Portishead Branch Line - MetroWest Phase 1

Written Representation

Objection to The Increased Closure of The Junction of The A3029 and Ashton Vale Road

SUTHERLAND PROPERTY & LEGAL SERVICES LTD

11-1-2020

''**cTc** is a transport planning and traffic engineering consultancy which was formed by Carl Tonks in 2011. Carl has over 30 years' experience of advising landowners, developers and property portfolio operators/managers on key traffic, transport and highway matters. In addition to representing developers in regard to the potential impact of their proposals on the operation of key transport infrastructure, Carl also has substantial experience advising major property portfolio managers in regard to the impacts of highway schemes on the ability to access their sites. This latter role included spending seven years advising a major food retailer in regard to operational impact of programmed road works schemes on the ability of customers, employees and deliveries to efficiently access their properties. This experience makes Carl ideally placed to advise on the potential impact of the proposed Metrowest scheme on the operation and accessibility of the employment uses in Ashton Vale Business Park''

''Sutherland Property and Legal Services was founded by Amanda Sutherland. Her career has spanned that of a solicitor for private law firms as well as for the Environment Agency and Bristol City Council. The practice boasts both chartered planners and a planning solicitor, this allows Sutherland's to provide advice on planning matters, with an acute understanding of relevant case law and policy. It is due to this wide-ranging experience that Sutherland's has represented clients in a host of matters, relating to certificate of lawfulness applications through to appeals and environmental permitting. ''

''SYSTRA has been involved in UK mobility for over 50 years and this underpins our modelling and appraisal expertise to analyse current and future transport problems. We work at the full range of geographic scales; some of our models examine individual junctions, others consider whole conurbations, regions, and even countries.

Systra is especially strong in microsimulation expertise as both developers of Paramics and users of multiple industry-standard platforms including Vissim. Malcolm has over 25 years' experience in transport modelling, advising both private and public sector clients on model scoping, data collection, model development, calibration & validation and application.

This experience, including 20 years' direct microsimulation experience, gives Malcolm the necessary skills to advise on a microsimulation model's 'fitness-for-purpose'.''

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Executive Summary

ETM Contractors Ltd and Manheim Auctions Limited are both long standing businesses on the Ashton Vale Industrial Estate/Cala Trading Estate. Though they do not object to the principal of the Development Consent Order they have continued to advance criticism of the modelling provided for the junction of the A3029 and Ashton Vale Road.

The level crossing at this entry point to The Estate passes adjacent to the signal controlled junction; between it and the business park. Currently, this line carries only freight traffic and closes typically no more than once a day. Whenever the level crossing is closed it severs The Estate from the adjacent highway infrastructure. Thus, preventing traffic from accessing or egressing The Estate, which becomes wholly landlocked for the duration of the closure (and subsequent clearance time) for queuing traffic. Any suggestion of increasing the frequency of such closures has potential for generating very significant impact on the ability of businesses within The Estate to continue to trade in a commercially viable manner.

It is submitted that the access serves a *Principal Industrial and Warehousing Area* (as designated by Bristol City Council), which is an important hub of industry, commerce and employment. In planning policy terms the application could not be supported because of the effect on the business within the Ashton Vale Industrial Estate/Cala Trading Estate and their ability to operate. The *'agent of change'* as set out in paragraph 182 of the National Planning Policy Framework 2019 is specific in stating that the proposed development (MetroWest) must demonstrate it can be successfully integrated with existing businesses and *''existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established''*.

The submission advances that not only is the current modelling insufficient to demonstrate the current operation of The Estate will be unaffected by this proposal, it also sets out that future restrictions may be placed on existing businesses wishing to expand within The Estate because of the implications of the level crossing closures proposed by MetroWest (and its impact on the highway providing access to and from the Estate units). As a final point it is quite conceivable that on receiving consent MetroWest may seek to increase the number of train movements per hour, placing further pressure on the existing businesses.

As such the applicant should be required to demonstrate that not only will the proposed operation of MetroWest not have an impact on the businesses within The Estate's current operating model, the applicant should also clearly demonstrate that businesses within The Estate that wish to expand will be able to do so without the risk of any further restrictions being placed upon them.

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1. Introduction

1.1. The following submission is made on behalf of ETM Contractors Ltd (ETM) and Manheim Auctions Limited (Manheim) both resident businesses on the Ashton Vale Industrial Estate/Cala Trading Estate (The Estate).

1.2. Neither party objects to the principle of the proposed Development Consent Order (DCO). Their concern is with the analysis contained within the DCO with specific regard to the impact on both the businesses within The Estate and the wider connectivity of the A3029that the proposed increased closure of the junction of the A3029 and Ashton Vale Road will have.

1.3. It is both ETM's and Manheim's submission that MetroWest is the 'agent of change' and must therefore provide suitable mitigation to allow for the continued effective operation of their businesses, both now and in the future.

1.4. When the use of the Line for MetroWest was first mooted, submissions were made to the MetroWest promoters in relation to this concern. At this point, MetroWest accepted there would be an inappropriate impact on the site entrance. As a consequence, further investigations were undertaken by MetroWest into using compulsory purchase powers to purchase the ETM site, the neighbouring site to ETM and other land areas in order to create an alternative rear entrance to The Estate joining with the new bypass (appendix II). After a year of work, MetroWest concluded they had insufficient funds to allow for this proposed mitigation. Thereafter, MetroWest proposed a reduction in the number of daily trips on the trainline in order to reduce the impact on the access. It is understood this is now the preferred mitigation. It is understood that MetroWest now consider that by limiting the use of the line, they can suitably mitigate the impact. We do not agree.

1.5. In submission it has been presented that the modelling undertaken on the junction was not satisfactory and that it understates the operational impact with regard to The Estate. As will be set out, it is not for our clients to provide detailed analysis of the junction, rather the agent of change (MetroWest) must satisfy the decision maker that the existing businesses will not be unreasonably restricted and that future operations or expansions will not be limited by the arrival of the development.

2. The Site

2.1. The junction in question is that of the A3029 and Ashton Vale Road (appendix I) and the predominant issue is one of the impact that inevitable changes to the operation of this junction will have on both the businesses within The Estate and the wider connectivity of the A3029. This junction provides the single access point for a large number of commercial and industrial sites within The Estate. The parties within The Estate most affected will be those with the highest reliance upon vehicular movements through the Junction but the proposed changes will affect all of The Estate occupiers.

2.2. The Inspectors may be familiar with the junction as it sits close to proposed Works no. 27 and 28, it was also visited as part of the unaccompanied site inspection which was undertaken on 29 September 2020.

2.3. The A3029 is a major arterial route which connects the west of the city to the city centre, the main airport road and the south of the city. With the introduction of the South Bristol bypass (Colliters Way) it appears there has been some diversion of traffic from this road but the large number of commercial, big box retail, industrial and entertainment services along this route means it retains a large volume of traffic throughout the day and week. Substantial congestion is exhibited in each daily highway peak period.

2.4. The junction sits at the northern end of a major radial route into the Cumberland Basin, Hotwells and Spike Island, which it connects to via an overbridge at Brunel Way. Frequent congestion on Brunel Way sees traffic back up onto the A3029, where it interacts with the operation of the subject signal controlled site access junction. In its current form, this junction exhibits substantial congestion, and it is not unusual for traffic to be required to wait for several signal cycles on leaving The Estate.

2.5. The level crossing at this entry point to The Estate passes adjacent to the signal controlled junction; between it and the business park. Currently, this line carries only freight traffic and closes typically no more than once a day. Whenever the level crossing is closed it severs The Estate from the adjacent highway infrastructure. Thus, preventing traffic from accessing or egressing The Estate, which becomes wholly landlocked for the duration of the closure (and subsequent clearance time) for queuing traffic. Any suggestion of increasing the frequency of such closures has potential for generating very significant impact on the ability of businesses within The Estate to continue to trade in a commercially viable manner.

2.6. In particular, no detail of the way in which trips will be limited to the numbers utilised in the assessment have been put forward and it must be considered that there will be significant pressure on the line, once opened, to work to its maximum capacity. On this basis alone it is considered extremely likely that the line will not remain limited as proposed. A more appropriate solution must be found.

3. Planning Policy and Material Considerations

Planning Policy

3.1. S.38(6) of the Planning and Compulsory Purchase Act 2004 requires that planning applications be determined in accordance with the development plan unless material considerations indicate otherwise. Such consideration must also apply to the DCO decision making process.

