council has erred in law in that it has refused the reserved matters application on grounds going to the principle of the development itself and which are therefore already implicit in the grant of the outline planning permission. Put another way, and in the language of Newbury, it has erred in law in that it has nullified the effect of the outline planning permission.

Conclusion

34. The Council did not act properly by requiring works to the Eywood Lane/B4355 junction not identified at the outline planning permission stage. Its 28 September 2018 refusal is erroneous in law.

STEPHEN WHALE
LANDMARK CHAMBERS, LONDON
16 OCTOBER 2018