

<b><u>MEETING</u></b> <b>STRATEGIC PLANNING COMMITTEE</b>
<b><u>DATE AND TIME</u></b> <b>THURSDAY 9TH SEPTEMBER, 2021</b> <b>AT 6.00 PM</b>
<b><u>VENUE</u></b> <b>HENDON TOWN HALL, THE BURROUGHS, LONDON NW4 4BQ</b>

Dear Councillors,

Please find enclosed additional papers relating to the following items for the above mentioned meeting.

Item No	Title of Report	Pages
5.	ADDENDUM (IF APPLICABLE)	3 - 12
7.	B AND Q BROADWAY RETAIL PARK CRICKLEWOOD LANE LONDON NW2 1ES - 20/3564/OUT (CHILDS HILL)	13 - 24

StrategicPlanning.Committee@barnet.gov.uk

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9th September 2021

**ADDENDUM TO SERVICE DIRECTOR OF DEVELOPMENT MANAGEMENT AND BUILDING CONTROL'S REPORT**

**Item No. 7**

**20/3564/OUT – Broadway Retail Park**

**Pages 141 - 236**

Revisions to Report

The following should be read alongside 9.26 to 9.42 of the report which relate to the impact of the scheme on statutory heritage assets.

*The LPA has a duty under Sections 72 and 66 of the Listed Buildings Act (1990) to pay special attention and regard to the desirability of preserving and enhancing the character and appearance of the Conservation Area (S72) and the setting of the listed building (S66).*

*The Council has given the requisite special attention to the preservation of the CA and LB in line with Sections 66 and 72. It is the view of the LPA's Heritage and Conservaton officer that the development would result in harm to the CA and LB but that this harm would be less than substantial. Therefore, having given the requisite due regard under S66 and S72, it is officers view that the benefits of the scheme would outweigh the harm in line with the assessment undertaken under NPPF Paragraph 196.*

Additional Responses

Since the publication of the report, additional representations have been received as set out below.

Representation	Officer Response
<p><u>Tepbrook Properties</u></p> <p>As you are aware, Williams Gallagher act for Tepbrook Properties Ltd. We have previously submitted objections to the above planning application in October 2020, May 2021 and July 2021.</p> <p>These objections have consistently raised the issue of the access being undeliverable and the daylight and sunlight assessment prepared by the applicant being deficient. For ease of reference I attach the two most recent submissions on these matters.</p>	<p>On the matter of the daylight and sunlight, as set out in Section 10.1 of the report, The application was accompanied by a Daylight/Sunlight report from AECOM within the ES (ES Volume: Chapter 11: Daylight, Sunlight and Overshadowing). The standardised assessment methodology for daylighting is set out within the BRE document Site Layout Planning for Daylight and Sunlight (BRE, 2011). Within this document it is set out that the primary tools for the assessment of daylight are Vertical Sky Component (VSC)). For VSC the guideline value for windows to retain the</p>

The applicant has not provided any response or scheme amendments in light of these objections and has failed to positively engage with my client.

In addition, the report to committee for determination of the application on 9th September does not address either of these matters adequately. The officer's assessment and conclusions ignore the deficiency in the daylight and sunlight assessment work and do not provide any legal analysis to counter the very clear and correct points made by Pinsent Masons in the attached letter of 20th July 2021.

We have reviewed the conditions which were missing from the previous committee report and note that proposed condition 5 is plainly, on its terms, inadequate to deal with the issue and is contrary to the NPPG as previously stated. We therefore conclude that the advice of Pinsent Masons remains wholly correct and a positive determination of the application will be open to legal challenge.

The full text of the legal opinion from Pinsent Masons is included as Appendix 1 to this Addendum.

potential for good daylighting is 27% or more than 0.8 times its former value. The Statement of Conformity submitted in support of the current scheme also confirms that the daylight and sunlight impact of the development would not be materially worsened by the revisions to the massing and in some cases would slightly improve.

The methodology for the assessment of the daylight impact of the development on neighbouring properties is in line with BRE Guidelines and is considered to be appropriate for assessment.

On balance, officers consider that the daylight impact of the development is acceptable. Full discourse on this is set out in Section 10 of the officer report.

On the matter of the access from Depot Approach, drawing ref SK04 sets out how this access would be provided. Condition 5 is a 'Grampian' style condition whereby development could not commence until the access has been delivered. The delivery of the access is therefore a matter for the respective landowners to facilitate in order to adhere to the requirements of the condition.