Local Plan

3.2. Due to the strategic nature of the application the DCO covers a large area, including multiple Local Planning Authorities. In this specific instance the planning polices of Bristol City Council cover the area of the junction and The Estate.

3.3. The statutory development plan for Bristol currently comprises the:

- Bristol Core Strategy (adopted June 2011)
- Site Allocations and Development Management Policies Local Plan (adopted July 2014)
- Bristol City Centre Area Action Plan (adopted March 2015)

3.4. Given that the site is not located in the area covered by the Bristol Central Area Action Plan, we have focused on the relevant policies contained within the Core Strategy and the Site Allocations and Development Management Policies Local Plan.

3.5. The Site Allocations and Development Management Policies Local Plan was adopted in July 2014. The document sets out the Council's development management policies, designations and specific site allocations in the city. The policies of most relevance to the application are set out below:

- Policy DM12: Retaining Valuable Employment Sites
- Policy DM13: Development Proposals on Principal Industrial and Warehousing Areas
- Policy DM23: Transport Development Management

3.6. The Bristol Core Strategy was adopted in June 2011 and sets out the overall approach for planning in Bristol. The following policy is of relevance to the application proposals:

- Policy BCS8: Delivering a Thriving Economy

3.7. Within the LPA's site mapping it is also worth noting that The Estate is one of Bristol's designated *"Principal Industrial and Warehousing Areas".* Paragraph 2.13.1 and 2.13.2 of the Development Management Polices sets out the following definition:

> *''2.131.1 The Core Strategy states that the city's Principal Industrial and Warehousing Areas (PIWAs) will be identified and retained for industrial and warehousing uses. The boundaries of the PIWAs are shown on the Policies Map. They are based on recent survey work which has identified them as functioning well as evidenced by generally high levels of occupancy and recent investment in new or refurbished buildings. Their designation reflects the National Planning Policy Framework's requirement that local planning authorities should identify strategic employment sites, support existing*

business sectors and plan positively for the location, promotion and expansion of clusters or networks of knowledge driven, creative or high technology industries.

2.13.2 Due to their strategic economic importance the council will generally seek to resist proposals on PIWAs which would lead to a loss of industrial or warehousing floorspace. However, over the course of the plan period to 2026, there may be a change of circumstances on some PIWAs which would lead the council to consider allowing a loss of industrial or warehousing floorspace. This Development Management policy sets out these circumstances and also identifies what uses are appropriate in PIWAs''

3.8. As a *Principal Industrial and Warehousing Area,* the site is clearly a valued employment and commercial centre and a site that Bristol City Council would look to protect from activities that may affect its efficient operation.

3.9. The National Planning Policy Framework (NPPF) 2019 also forms a material consideration, the following paragraphs are considered relevant:

''108. In assessing sites that may be allocated for development in plans, or specific applications for development, it should be ensured that:

a) appropriate opportunities to promote sustainable transport modes can be – or have been – taken up, given the type of development and its location;

b) safe and suitable access to the site can be achieved for all users; and

c) any significant impacts from the development on the transport network (in terms of capacity and congestion), or on highway safety, can be cost effectively mitigated to an acceptable degree.''

3.10. It is not considered that the current proposal acceptably mitigates the impacts identified.

''109. Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe.''

3.11. The impacts are assessed as severe.

3.12. Paragraph 182 is also considered a material consideration; due to the importance of this paragraph it is set out in an individual chapter (chapter 4).

3.13. It is also worth noting the Planning Policy Guidance (PPG) on material planning considerations:

''What is a material planning consideration?

A material planning consideration is one which is relevant to making the planning decision in question (eg whether to grant or refuse an application for planning permission).

The scope of what can constitute a material consideration is very wide and so the courts often do not indicate what cannot be a material consideration. However, in general they have taken the view that planning is concerned with land use in the public interest, so that the protection of purely private interests such as the impact of a

development on the value of a neighbouring property or loss of private rights to light could not be material considerations''.

Paragraph: 008 Reference ID: 21b-008-20140306 Revision date: 06 03 2014

3.14. For the interpretation of the courts with regard to a material consideration, paragraph 21 of *Cemex (UK) Operations Ltd v Richmondshire District & Anor [2018] EWHC 3526 (Admin) (19 December 2018)*is included below (appendix III)*:*

> *''Planning applications are required to be determined in accordance with the statutory development plan unless material considerations indicate otherwise (S38(6) Planning and Compulsory Purchase Act 2004 and S70 Town & Country Planning Act 1990) [AB/1 and 2]. Whether or not a consideration is a relevant material consideration is a question of law for the courts: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1WLR 759 at 780 [AB/6]. A material consideration is anything which, if taken into account, creates the real possibility that a decision-maker would reach a different conclusion to that which he would reach if he did not take it into account: R (Watson) v London Borough of Richmond upon Thames [2013] EWCA Civ 513, per Richards LJ at paragraph 28 [AB/16].''*

3.15. It is useful to note that a material consideration can be anything that creates a *real possibility* of the decision maker coming to a different conclusion if they would come to a different decision by not taking this information into account.

3.16. It is advanced that this junction, and the effect MetroWest will have on its operation, is a material consideration.

Planning Policy Considerations

3.17. The Estate is a *Principal Industrial and Warehousing Area,* as set out in the Development Management Polices (DMP). As such, it is clearly given significant weight as an employment and commercial area. As set out in 2.13.1 and 2.13.2 of the DMP it is clear that the LPA's decisions and policies need to support the *''location, promotion and expansion''* of these areas.

3.18. Bristol Local Policy is unambiguous in protecting important employment and commercial areas, with policy being restrictive to the loss of any floor space (DM17). Policy BCS8 of the Local Plan also recognises the restrained and limited nature of employment land in the city centre:

> *''4.8.17 Retaining valuable employment land is an important part of the council's strategy. It helps to maintain the city's diverse economic base by ensuring a wide variety of business spaces of different types, sizes, quality and cost. The built-up nature of the city means that it is very difficult to physically replace employment sites which are re-developed for alternative uses. Employment land provides continued enterprise and employment opportunities across the city, especially for business start-ups and in those parts of Bristol experiencing persistently high levels of socio-economic deprivation. The approach can help to provide employment close to where people live and so helps reduce the need to travel, especially by car. The city's Principal Industrial and Warehousing Areas represent Bristol's essential core provision of industrial and warehousing land. Retaining these strategically important areas will help the city meet the latent and future demand for industrial and warehousing development.''*

(Our emphasis added)

3.19. Serious consideration must therefore be given to any issues that may give rise to adverse impact on the continued operation of The Estate and its ability to run effectively.

3.20. The NPPF also provides a basis for assessing the potential highways impacts, this is at 108 b) and c); the paragraph requires a wider assessment of highways impact on the site and the wider transport network.

3.21. As such both ETM and Manheim submit that within the existing policy basis the DCO fails because of the unsatisfactory proposed mitigation of the acknowledged adverse highway impacts. It is considered that this is due to the limited survey effort and failure to recognise the importance of this site as a *Principal Industrial and Warehousing Area* which is supported in policy both locally and nationally.

4. Agent of Change as a Material Consideration

4.1. It is the assertion of this submission that MetroWest is the *'agent of change'* as referred to and defined in planning policy at a national level and that the closure of the junction at The Estate to allow the passing of trains will have a deleterious impact on the operation of our clients businesses in The Estate. Further it is asserted that the modelling undertaken is not only unsatisfactory with regards to immediate impact on the operation of The Estate, it also fails to give due consideration to any change in operation that may occur within The Estate (change that could occur either with or without planning permission). The approval of the DCO in its existing state may also mean that an application by a resident business of The Estate to expand or change its parameters of operation could be refused due to the lack of highway availability to the site.

4.2. Both our clients are significant local employees and both businesses rely on the large scale movement of vehicles, there is no other way their business can operate. As a car retail and auction site, Manheim's vehicle movements vary significantly on a day to day basis, with an auction day seeing a considerable spike in activity. It is noted that the modelling undertaken by the applicant did not take into consideration an auction day. As the operator of Bristol's recycling facilities, ETM has a large fleet of vehicles and skips that require a continued and steady arrival to the plant located in The Estate. ETM obtained consent for and has recently implemented a £5m investment in their site to increase throughput to meet the increased recycling needs of the City.

