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