The LPA has taken full legal advice from HBPL in response to the legal opinion of Pinsent Masons which states that the use of a Grampian condition is entirely appropriate and that there is case law which confirms this. The conclusion is set out below:

*"Based on the Court of Appeal ruling in Shaw v Gould it appears that the applicant has a realistic possibility of creating a new access point. There is no physical impediment to this. Therefore, planning permission should not be refused on the basis that it is unlikely that the new access can be provided. The provision of a new access can, if necessary, be secured by a condition preventing commencement of the construction of the units until the new access had been provided, similar to the condition in the British Railway Board v SoSE case."*

	<p>The full text of the legal opinion from HBPL, including full references to the case law set out, is included as Appendix 2 to this report.</p>
<p><u>Network Rail</u></p> <p>We have recently been made aware that our previous comments in respect of this application do not appear to have been received by the council and wish to ensure Network Rail's views and requirements are represented when considering this application.</p> <p>Network Rail own, operate and develop Britain's railway infrastructure. Our role is to deliver a safe and reliable railway. All consultations are assessed with the safety of the operational railway in mind and responded to on this basis.</p> <p>Following assessment of the details provided to support the above application, Network Rail has serious concerns about the potential impact of these proposals upon the safe operation of the adjacent Cricklewood Railway Station without suitable mitigation measures being undertaken.</p> <p>We note from the Transport Assessment provided in support of this application that it is anticipated that the proposals will generate a significant increase in usage at the adjacent station and we believe that this will exacerbate existing issues relating to the restricted station access and crowding in the station entrance and platform areas, as well as the continued issues of accessibility at the station for mobility impaired people. Without mitigation measures, we consider that the increase in passenger numbers generated by this scheme would have a considerable adverse impact on passenger safety in these restricted areas of the station.</p> <p>We consider that if this scheme is to be permitted, suitable remodelling of the station entrance, ticket office and ticket gate areas must be undertaken in order to mitigate this risk and initially estimate the cost of this to be at least £500,000 which we consider should be</p>	<p>NR assert that the development will result in a 'significant increase in the usage of the adjacent station' and that this would 'exacerbate existing issues relating to the restricted station access'. The TA assesses the very worst case by assuming that the existing 7990sqm of retail use generates ZERO travel by rail. This is highly unlikely given the site's location but it allowed for a worst-case assessment to be undertaken. The proposed development is predicted to generate an average of some 120 peak hour trips by rail. That equates to 60 passengers arriving and 60 passengers departing across an hour (one in each direction per minute). The station currently accommodates 8 trains per hour so even taking this worst-case net effect, the development would see 15 additional passengers boarding or alighting from each train. NR have provided no supporting evidence to suggest why this modest increase in passenger numbers would have any material effect on the operation of the station access.</p> <p>On this basis, it is not considered reasonable or justified that any contribution be sought for station remodelling, Given the empirical data set out within the TA setting out the modest level of additional hourly passengers (on a worst-case scenario basis), such a contribution would not meet the S106 test of necessity.</p> <p>However, it is important to note that the station has had regard for future station plans and land for a potential future southern entrance would be safeguarded as part of the S106.</p> <p>On the matter of the conditions requested in relation to construction methodology, Condition 4 has been amended to include requirement for the applicant to liaise with Network Rail in respect of the construction methodology.</p>

met by the developer as part of the S106 agreement should the scheme be permitted.

We would welcome discussion with the local authority and developer in respect of this matter, however, without such measures, we have serious concerns about the impact of this scheme upon operational railway safety.

Aside from the above, it is imperative that the actual construction work itself does not impact on railway safety given the proximity of the scheme to the railway which includes high voltage over head line equipment. Should the council be minded to approve this application, the following should be included as conditions in addition to the above S106 requirement;

#### Works in Proximity to the Operational Railway Environment

##### Development Construction Phase and Asset Protection

Due to the proximity of the proposed development to the operational railway boundary, it will be imperative that the developer liaise with our Asset Protection Team (contact details below) prior to any work taking place on site to ensure that the development can be undertaken safely and without impact to operational railway safety. Details to be discussed and agreed will include construction methodology, earthworks and excavations, use of crane, plant and machinery, drainage and boundary treatments. It may be necessary for the developer to enter into a Basic Asset Protection Agreement (BAPA) with Network Rail to ensure the safety of the operational railway during these works.

##### Condition

Development shall not commence until a construction methodology has been submitted to and approved in writing by the Local Authority. The construction methodology shall demonstrate consultation with the Asset Protection Project Manager at Network Rail. The development shall thereafter be carried out in accordance with the approved construction methodology unless otherwise

In respect of the conditions requested in relation to landscaping and boundary fencing, these are matters which are reserved from this outline application and as such it would not be appropriate to condition details of reserved matters.