4.3. The agent of change principle is established in the National Planning Policy Framework (NPPF). The NPPF 2012, set out at paragraph 123 the requirement for planning polices and decisions to:

> *'recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established;'*

4.4. The Housing White Paper '*Fixing our broken housing market'* (February 2017) recognised the importance new development could have on existing business and provided specific mention to it. It is notable that the White Paper looked to incorporate not just noise but other impacts of the new development. The relevant section of the White Paper is included below:

> *''**Noise and other impacts on new developments***
>
> *A.140 The National Planning Policy Framework, supported by planning guidance, already incorporates elements of the 'agent of change' principle (this provides that the person or business responsible for the change should be responsible for managing the impact of that change) in relation to noise, by being clear that existing businesses wanting to grow should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established.*
>
> *A.141 We propose to amend the Framework to emphasise that planning policies and decisions should take account of existing businesses and other organisations, such as churches, community pubs, music venues and sports clubs, when locating new development nearby and, where necessary, to mitigate the impact of noise and other potential nuisances arising from existing development. This will help mitigate the risk*

of restrictions or possible closure of existing businesses and other organisations due to noise and other complaints from occupiers of new developments.''

4.5. This has led to the latest iteration of the NPPF (both 2018 and 2019) with the inclusion, at paragraph 182 of the following:

> *"Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed."*

4.6. The main application of paragraph 182 has thus far been that of noise mitigation and the impact an existing 'noisy' business may have on a newly permitted development which may in turn object to being situated next to a 'noisy' business and curtail its operation.

4.7. In this case the nuisance arising that affects our clients site is that of curtailed access to their business premises. There are two recent High Court Decisions which hold particular relevance, these being:

- *Cemex (UK) Operations Ltd v Richmondshire District & Anor [2018] EWHC 3526 (Admin) (19 December 2018)*
- *Ornua Ingredients Ltd, R (On the Application Of) v Herefordshire Council [2018] EWHC 2239 (Admin) (22 August 2018)*

(appendix III and IV respectively)

4.8. That this application does not involve a noise issue is not to say the thinking behind the decision taking in the above cases is flawed when applied to this circumstance. In both cases it was the failure of the decision maker to consider relevant material considerations that led to the quashing of the decision.

4.9. Such an approach has had a bearing with Inspectors with the two notable appeals being recently dismissed

- *3217413 -18-20 Albion Court, Frederick Street, Birmingham B1 3HE*
- *3234440 - Land to South of Walker Road, Formerly Saint Peters Scrap Yard*

(attached as appendix V and VI respectively)

4.10. With regard to the Albion Court appeal the paragraph of note is that of 22:

> *''I conclude that the appeal proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development. It would conflict with the relevant requirements of the Framework which seeks to ensure that new development can be effectively integrated with existing businesses and community facilities; that where the operation of an existing business would have a significant effect on new development nearby, suitable noise mitigation is provided as part of the development; and that new development provides a high standard of amenity for future occupiers.''*

(our emphasis added)

4.11. In this regard the Inspector has identified that the proposal would conflict with the NPPF in integrating the new development with the existing businesses.

4.12. Land to South of Walker Road is a useful inclusion as it shows the same rigorous application of NPPF 182 but in this instance the 'effect' is that of odour. At paragraph 18 the Inspector draws together their findings:

> *''Drawing all these matters together, I cannot rule out the possibility that future occupiers of the development could be exposed to harmful odour effects from the BWTTS. There is also a realistic prospect that the proposal could lead to further odour-related complaints against the BWTTS. This could result in further costly measures and restrictions being placed on its operations. Not only would this disadvantage an existing business, but it could also unacceptably prejudice the Council's essential waste management and recycling infrastructure and services. In these circumstances, I consider that a precautionary approach is a necessity.''*

(our emphasis added)

4.13. In brining together parallels there is a high degree of probability that there will be conflict at this junction between the proposed users and that of MetroWest. Neither ETM nor Manheim have any way of functioning without the use of the access for a significant number of vehicle movements. It is also reasonable to assume that another business unit at The Estate may increase in size or change its mode of operation, both of which could place unreasonable pressure on the junction. It should also not go unnoticed that the proposed operation of MetroWest may also change, with an increase in the number of routes operated per hour not being an inconceivable prospect. Such an increase would see further closure of the junction every hour. As stated in Land to South of Walker Road *'a precautionary approach is a necessity'*.

4.14. In regard to the thrust of this submission, numerous land-use changes in the vicinity of this site have the potential to be brought forward in the future. This creates the potential for severe impact on traffic flows in and around Brunel Way, Winterstoke Road and Ashton Vale Road.

4.15. The traffic modelling undertaken in support of the DCO scheme fails to account for any of the proposed or potential changes, hence it remains undemonstrated that the scheme can adequately mitigate the impact on the continued operation of these businesses.

4.16. Potential and proposed local land use changes which should be but are not accounted for in the DCO submission include the development of Bristol Western Harbour. Bristol City Council has aspirations for a strategic redevelopment of this historic industrial area, including remodelling of the highly congested road network around and across the harbour. A high level swing bridge currently crosses the western harbour at Brunel Way and this exhibits substantial peak hour congestion, which extends onto Winterstoke Road, with impact on the operation of our client's access junction.

4.17. In cTc's previous submissions, the scope of technical assessment undertaken by ch2m was heavily criticised, including the lack of consideration of any interaction between junction effects and background congestion further afield. In particular, on Brunel Way. This interaction effect has not been modelled and the traffic model only considers effects at the junction itself. This is a likely contributory factor to the model's failure to reflect the traffic conditions seen on a daily basis by our clients.

4.18. In view of the substantial changes likely to be brought forward in the coming years at the Western Harbour, including strategic remodelling of Brunel Way and the interaction with Winterstoke Road and our clients access; the junction needs to be explicitly considered before any substantial changes are made to the operation of the Ashton Vale Road junction.

4.19. In view of recent changes to the Planning Use Class Order, which permit a more simple change of use between employment uses, there is the potential for the less onerous (in terms of traffic generation) uses within the Ashton Vale estate to convert to other employment in a form which could generate significantly more traffic. As an example, a B8 storage facility could now change under Permitted Development rights to a B1 office facility. Consequently, an employment use with low employee density per unit floorspace could conceivably transfer to a use exhibiting much higher employee density, hence greater traffic generation. In order to illustrate this, the TRICS database has been interrogated for edge of centre employment sites in both B1 and B8 uses, with the associated traffic generation rates per 100sqm compared in Table 4.1, below.

Table 4.1 Comparison of Traffic Generation Rates for B8 Storage and B1 Office Uses

Period	**Traffic Generation (veh/100sqm)**		
	B8 storage	**B1 office**	**Change**
AM Peak Hour	0.361	2.123	+488%
PM Peak Hour	0.359	1.800	+401%

4.20. The traffic model submitted in support of the DCO fails to account for any of the above potential background changes and consequently it is clear that the potential traffic impact of the additional closures of the level crossing has not been adequately assessed.

Summary

4.21. MetroWest proposes a scheme that will have significant adverse impacts and has failed to adequately assess how to mitigate them. The proposal is a significant *'agent of change'* to the current operation of The Estate. As per the requirements of paragraph 182 of the NPPF it is for the applicants to demonstrate that these proposed changes will not impact on the current and future running of The Estate. This demonstration must include an understanding that there may well be material changes to The Estate that will increase vehicle movements and a potential change in the number of operated movements by MetroWest forcing further road closures.

5. Limitations of Previous Modelling

5.1. cTc has made two previous submissions to the DCO process on behalf of our joint clients, ETM and Manheim. These comprised firstly an initial letter to our client's Planning Lawyer, raising concerns from a preliminary review of the submitted traffic modelling reports and subsequently a more considered and detailed review of the documentation, undertaken with the assistance of traffic microsimulation modelling specialists, SYSTRA. Those submissions are included herewith at appendix VII and VIII.

5.2. Having reviewed the scheme promoters' responses to cTc's earlier submissions, there appears to have been surprisingly little credible explanation of, or response to, the serious concerns expressed. Those concerns demonstrated that the traffic modelling on which the scheme promoters' mitigation proposals are predicated exhibits substantial flaws in regard to both its methodology and the data on which the model is based. It concluded that substantial new data collection was required and the traffic models should then be re-constructed, recalibrated and revalidated. Only once this process has been undertaken will the models potentially provide a reliable basis upon which to determine the impact and required mitigation of the proposal for Metrowest at Ashton Vale Road.