An additional informative is included in association with Condition 10 (Surface Water Drainage) to refer to the points made by Network Rail.

agreed in writing by the Local Planning Authority.

Contact details for Asset Protection are supplied below and we would draw the developers' attention to the attached guidance on Network Rail requirements.

#### Drainage

It is imperative that drainage associated with the site does not impact on or cause damage to adjacent railway assets. Surface water must flow away from the railway, there must be no ponding of water adjacent to the boundary and any attenuation scheme within 30m of the railway boundary must be approved by Network Rail in advance. There must be no connection to existing railway drainage assets without prior agreement with Network Rail. Please note, further detail on Network Rail requirements relating to drainage and works in proximity to the railway infrastructure is attached for your reference.

#### Condition

It is expected that the preparation and implementation of a surface water drainage strategy addressing these above points will be conditioned as part of any approval.

#### Boundary Treatments, Landscaping and Lighting

##### Trespass Proof Fencing

Trespass onto the railway is a criminal offence. It can result in costly delays to rail traffic, damage to the railway infrastructure and in the worst instances, injury and loss of life. Due to the nature of the proposed development we consider that there will be an increased risk of trespass onto the railway.

#### Condition

The developer must provide a suitable trespass proof fence adjacent to Network Rail's boundary (approx. 1.8m high) and make provision for its future renewal and maintenance. Network Rail's existing fencing/wall must not be removed or damaged.

#### Vehicle Incursion Measures

An Armco or similar barrier should be located in positions where vehicles may be in a position to drive into or roll onto the railway or damage the lineside fencing. Network Rail's existing fencing / wall must not be removed or damaged. Given the considerable number of vehicle movements likely provision should be made at each turning area/roadway/car parking area adjacent to the railway. This is in accord with the new guidance for road/rail vehicle incursion NR/LV/CIV/00012 following on from DfT advice issued in 2003, now updated to include risk of incursion from private land/roadways.

#### Condition

Given the nature of the proposals and location of turning areas/car parking, we would expect that a condition securing the design and installation of suitable vehicle incursion measures by the developer is included in any consent. This is for the safety, operational needs and integrity of the railway.

#### Landscaping

It is imperative that planting and landscaping schemes near the railway boundary do not impact on operational railway safety. Where trees and shrubs are to be planted adjacent to boundary, they should be positioned at a minimum distance greater than their height at maturity from the boundary. Certain broad leaf deciduous species should not be planted adjacent to the railway boundary. Any hedge planted adjacent to the railway boundary fencing for screening purposes should be placed so that when fully grown it does not damage the fencing, provide a means of scaling it, or prevent Network Rail from maintaining its boundary fencing. Below is a list of species that are acceptable and unacceptable for planting in proximity to the railway boundary;

#### Acceptable:

Birch (Betula), Crab Apple (Malus Sylvestris), Field Maple (Acer Campestre), Bird Cherry (Prunus Padus), Wild Pear (Pyrus Communis), Fir Trees – Pines (Pinus), Hawthorn (Cretaeagus), Mountain Ash – Whitebeams (Sorbus), False Acacia (Robinia), Willow Shrubs (Shrubby Salix), Thuja Plicatata "Zebrina"

<p>Not Acceptable:  Acer (<i>Acer pseudoplatanus</i>), Aspen – Poplar (<i>Populus</i>), Small-leaved Lime (<i>Tilia Cordata</i>), Sycamore – Norway Maple (<i>Acer</i>), Horse Chestnut (<i>Aesculus Hippocastanum</i>), Sweet Chestnut (<i>Castanea Sativa</i>), Ash (<i>Fraxinus excelsior</i>), Black poplar (<i>Populus nigra</i> var, <i>betulifolia</i>), Lombardy Poplar (<i>Populus nigra</i> var, <i>italica</i>), Large-leaved lime (<i>Tilia platyphyllos</i>), Common lime (<i>Tilia x europea</i>)</p> <p>Condition  Landscaping detail should be submitted to the Local Planning Authority and approved in conjunction with Network Rail.</p> <p>Lighting  Where lighting is to be erected adjacent to the operational railway, the potential for train drivers to be dazzled must be eliminated. In addition, the location and colour of lights must not give rise to the potential for confusion with the signalling arrangements on the railway.</p>	
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Revised Condition

In response to the representation from Network Rail, Condition 4 is to be amended as follows to include requirement to consult with Network Rail:

4. No site works or works on this development including demolition or construction work shall commence until a Demolition and Construction Management and Logistics Plan has been submitted to and approved in writing by the Local Planning Authority. The development shall thereafter be implemented in full accordance with the details approved under this plan. The Demolition and Construction Management and Logistics Plan submitted shall include, but not be limited to, the following information:
  - i. details of the routing of construction vehicles to the site, hours of access, access and egress arrangements within the site and security procedures;
  - ii. site preparation and construction stages of the development;
  - iii. details of provisions for recycling of materials, the provision on site of a storage/delivery area for all plant, site huts, site facilities and materials;
  - iv. details showing how all vehicles associated with the construction works are properly washed and cleaned to prevent the passage to mud and dirt onto the adjoining highway;

- v. the methods to be used and the measures to be undertaken to control the emission of dust, noise and vibration arising from construction works;
- vi. a suitable and efficient means of suppressing dust, including the adequate containment of stored or accumulated material so as to prevent it becoming airborne at any time and giving rise to nuisance;
- vii. noise mitigation measures for all plant and processors;
- viii. details of contractors compound and car parking arrangements;
- ix. Details of interim car parking management arrangements for the duration of construction;
- x. Details of a community liaison contact for the duration of all works associated with the development;
- xi. Construction methodology shall demonstrate consultation with the Asset Protection Project Manager at Network Rail.**

Reason: To ensure that the proposed development does not prejudice the amenities of occupiers of adjoining residential properties and in the interests of highway and pedestrian safety in accordance with policies CS9, CS13 , CS14, DM01, DM04 and DM17 of the Barnet Local Plan and the London Plan 2021.

#### Additional Informative

In response to the representation from Network Rail, the following informative to be added in association with Condition 10:

*“It is imperative that drainage associated with the site does not impact on or cause damage to adjacent railway assets. Surface water must flow away from the railway, there must be no ponding of water adjacent to the boundary and any attenuation scheme within 30m of the railway boundary must be approved by Network Rail in advance. There must be no connection to existing railway drainage assets without prior agreement with Network Rail. Please note, further detail on Network Rail requirements relating to drainage and works in proximity to the railway infrastructure is attached for your reference.”*

**Item No. 8**

**21/3001/PNV – Blocks 7 -9 Chandos Way and Blocks 1 to 6 Britten Close**

**Pages 237 - 256**

Under the Section A.2, the following assessment text is added:

**(i) where the existing building is 18 metres or more in height, the fire safety of the external wall construction of the existing building.**

The existing building is less than 18 metres in height and so does not need to be accompanied with a report from a chartered engineer or other competent professional. The proposal is compliant on this criteria.

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7<sup>th</sup> September 2021

Carl Griffiths  
London Borough of Barnet  
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2 Bristol Avenue  
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NW9 4EW

**Williams Gallagher**  
Portman House  
5-7 Temple Row West  
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Sent by Email

Dear Carl

**FURTHER OBJECTION TO PLANNING APPLICATION REFERENCE 20/3564/OUT  
REDEVELOPMENT OF B&Q, CRICKLEWOOD LANE, LONDON, NW2 1ES**

As you are aware, Williams Gallagher act for Tepbrook Properties Ltd. We have previously submitted objections to the above planning application in October 2020, May 2021 and July 2021. These objections have consistently raised the issue of the access being undeliverable and the daylight and sunlight assessment prepared by the applicant being deficient. For ease of reference I attach the two most recent submissions on these matters.

The applicant has not provided any response or scheme amendments in light of these objections and has failed to positively engage with my client.

In addition, the report to committee for determination of the application on 9th September does not address either of these matters adequately. The officer's assessment and conclusions ignore the deficiency in the daylight and sunlight assessment work and do not provide any legal analysis to counter the very clear and correct points made by Pinsent Masons in the attached letter of 20th July 2021.

We have reviewed the conditions which were missing from the previous committee report and note that proposed condition 5 is plainly, on its terms, inadequate to deal with the issue and is contrary to the NPPG as previously stated. We therefore conclude that the advice of Pinsent Masons remains wholly correct and a positive determination of the application will be open to legal challenge.