5.3. Rather than produce the further survey work required to reliably update the traffic model, the scheme promoters have sought instead to justify the data previously collected, which was clearly and undeniably flawed. Consequently, no weight can be given to the results of the traffic model produced, which remains demonstrably unreliable.

Deleterious Impact

5.4. Our clients' concerns are that the traffic modelling which has been submitted in support of the DCO is unsatisfactory in ways which understate the operational impact in regard to access to our clients' sites. These inadequacies potentially understate the resultant congestion in accessing and egressing the industrial estate to such a degree that the ability of businesses to not only retain, but continue to grow their operations within The Estate may be seriously compromised.

5.5. In particular and in regard to the ability of employers currently residing within The Estate, any net impact on their ability to easily, safely, quickly and conveniently enter and leave their premises could severely constrain their ability to further develop their businesses moving forward. ETM requires ease of access by its lorries, bringing in unprocessed waste and removing processed and packaged product. They have recently invested heavily in new plant in order to enhance the efficiency of operation of their site, with the result that throughput of waste is increasing. Consequently, if they are to realise the full potential of their recent significant investments, traffic associated with their operation (which has already increased significantly since the time at which the surveys were undertaken for the Metrowest modelling) will continue to grow. Congestion at the access to The Estate, could easily prevent these increases from being efficiently achieved, hence reducing the benefit available from their substantial investment in this site.

5.6. Manheim currently operate vehicle auctions from their site and traffic demand accessing and egressing this site increases dramatically on auction days. The surveys which were undertaken to inform the DCO traffic models were not conducted on auction days, hence underestimate traffic demand considerably. In the promoters own response to the DCO it is acknowledged that the traffic flow on Ashton Vale Road is seen in subsequent ATC surveys to vary from the MCC flow from which the model was constructed. The original MCC flow on

Ashton Vale Road is quoted as 204 vehicles during the peak hour and a variation up to 290 vehicles is referred to. This is dismissed as inconsequential, despite representing an error of the order of 40%. It is reasonable to conclude that an error in the model input of 40% could easily result in an error in the model output of at least similar scale, which could perhaps explain why the model conclusions are not witnessed by occupiers of the industrial estate on a day to day basis.

Conclusions

5.7. The conclusions of cTc's further consideration of ch2m's VISSIM traffic model remain the same as those presented previously; that the model has not been demonstrated to be fit for purpose. The modelled traffic conditions on Ashton Vale Road do not reflect those experienced by occupiers of The Estate and consequently no weight can be given to the stated conclusion that the proposed mitigation will adequately address the issues arising.

5.8. cTc has clearly stated throughout this process that the base data on which the model has been constructed is flawed and that new surveys are required. These should include a day on which Manheim have an auction. Once these surveys are completed, the model matrices should be reconstructed from this new data and the model recalibrated and revalidated. The results of this process should be shared with the occupiers of The Estate in order to reach a common position in which the model can be agreed as representative of the conditions experienced by regular users of Ashton Vale Road. Only then should the model be used to forecast future traffic impact and to design appropriate mitigation. The analyses of future traffic impact need to consider likely changes and/or extensions in the use of key sites both within The Estate and external to it. These changes will need to account for the Bristol Western Harbour scheme and the geographic scope of the model needs to be extended to include Brunel Way in order to account for any interaction.

5.9. Once the above additional work is completed it will be possible to produce an informed analysis of required mitigation in order to ensure that the ability of our clients to continue to develop their businesses in line with their potential is not prevented by an ill-thought out design with the potential to impact significantly on the operational traffic capacity of the sole highways access to the business park.

6. Summary and Conclusion

6.1. Both ETM and Manheim do not object to the principle of the DCO, provision of alternative means of travel is supported. The concern is that in the grand scope of the DCO the existing businesses of Ashton Vale Industrial Estate/Cala Trading Estate have been forgotten and their ability to operate effectively, now and in the future, has been swept away.

6.2. In policy terms The Estate is a *Principal Industrial and Warehousing Area*, protection of such land is a high priority in planning policy and great weight is given to the preservation and support of this land to allow continued and effective operation. A planning application submitted to the LPA that inhibited the ability of a Principal Industrial and Warehousing Area would not be approved, the same application of policy must apply with regard to this DCO.

6.3. It is also advanced that MetroWest is the '*agent of change'*, case law has been provided that demonstrates the 'agent of change', and its effects on the operation of existing business, must be considered in full. This includes the ability of the existing businesses to carry out expansion. Brief calculations are included within this Written Representation to demonstrate what a simple change of use could achieve in terms of vehicle numbers. MetroWest could quite conceivably also request to increase the number of journeys per hour, closing the junction further. If the works to this junction are allowed to proceed as is it is entirely plausible that a business unit within The Estate may not be able to achieve a planning consent to expand, change its operation or increase its hours of operation because of conflict with this junction. Such a consent would normally expect to be reasonably consented based on the land sitting within the *Principal Industrial and Warehousing Area* and the supportive policy for industry and warehousing contained within it.

6.4. As it stands this junction will have a detrimental impact on existing businesses and may well have consequences to the wider Cumberland Basin Road network. As per the provisions set out in paragraph 182 of the NPPF the applicant should provide a detailed analysis of the junction that includes consideration for future expansion of the existing business and modelling to demonstrate the effect of an increase in the number train movements per hour.

Appendix I

Appendix II

MetroWest

MetroWest
Engine Shed
Station Approach
Temple Meads
Bristol BS1 6QH

metrowest@westofengland.org

November 10, 2016

ETM Contractors Limited
41 Ashton Vale Road
Ashton Vale
Bristol
BS3 2HA

Reference: 41 Ashton Vale Road, Ashton Vale, Bristol, BS3 2HA

Dear Stakeholder,

METROWEST PHASE 1 –
SECOND INFORMAL CONSULTATION ON PROPOSALS FOR ASHTON VALE ROAD

In February 2016 we consulted on six alternative highway, pedestrian and cycling access routes to the Ashton Vale Industrial Estate as part of the MetroWest Phase 1 project.

Following on from that work, we have selected two of these options for further consideration, and are seeking your views on these, along with an additional new option that has been identified.

This consultation closes at midnight on 12th December. More information, including details of a drop-in event on 22nd November, can be found below.

Background information

MetroWest Phase 1 is proposing to re-open the Portishead rail line to passenger train services and enhance the passenger train service for the Severn Beach and Bath to Bristol line (local service). The project is being led by North Somerset Council on behalf of the four councils; Bristol City, Bath & North East Somerset, North Somerset and South Gloucestershire.

The consultation held in February 2016 was as a result of emerging work for our Transport Assessment which indicated that the MetroWest Phase 1 half hourly train service of up to 30 passenger trains per day in each direction would result in traffic impacts on Ashton Vale Road (exiting the industrial estate) and on Winterstoke Road (entering the industrial estate), in respect of longer traffic queue lengths. As a result the level crossing barriers would need to operate significantly more often than they do currently. Our initial train service operational planning indicates a total barrier down time of approximately 20 minutes each hour, with each cycle of the level crossing barrier being down between 3 and 12 minutes.

Ashton Vale Road & Barons Close alternative access options

We consulted on six highway options to mitigate this issue, and from that work we have selected two options for further consideration. We also consulted on two pedestrian and cycling options as the pedestrian only level crossing at Barons Close will have to be closed permanently for safety reasons. We have selected one of these two options to take forward.

The report from the February consultation is available online at www.travelwest.info/metrowest.

During the development of the engineering design over the last few months, a third possible route has been identified which we are now also seeking views on. This third option reconfigures the A370 / B3128 junction introducing new on and off slips and utilises an existing off slip road before connecting through to the industrial estate.

The three options are:

- **Option A:** new highway access via land owned by Bristol Sport, Manheim Auctions and Bristol City Timber (previously option 2)
- **Option B:** new highway access via land owned by Bristol Sport and Manheim Auctions (previously option 4)
- **Option C:** reconfiguration of the A370 / B3128 junction with additional on and off slips and a new highway access via land owned or leased by David Lloyd, Bristlewand / Kenny Group and Sandhurst Plant Hire (new option)

As a result of the February consultation we are proposing to take forward the pedestrian and cycling access on the eastern side of the estate for all three options, via a new ramp running parallel to the railway adjacent to Babcock. The existing pedestrian only level crossing at Barons Close is to be closed permanently. The public right of way at Barons Close is to be diverted onto a new path linking to Ashton Vale Road, currently being constructed by the MetroBus project. The proposed pedestrian and cycling ramp will connect Ashton Vale Road to Ashton Road linking with various on-street and off street pedestrian / cycling routes to Winterstoke Road and beyond, including via the subway.

The three options can be viewed on the enclosed concept plans and it is these which we are now seeking views on.

Ashton Vale Road Level Crossing

The proposed intensification of the existing railway with the re-introduction of passenger train services operating 30 trains per day in each direction, raises some safety concerns for the level crossing. There is an increased risk of pedestrians or road users becoming frustrated waiting to cross and then attempting to cross during the level crossing sequence, i.e. while the barriers are being lowered or have been lowered. On-going technical assessment on the safety of the level crossing indicates it is likely that the level crossing will have to be closed permanently.

How to respond our consultation

We are seeking the views of those directly affected by the options and wider stakeholders. We are targeting our consultation at the businesses and property owners of the industrial estate and adjacent properties, the employees of the businesses and statutory bodies such as the Environment Agency. However the consultation is also open to wider stakeholders and the public.

We will use consultation responses to inform the selection of the highway access options to be taken forward for further development of the project design. Following this, we intend to undertake formal public consultation in spring 2017 on the whole project.

The project is a nationally significant infrastructure project and therefore requires a Development Consent Order for powers to build and operate the project. We are aiming to submit our application to the Secretary of State for a Development Consent Order in Autumn 2017.

We would like to know what you think about the options outlined above. You can let us have your feedback by either:

- visiting https://travelwest.info/ashton-vale-road and submitting an online response, or
- email us at: metrowest@westofengland.org, or
- write to us at: MetroWest, Engine Shed, Station Approach, Temple Meads, Bristol, BS1 6QH

When providing a response please indicate whether you are responding as a business or an organisation or whether for instance as an employee. It would help us of you can also be specific about issues, and provide as much detail as possible. For example; what is the exact location of the issue? Does it occur on certain days, or times during the day?

You can also discuss the proposals with us in person. We will be holding a drop-in session at the nearby Ashton Gate Stadium (Bristol City Football Club) Dolman Lounge 2 & 3 on **Tuesday 22nd November from 12:30pm to 7.00pm**. Ashton Gate Stadium, Ashton Road, Bristol, BS3 2EJ.

The consultation opens on the **14th November** and remains open until **midnight 12th December 2016**.

For more information about the MetroWest Phase 1 project, please visit the website: travelwest.info/metrowest. We look forward to hearing from you.

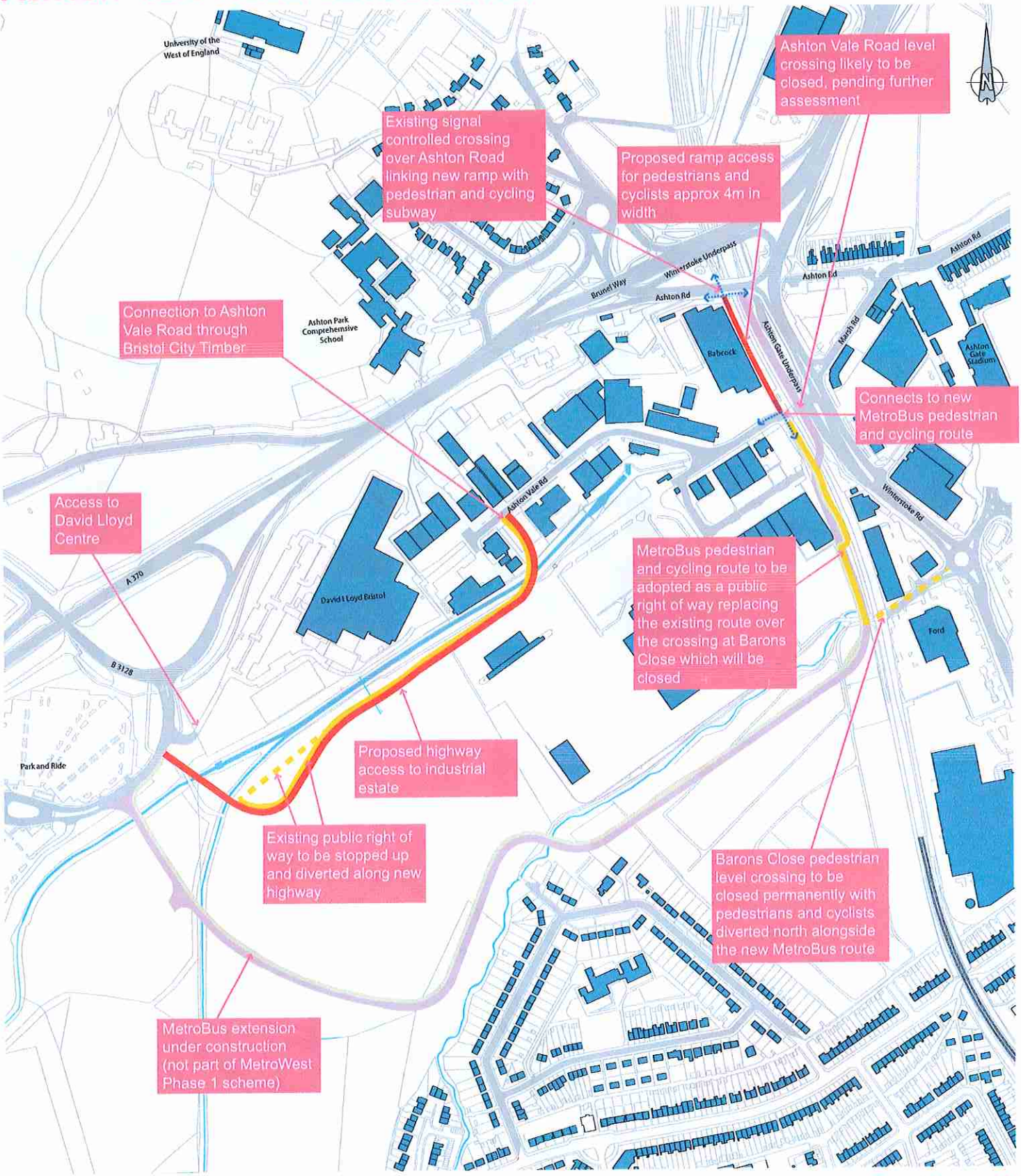
Yours faithfully

[redacted]

James Willcock
MetroWest Phase 1

enc: Concept plans of highway access options A, B & C, and pedestrian and cyclist access