Yours sincerely



**Matthew Williams**  
**WILLIAMS GALLAGHER**

Cc: Fabien Gaudin  
Cllr Peter Zinkin  
Cllr Anne Clarke  
Cllr Shimon Ryde  
Enc: Letter of Pinsent Mason dated 20<sup>th</sup> July 2021 and letter of JMR dated 27<sup>th</sup> July 2021

BY E-MAIL

Tepbrook Properties Limited  
124 Finchley Road  
London  
NW3 5JS

Our Ref 118086548.2\JO09\PRP001.000100

20 July 2021

Dear Sirs

**B&Q, BROADWAY RETAIL PARK, CRICKLEWOOD LANE, LONDON, NW2 1ES (THE "PROPERTY")  
PLANNING APPLICATION REF: 20/3564/OUT (THE "APPLICATION")**

We are instructed by Tepbrook Properties Limited ("**Tepbrook**") to provide advice in relation to the Application, which has been submitted by Montreaux Cricklewood Developments Limited (the "**Applicant**").

This letter highlights two fundamental legal flaws with the Report to Committee for the Application scheme ("**the Report**") which is scheduled to go to Planning Committee on Monday 26th July 2021. This is without prejudice to the identification of other legal and other flaws in relation the Report.

**1. FAILURE TO DEAL PROPERLY WITH UNDELIVERABLE NEW ROAD ACCESS TO THE SCHEME AND UNDELIVERABLE NEW FOOTPATH ARRANGEMENTS TO THE SCHEME**

1.1 We note at paragraphs 12.16 and 12.17 of the Report in relation to access arrangements to the scheme that the Report states as follows:

**Access**

*12.16 It is proposed that vehicular access would be from Depot Approach, a private access road, with the closure of the existing vehicle access onto Cricklewood Lane. The closure of the existing vehicle access onto Cricklewood Lane will require a s278 Agreement and would include improvements to the pedestrian environment and this is included within the agreed heads of terms.*

*12.17 In terms of the access from Depot Approach, it is noted that this is a private road under the ownership of an adjoining landowner. It is also noted that the adjoining landowner has objected to the application on the basis that the applicant has no legal right to install a new access from the private road. The LPA have taken legal advice on the matter from HBPL and it is advised that there is no legal basis for resisting the application on this basis and that an appropriately worded condition would serve to secure the relevant access in so far as the LPA granting consent is concerned."*

Pinsent Masons LLP

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- 1.2 We enclose our letter dated 6 November 2020 which concluded two key points:
- 1.2.1 There are no rights for the applicant to create the New Access for the Application scheme which is therefore not deliverable.
  - 1.2.2 There are no rights for the applicant to create the New Footpaths for the Application scheme which are therefore not deliverable.
- 1.3 As set out in our letter dated 6 November 2020:
- 1.3.1 Pursuant to section 70(2) of the Town and Country Planning Act 1990, the local planning authority must have regard to all material considerations when determining a planning application. The inability of the applicant to deliver its proposals, including the New Access and the New Footpaths which are fundamental to the delivery of the Application is a highly material planning consideration given the nature of the application and the reliance placed on the New Access and the New Footpaths to enable and serve the development. This was reflected in the case of *British Railways Board v SoSE* [1993] 3 P.L.R. 125.
  - 1.3.2 **In this case, there is no prospect at all of the New Access or New Footpaths being provided and these fundamental issues cannot be avoided by imposition of a planning condition, given there is no prospect of such condition being satisfied either, see NPPG Paragraph: 009 Reference ID: 21a-009-20140306:**  
  
*"Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – ie prohibiting development authorised by the planning permission or other aspects linked to the planning permission (e.g. occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure). Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission."*
  - 1.3.3 The Report refers to the LPA having taken legal advice on the matter and "*it is advised that there is no legal basis for resisting the application on this basis and that an appropriately worded condition would serve to secure the relevant access in so far as the LPA granting consent is concerned*". However, no explanation is provided to support this position in light of the legal position as we set it out above. There is no explanation at all dealing with the clear contravention of the NPPG planning guidance. The Report is flawed and any decision made on the basis of it in this respect is liable to judicial review. In addition, there is no published Appendix 2 set of conditions which means it is not possible to examine the proposed condition purportedly imposed to address the issue. Give the proposed planning conditions, including this one, would need to be provided alongside the report 5 clear days before the Committee meeting on 26 July 2021,
2. **FAILURE TO COMPLY WITH SS100B AND 110D LOCAL GOVERNMENT ACT 1972 IN TERMS OF PUBLISHING REPORTS AND BACKGROUND PAPERS 5 CLEAR DAYS BEFORE THE COMMITTEE MEETING**
- 2.1 The failure to publish Appendix 2 (draft conditions) within 5 clear days of the Committee meeting on Monday 26 July 2021 is a clear breach of sections 100B and D of the Local Government Act 1972 (as amended). Section 100B deals with access to agendas and



reports and section 100D with access to background papers. In both cases these must be “open to inspection by members of the public at the offices of the council” at least five clear days before the meeting (“clear days” refers to weekday working days and does not include the day of publication or the day of the meeting (*R v Swansea City Council, ex p Elitestone Ltd* (1993) 66 P. & C.R. 422)). As per case law, e.g. *Joicey, R (on the Application of) v Northumberland County Council* [2014] EWHC 3657, this must be strictly adhered to and the report cannot be properly interpreted without sight of the draft conditions. The Committee will therefore have to be deferred to allow for the proper time for the conditions in Appendix 2 to be published and 5 clear days to elapse before the meeting can be held.