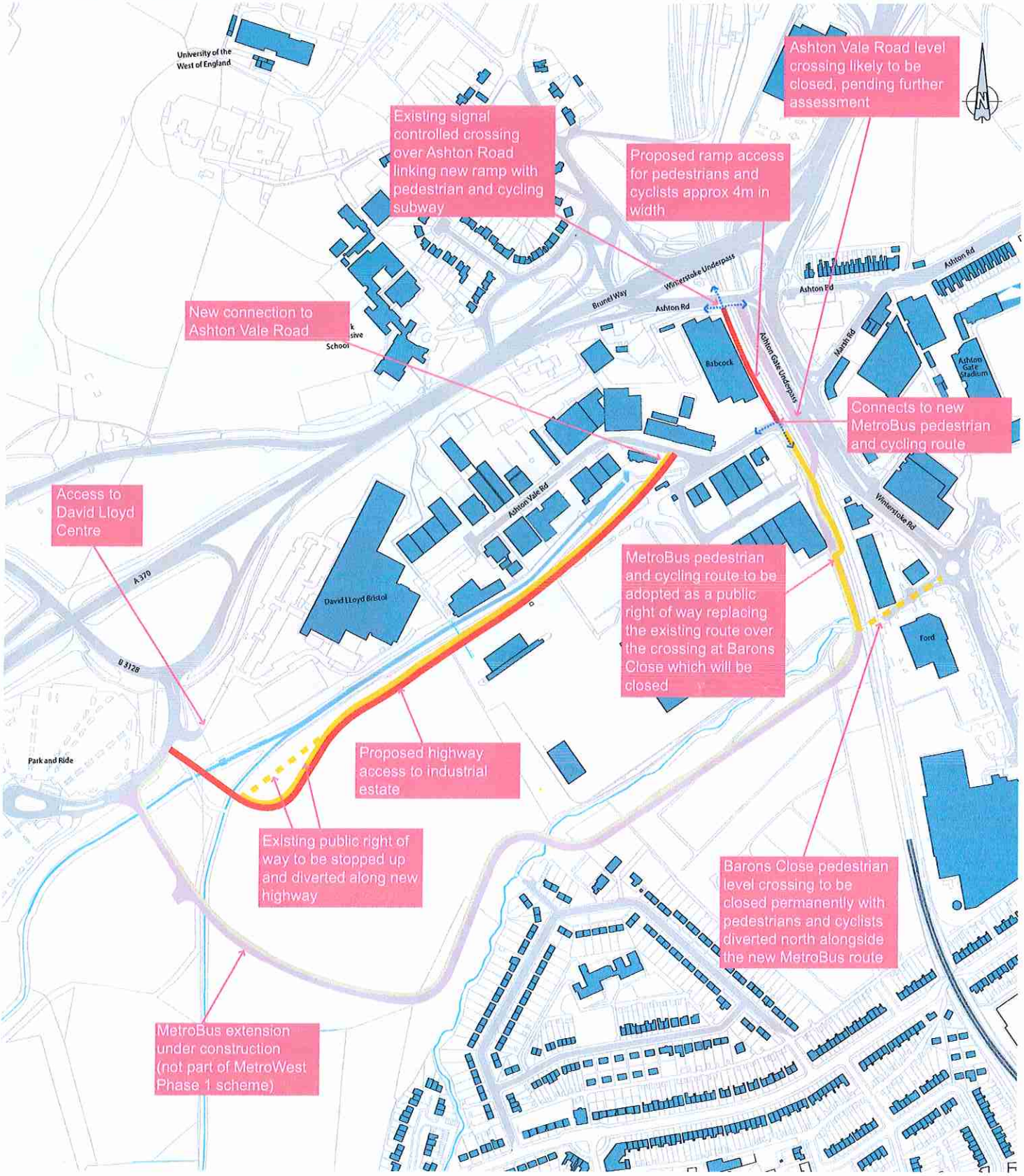
Ashton Vale Road Consultation



Option A

MetroWest

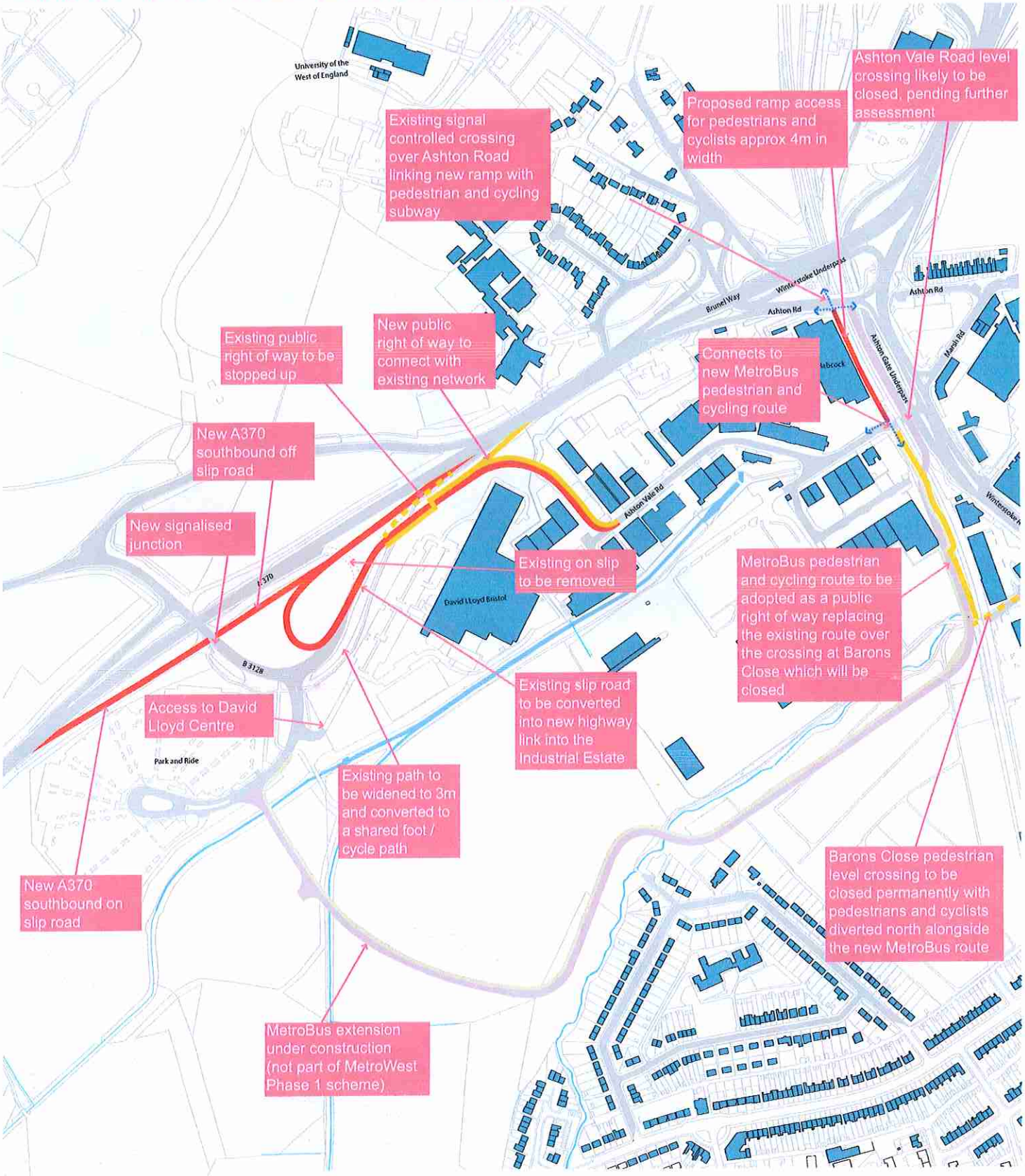
Ashton Vale Road Consultation



Option B

MetroWest

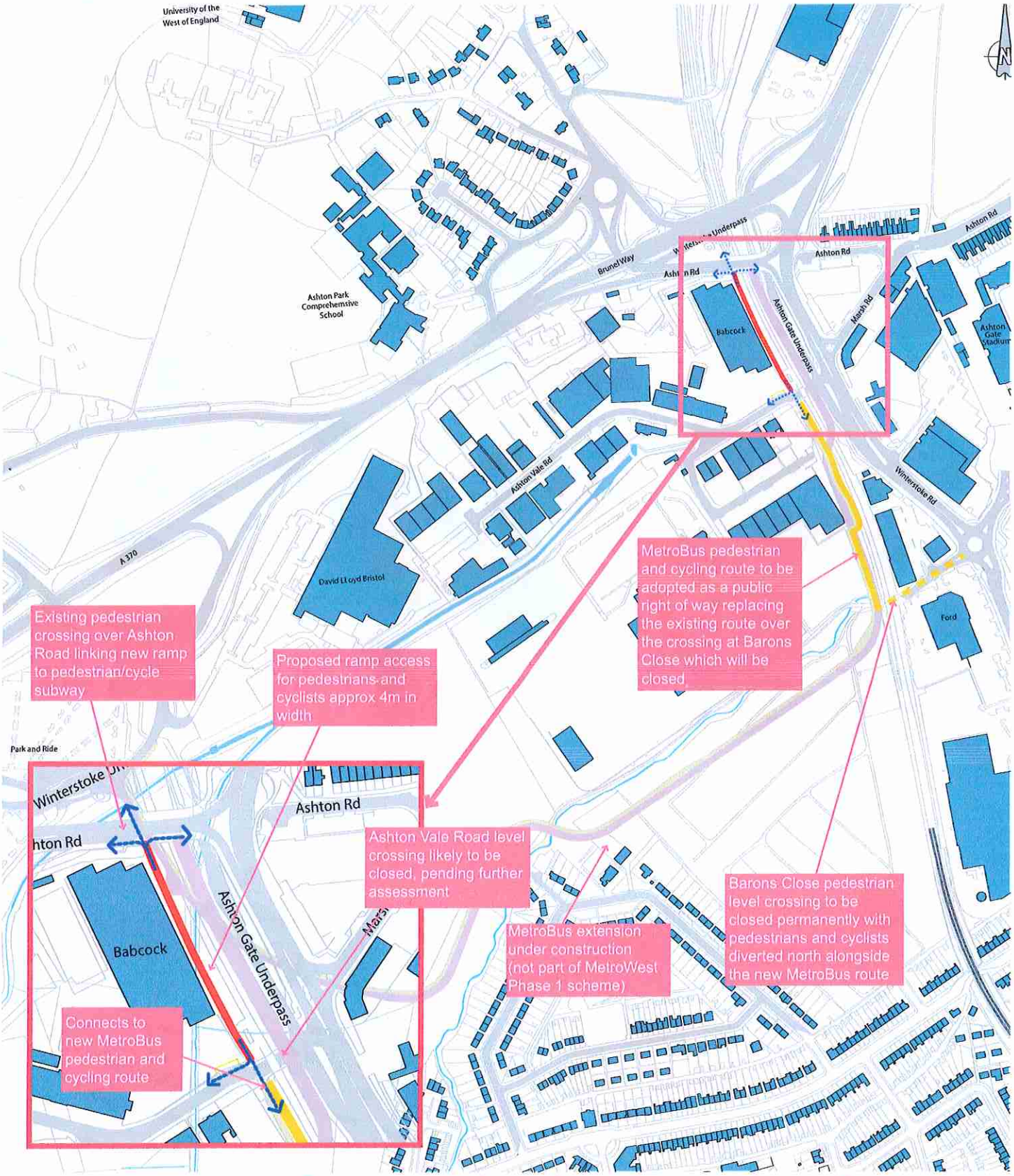
Ashton Vale Road Consultation



Option C

MetroWest

Ashton Vale Road Consultation



Details of proposed pedestrian and cyclist access

MetroWest

Appendix III

England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2018] EWHC 3526 (Admin)
Case No: CO/1639/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

19/12/2018

B e f o r e :

HER HONOUR JUDGE BELCHER

Between:

CEMEX (UK) OPERATIONS LIMITED	**Claimant**
- and -	
RICHMONDSHIRE DISTRICT COUNCIL	**Defendant**
-and-	
DAVID METCALFE	**Interested Party**

Miss Jenny WIGLEY (instructed by Clyde & Co) for the Claimant
Mr Juan LOPEZ (instructed by Darlington Borough Council Legal Services) for the Defendant
Hearing dates: 9 and 26 November 2018

HTML VERSION OF JUDGMENT

Her Honour Judge Belcher :

1. In this matter the Claimant challenges the decision of the Defendant local planning authority dated 15/03/2018 granting planning permission (the Permission") to the IP (the "IP") for the conversion of a stone barn into a three-bedroom dwelling with detached garage on land at Quarry Barn, Moor Road, Leyburn, North Yorkshire (the "Property").

2. The Statement of Facts and Grounds contains five Grounds of challenge. By Order dated 20 June 2018, John Howell QC, sitting as a Deputy High Court Judge, granted permission on the papers in relation to Ground 4 and part only of Ground 5, but refused permission on Grounds 1, 2, and 3, and the remaining part of Ground 5. He ordered the matter to be listed for one day-based on that permission order. The Claimant sought to renew the Application for Permission on Grounds 1 to 3 and asked that this be considered within the substantive hearing. Those Grounds are substantial, and the net effect was that the one day allowed for the substantive hearing was insufficient. Fortunately, we were able to find a second day within a reasonably short time frame, but I repeat my advice to Counsel that in such circumstances, the time estimate given should be revisited and, if appropriate, a revised time estimate provided to the listing officer. Having heard argument over 2 days, I am satisfied that permission should be granted on Grounds 1, 2, and 3. I grant permission accordingly.

3. At the outset of the hearing, both parties sought permission to rely upon further witness evidence, and each opposed the other's Application on the basis that the evidence in question was inadmissible. I allowed both Applications on the basis that I considered the evidence to be admissible, and that the real issue was as to its relevance and or weight. There was also an Application by the Claimant for permission to add, whether as a new Ground or as part of Ground 5, the comments at Paragraph 8 of the Claimant's Response. I gave a preliminary indication that I did not consider this to be a new Ground, but in any event, Counsel agreed that all matters should be dealt with by the court within this hearing. References in this judgment to the trial bundle will be by Tab number, followed by the page number, for example [15/102]. References to the bundle of authorities will be by the capital letters AB, followed by the Tab number, for example [AB/10].

   The Facts

4. The Claimant is a global producer and marketer of cement, concrete and other building materials. Within the UK it is a leading producer of ready mix concrete, and the third largest cement and asphalt producer. The claimant operates a major limestone quarry (the "Quarry") on an industrial site which includes an asphalt road stone coating plant (the "Asphalt Plant") at Black Quarry, Leyburn North Yorkshire. The Asphalt Plant and the Property are located directly opposite each other on opposite sides of a road called Whipperdale Bank. The Property is located 64 m to the south of the Asphalt Plant. The distance between the Quarry and the Property is 569 metres.