For the reasons set out in this letter, the Report is legally defective, the Committee meeting has to be deferred and the LPA must deal properly with the material consideration in relation to non-deliverability of the New Access and New Footpaths as referred to above. As referred to above, a condition will not satisfy these fundamental issues and the Application will need to be recommended for refusal. If there is cogent legal advice to the contrary, the key points of this advice needs to be reported to the Committee in the Report.

Yours faithfully

**Pinsent Masons LLP**

Enc Letter dated 6 November 2020

Our ref: DR/B&QCricklewood

3 Princes Street, Mayfair  
London W1B 2LD

020 3633 0010

Tepbrook Properties Ltd  
C/o Williams Gallagher Town Planning Solutions  
Studio 321  
51 Pinfold Street  
Birmingham B2 4AY

**By Email Only**

Date 27<sup>th</sup> July 2021

**Re: Proposed Development at B&Q site, Depot Approach, Cricklewood**

We have been further instructed to comment upon the B&Q development proposals at Depot Approach in relation to the consented development at 194-196 Cricklewood Broadway (“Asda site”) planning reference 17/0233/FUL.

We have reviewed the B&Q Broadway Retail Park Cricklewood Lane London NW2 1ES response by Childs Hill reference 203564 (total 86 pages).

We set out below our comments in relation to daylight, sunlight:-

1. The latest responses confirm, acknowledges we are on site building out the consented scheme. We are therefore an existing building eligible for consideration as per the BRE Guidance. Therefore the Daylight, Sunlight consultant is obliged to undertake a VSC and NSL assessment of our clients consented scheme.
2. We are firmly of the view that the developers consultant is refusing to undertake this method of assessment as the results will clearly demonstrate our concerns raised over 8 months ago.
3. Whether the scheme is 25 or 19 storeys high our concerns are and remain the same.
4. Unless the developers consultant undertakes a VSC and NSL assessment of our clients development how can the local authority carefully consider the impacts to adjacent existing residential properly, in a considered manner, to in turn make an informed decision.
5. The local authority has accepted VSC and NSL method of assessment for existing properties elsewhere around the site including properties further distanced away from the site than our clients development.

Continued...



## Summary

Given the orientation of the Asda site relative to the B&Q site, the majority of the windows serving our clients property will be significantly impacted and rooms facing the site will have to heavily rely upon electric lighting throughout the day due to the significant reduced daylight levels with the proposed outline development in place.

Our comments made on 30<sup>th</sup> Oct 2020 still stand – no changes nor further assessments have been undertaken. We have previously requested and still do expect to see VSC and NSL assessments to be undertaken.

We enclose a further copy of our response dated 30<sup>th</sup> October 2020.

It would appear for a number of reasons set out above that the proposed massing on the B&Q site is likely to cause harm through impacts to the Asda site residential and its surrounding residential neighbours.

Yours sincerely

David Reynolds MRICS  
Director

david@jmrsurveyors.com  
Mobile: 07813 782879

Enc Letter dated 30/10/2021

1. We have been instructed by Barnet Council in connection with the objection by Tepbrook Properties Limited (“Tepbrook”) to the planning application reference 20/3564/OUT relating to the redevelopment of B&Q, Cricklewood Lane, London, NW2 1ES (“the Property”).
2. We have been asked to review the document produced by Pinsent Masons (“PM”) submitted to the Council on behalf of Tepbrook by Williams Gallagher and advise:
  - a. If the issue regarding the provision of the new access is a material planning consideration.
  - b. If the use of a Grampian condition would be appropriate in this instance.
  - c. If there are any other mechanisms available to the Council to secure improvements/access/visibility splays etc to a road that is outside of the applicant's ownership.
  - d. Any other general comments on the matters raised in the enclosure.

### Summary of Advice

3. Access, is a material planning consideration. The fact that it is over third-party land is not necessarily relevant from a planning perspective, as the applicant may have a right to use the access or may be able to secure such rights. In this instance, the access is not an issue as the applicant has a right of way over Depot Approach, but the owner of Depot Approach will not permit the access to the Property at the locations shown on the plans submitted with the application.
4. The applicant has a right of way over Depot Approach to access the Property, pursuant to a transfer in 2001. The grant of the right of way does not restrict access to the Property at a particular point on Depot Approach. Therefore, the applicant has a right to access the Property from anywhere along Depot Approach shown hatched on the 2001 transfer plan sent by PM. Therefore, planning permission should not be refused on the basis that the new access is unlikely to be provided. A Grampian condition could be used if it is considered necessary.
5. The applicant has a right of way on foot over that part of the Depot Approach that is not shown hatched on the plan, sent by PM, provided that, it has not been landscaped. It is difficult to conclude whether this makes it unlikely that the applicant can provide these footpaths. It may be difficult to obtain the consent of Tepbrook or establish the applicant's right to construct the footpaths but these difficulties are not planning considerations. It could be a material consideration if it was impossible to provide these footpaths and these footpaths at these locations were essential. In this instance, it would be easier to ask the applicant to revise the plans so that the footpaths are all located within the site boundary.

### Facts and case law

6. The applicant has submitted an outline planning application (including means of access with all other matters reserved) for the demolition of existing buildings and the comprehensive phased redevelopment of the site for a mix of use development including up to 1100 residential units (Use Class C3), and up to 1200 sqm of flexible commercial and community floorspace (Use Classes A3/B1/D1 and D2) in buildings

ranging from 3 to 25 storeys along with car and cycle parking landscaping and associated works. It is a substantial development therefore it would be necessary to ensure that the access to the site is suitable and the adjoining road is able to accommodate the increased pedestrian traffic.

7. The access to the Property is over Depot Approach. Depot Approach is owned by Tepbrook.
8. Tepbrook claim that permission should not be granted, as there is no reasonable likelihood of the permission being implemented, as they will not permit the construction of the new access off Depot Approach or the new footpaths on Depot Approach. They refer to the case of *British Railway Board v Sec State for the Environment 1993*. In that case, British Railway Board (“**BRB**”) applied for planning permission for a residential development with access over land owned by Hounslow Council. Hounslow Borough Council, failed to determine the planning application and BRB appealed to the Secretary of State. Hounslow would not grant its consent to the access road on its land. Therefore, the Secretary of State refused planning permission on the basis that he was precluded in law from granting the permission subject to conditions which appeared to have no reasonable prospect of fulfilment within the five-year life of the permission. However, on appeal, the House of Lords ruled that the Secretary of State’s decision was incorrect. The House of Lords confirmed that a negatively worded condition could be imposed to secure an access over third party land. It said, even if the access land was outside the application site, the considerations would be the same as those to be applied where an application for planning permission relates to land not in the ownership of the applicant. The court concluded that “*the mere fact that a desirable condition appeared to have no reasonable prospects of fulfilment did not mean that planning permission must necessarily be refused. Something more is required before that could be the correct result*”.
9. The National Planning Practice Guidance (“NPPG”) provides:

*Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – i.e. prohibiting development authorised by the planning permission or other aspects linked to the planning permission (e.g. occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure). Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission.*
10. Therefore, the question is whether, because of Tepbrook’s position, it is unlikely for the permission to be implemented. Tepbrook transferred the Property to B&Q Plc in 2001. The sole access to the Property from the public highway is over Depot Approach. The Property was transferred, with a right of way over Depot Approach, for all persons at all times for access to and egress from the Property: with or without motor vehicles over those parts of Depot Approach hatched black and on foot only over those parts of Depot Approach not hatched (and not landscaped from time to time). PM, do not refer to any clause in the 2001 transfer that restricts the location of the access to the Property.