5. The Quarry and Asphalt Plant operate subject to planning conditions imposed on 5 April 2000 in a Minerals Planning Permission granted by North Yorkshire County Council (the "Minerals Permission") [23/161-170]. Conditions 14 to 16 of the Minerals Permission limit the hours of operation of the Quarry, but there is no limit on the hours of operation of the Asphalt Plant [23/166]. Condition 17 of the Minerals Permission, which appears under the heading "Noise Control ", requires that noise from the operations on the site including the use of fixed and mobile machinery shall not exceed a noise limit of 55 dB (A) LA eq (1 hour) free field at two residential properties, namely Moor Farm, and Stonecroft, Washfold Farm [23/167]. There is no dispute in this case that the Claimant's operations, and the Asphalt Plant in particular, generate a considerable amount of noise.

6. I have the benefit of an aerial photograph based on ordnance survey land line data [12/86]. I was provided with an enlarged and much clearer version of this document which was kept loose during the trial. For ease of reference I shall refer to that enlarged aerial photograph as "AP1". AP1 has a number of arrows and distances marked on it. There are arrows purporting to show distances between Moor Farm and the Property, and between Washfold Farm and the Property. Miss Wigley advised me that those arrows should

in fact be from the respective farms to the Asphalt Plant, rather than to the Property. There is no dispute in this case that the distances shown on AP1 are from the respective farms to the Asphalt Plant. Thus, Moor Farm is 1131 metres from the Asphalt Plant, and Washfold Farm is 652 metres from the Asphalt Plant.

7. On 21/01/14 the Defendant granted planning permission for conversion of the Property in a manner almost identical to the development which is the subject of the Permission which is challenged before me. The Claimant's case is that it did not receive any notice from the Defendant in relation to that planning application, and did not otherwise become aware of it. In those circumstances, the Claimant was obviously not able to object to that application. It is the Claimant's case that had it been aware of that application, it would have objected to it because of the proximity of the Property to the Quarry and the Asphalt Plant, and the adverse impact those operations would have in noise terms for the residents of the Property. (See Witness Statement of Mark Kelly, paragraph 26: 25/176]. There is no dispute that the Defendant's own Environmental Health Department was not consulted with regard to noise emanating from the Claimant's operations in relation to the 2014 grant of planning permission.

8. The Property has been developed. However, there is no dispute that the works undertaken to convert the barn constituted unlawful development. This is because the pre-commencement conditions contained in the 2014 planning permission had not been discharged prior to the start of the works. Accordingly, in February 2017, the IP made a fresh planning application to regularise the position, with the proposed development being the same as that previously approved, save for the addition of a detached garage.

9. On 25/04/2017 the Claimant submitted objections in the form of an e-mail note from Dr Paul Cockcroft of WBM Acoustic Consultants, raising the issue of noise impacts at the Property. As a result, the Defendant's Planning Officer, Natalie Snowball, consulted Lindsey Wilson, a Scientific Officer in the Defendant's Environmental Health Department. Lindsey Wilson made an initial visit to the site to look at the relationship between the quarry and the dwelling. On 23/05/17 Lindsey Wilson sent an e-mail to Natalie Snowball about that visit. In her e-mail Lindsey Wilson describes clearly audible noise from the Asphalt Plant despite the wind direction blowing noise away from the Property. She comments that the noise had the potential to have a significant adverse impact on that the proposed dwelling, particularly at night as it would appear that the Asphalt Plant has permission to operate through the night where background noise levels will be low. In those circumstances, she recommended that the IP should be requested to carry out a noise impact assessment by reference to BS 4142:2014 "Methods for rating and assessing industrial and commercial sound", and should give consideration to BS 8233, "Guidance on sound insulation and noise reduction for buildings", with regard to whether recommended noise levels are achievable [16/117].