11. In *Shaw v Grouby & another* [2017] EWCA Civ 233, the Court of Appeal considered the extent of a right of way granted over a neighbouring driveway. The appellants sold a parcel of land to the respondent but retained ownership of the driveway. Access to the respondent's property was provided by the grant of a right of way under the terms of the property transfer. There was an access point to the driveway from the property at the time of the transfer. The respondent then constructed a new access off the driveway, at another location. The appellant in that case argued that the respondent could only access their land from the original access point, at the time of the transfer. The Court of Appeal concluded that the right of way granted access to every part of the property that abutted the driveway over which a right of way had been granted. If the intention had been to limit the right of way to a particular and fixed point of access, it was to be expected that the transfer would say so. It did not.
12. Applying the ruling by the Court of Appeal in *Shaw*, to the rights granted over Depot Approach, it appears that as the 2001 transfer, that granted the right of way, did not limit access to the Property to a particular point. The applicants can access and egress their Property from any point that directly abuts the area shown hatched on the plan provided by PM. Therefore, there is a realistic possibility that the applicant can implement the planning permission with the new access. Any condition imposed to secure this would be in accordance with the guidance in the NPPG.
13. With regard to the new footpaths, it is not clear whether these are within the area which is excluded from the grant, as they are within 'landscaped areas'. More details are required. The applicant has a right of way on foot over the areas shown hatched and in respect of the areas not shown hatched, provided they are not landscaped. It is not clear whether the term 'landscaped areas' include hard landscaping or only applied to soft landscaping. Tepbrook are said to have hard landscaped the areas on which the new footpaths are to be created. What is the nature of the hard landscaping? Looking on Google maps, it appears that there are existing footpaths along Depot Approach. Are the proposed new footpaths along these existing footpaths? If so, it is unlikely that the existing footpaths have been excluded from the pedestrian right of way granted to the applicant. More information is required.

## Conclusion

14. Based on the Court of Appeal ruling in *Shaw v Gould* it appears that the applicant has a realistic possibility of creating a new access point. There is no physical impediment to this. Therefore, planning permission should not be refused on the basis that it is unlikely that the new access can be provided. The provision of a new access can, if necessary, be secured by a condition preventing commencement of the construction of the units until the new access had been provided, similar to the condition in the *British Railway Board v SoSE* case.
15. The creation of the new footpaths may be an issue depending on what was meant by 'landscaped'. If there is an issue of the footpaths being within an area specifically excluded, it could be argued that in view of the stance taken by Tepbrook that it may not be possible to provide these footpaths and therefore a Grampian condition should not be imposed. The mere fact that the owner of Depot Approach does not want these footpaths to be constructed is not sufficient reason, in my view, to say that there is no prospect of these footpaths being constructed.

16. If the new footpaths, outside the site boundary, are in fact within the area excluded in the 2001 transfer from the right of way on foot, then the simplest solution would be to push back the footpaths within the red line boundary.

I have not considered the other objections and have limited this opinion just to the issue of the new access and new footpaths as set out in the PM letter. If you have any questions please do not hesitate to contact me either by phone or email.

Mrinalini Rajaratnam 17 November 2020

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Our ref: MON002/0001/cf  
22 January 2021

Dear Matt

### **Cricklewood - Tepbrook objection**

You have asked us to comment on the letter from Pinsent Masons dated 6 November 2020 which forms part of the objection to your planning application that has been submitted by Tepbrook Properties Limited.

We cannot comment on the matter of the extent of the private law matters referred to in paragraphs 1, 2 and 3 of Pinsent Masons' letter, i.e. whether or not the applicant does or does not have the requisite legal rights over the proposed point of access and/or the land on which the footpaths are proposed to be provided.

However, in relation to paragraph 4 of Pinsent Masons' letter, we note that in the case they refer to - British Railways Board v SSoE (1994) JPL 32 - the leading judgement acknowledged that planning legislation contemplated that an application for planning permission could be made by a person who did not own the land to which [part of] an application related and that the owner of any such land could object to it. However, if there were good planning reasons why the development should be allowed, the owner's objections were not necessarily a ground for refusal. There was therefore no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to the refusal of planning permission. Lord Keith of Kinkel, giving the leading judgement, said:

"A would-be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considered that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are."

This led to the change in the Government's guidance on the imposition of Grampian-style planning conditions which Pinsent Masons identifies. Prior to this case planning guidance used to prevent imposition of Grampian conditions unless there was a reasonable prospect of the condition being satisfied. The way the planning guidance puts it nowadays (following this court decision) is that Grampian conditions should not be used where there are "no prospects at all" of the action in question being performed within the time limit imposed by the planning permission.

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22 January 2021

It is for these reasons that planning authorities rarely refuse planning permission based on objections about the “deliverability” of development due to private law issues raised by neighbours.

Insofar as the matters referred to in Pinsent Masons’ letter are concerned, therefore, it would clearly be lawful for a Grampian condition to be imposed preventing the development (or relevant parts of it) from being implemented until any requisite remaining legal rights over the relevant land had been secured. This would also be in accordance with the guidance in the PPG since the local planning authority cannot know whether there are “no prospects at all” of those rights being secured, notwithstanding what Pinsent Masons’ letter says. Commercial parties frequently reach agreement about private law matters on neighbouring sites, as the local planning authority will know.

Yours sincerely

A handwritten signature in black ink that reads "Town Legal LLP". The signature is written in a cursive, slightly slanted style.

Town Legal LLP