10. Her email continues as follows:

> "I have also sought advice from North Yorkshire County Council mineral planning with regards to the planning permission for the quarry and whether any existing noise conditions would apply to [the Property] should permission be granted, or whether they could apply any review of the planning permission, which I understand is overdue. ….. My initial concern is that should a noise limit from quarry operations be applied to this property, the quarry may be unable to comply particularly to any night time limit applied, and this would therefore impact on the operations of the existing quarry. I would therefore also recommend that consideration is given to this aspect" [16/117].

11. The IP instructed Apex Acoustics to undertake the noise assessment. Apex Acoustics produced a report dated 10/08/2017 (the Apex Report") [17/119-138]. I shall have to consider the Apex Report in some detail later in my judgment, but for present purposes it suffices to say that the assessment carried out under BS4142 indicated a significant adverse effect from noise at the Property for both daytime and night time periods, and demonstrated high noise levels at the Property. The assessment results showed levels of noise far exceeding the threshold for the 'significant observed adverse effect level' as contained in the Noise Policy Statement for England ("NPSE"). This is the level of noise exposure above which significant adverse effects on health and quality of life occur and the policy aim is to avoid such levels [33/226 and 227]. The Apex Report sets out two "Feasible Ventilation Strategies" for achieving satisfactory noise

levels within the Property, which options both include continuous mechanical ventilation [17/122]. Again, I shall return to this in more detail later in my judgment.

12. There is no dispute in this case that the IP did not wish to install mechanical ventilation at the Property. By way of follow-up to a meeting between Brian Hodges, Planning Consultant for the IP, and Natalie Snowball and Lindsey Wilson, Brian Hodges emailed Natalie Snowball on 08/12/17 to confirm "… the works proposed to satisfactorily attenuate the noise impact from the nearby quarry operations" [18/139]. That email was copied to Lindsey Wilson. He attached a further copy of the Apex Report and referred to the fact that with respect to internal noise levels, subject to appropriate glazing specification and ventilation arrangements, any Significant Observed Adverse Effect Level impacts can be avoided. He then gives details and specification of the existing glazing which had already been installed and which exceeds the example specification for glazing as referred to at Paragraph 2.9 of the Apex Report. He then goes on to deal with ventilation stating as follows:

> "It is confirmed that the trickle vents used on the windows and doors are Greenwoods Slot Vents as referred to at 2.10 of the Noise Assessment Report and satisfy the performance requirements to achieve the acceptable internal noise levels. As detailed in Table 1 of the Noise Assessment Report Summary of minimum facade sound insulation treatment included in assessment calculations, in order to achieve the acceptable internal noise levels it is necessary to remove the slot vents from certain windows in the bedrooms."

He then goes on to list the vents to be removed and confirms that the works would be carried out within two months from the grant of planning permission and would be the subject of a planning condition. There is no reference at all to mechanical ventilation in that email.

13. By further email dated 03/01/2018 Brian Hodges emailed Natalie Snowball (copied to Lindsey Wilson) indicating that in addressing the issue of the reduction of noise levels within the building involving the reduction in the ventilation arrangements, he was conscious of the implications and possible conflict with building regulations. He goes on to confirm that even with the removal of the required vents, the ventilation requirements to meet building regulations are still satisfied, and he encloses an email received from Yorkshire Dales Building Consultancy Ltd to confirm that [19/144]. The enclosed email from Yorkshire Dales Building Consultancy Ltd states as follows

> "Further to our discussion regarding the provision of background ventilation… windows which will need to have the background ventilation openings (trickle vents) sealed in order to better meet the requirement for sound reduction into the building, will not reduce the background ventilation provisions required by building regulations as the provision can be met by the 2nd openings into each of the rooms….[19/147]."

In response to that, by email dated 08/01/2018, Lindsey Wilson replied

> "Thank you for the additional information from Building Control who confirmed that the ventilation arrangements are satisfactory. I therefore confirm that Environmental Health are satisfied with the proposed glazing and ventilation arrangements."

14. On 12/03/18 Lindsey Wilson provided her report to Natalie Snowball. I shall visit the detail of this report when considering the Grounds of challenge. For present purposes it suffices to say that Lindsey Wilson confirmed that the noise assessment recommended certain glazing and ventilation options all entailing the use of mechanical ventilation in order to achieve the recommended noise levels. She notes that the IP does not propose to use mechanical ventilation "….. and has forwarded documentation from Building Control who have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation". She concluded that satisfactory internal noise levels can be achieved through the use of glazing and ventilation arrangements [21/150-151].

15. She also dealt with the question of the Mineral Permission and the need to protect the existing quarry operation. She sets out advice received from North Yorkshire County Council who advised that the conditions set out in the Minerals Permission for the Quarry are the only conditions that they would refer to and are in force until such time as that permission may be subject to a review under the ROMP (i.e. review of minerals permission) regulations or a variation. She confirms that the noise limits contained within the Minerals Permission would not apply to the Property and therefore there would be no breach of the Minerals Permission [21/151].

16. Natalie Snowball prepared a delegated application report dated 15/03/18. It was referred to throughout the proceedings as the Officer's Report and I propose to refer to it in the same way but using the commonly recognised abbreviation "OR". In the OR, Natalie Snowball set out verbatim the final comments received from Environmental Health [14/94-96]. At paragraphs 6.8 to 6.13 of the OR, Natalie Snowball deals with "Noise and Amenity". The need for noise attenuation measures to overcome the unacceptable noise level was recognised and paragraph 6.11 provides as follows:

> "Environmental Health commented on the agent's mitigation proposals confirming that the glazing specification of the building would appear to meet the requirements of the acoustic report, but raised concern regarding whether sealing up the trickle vents as proposed by the agent would result in unacceptable ventilation in the dwelling. The agent had this checked by a Building Control Inspector who confirmed that the ventilation in the dwelling was acceptable and met the requirements under the Building Regulations" [14/99]

17. The OR notes the Claimant's continuing concern about the very high noise levels generated by the Asphalt Plant and the impact of this on the amenity of the Property, and that the Claimant is concerned that if the planning permission is approved it would have the effect of placing unreasonable restrictions on the Cemex Asphalt Plant operations particularly at night time. Paragraph 6.13 provides as follows:

> "Environmental Health have looked carefully at the proposal, and the concerns of Cemex, and whilst recognising that the proposed dwelling will experience relatively high levels of noise from the [Asphalt Plant], they have concluded that, with the mitigation measures proposed by the agent including removing and blocking up trickle vents in certain windows,…… satisfactory noise levels….. inside…… the dwelling can be achieved…….. They have also confirmed that the proposal will not conflict with the mineral planning permission which relates to the operations at [the Quarry] including the roadstone coating plant" [14/99]

18. On 15/03/18 the Permission was granted by the Defendant's planning manager under the Defendant's scheme of delegation. The Permission is subject to a condition requiring the removal or blocking up of trickle vents in certain bedroom windows in the Property. There are no conditions expressly requiring the retention of specified window glazing or requiring the installation of a mechanical ventilation system. The "Informative" on the planning permission states as follows:

> "[The Property] is located in close proximity to [the Quarry], and in particular the [Asphalt Plant], which has permission to operate 24 hours per day if required. The occupants of [the Property] will therefore experience noise from the quarrying operations. By using a combination of glazing and ventilation to the property, guideline internal noise levels in accordance with BS 8233:2014 'Guidance on sound insulation and noise reduction from buildings' can be achieved with windows closed…" [11/83].

19. The Claimant's Minerals Permission is due for review in April 2025 under ROMP. Any review will be required to consider operating conditions alongside any change in circumstances, including the existence of any new dwellings in the vicinity of the Quarry. On the second day of the hearing, the Defendant provided me with a second aerial photograph showing a number of other properties in the vicinity of the quarry, all of which have been developed pursuant to planning permissions granted since the grant of the Minerals Planning Permission in April 2000. I shall refer to this aerial photograph as "AP2". The Claimant asserts that there is a very real risk that conditions could be imposed under ROMP in order to protect the

residential amenity of occupants of the Property, and that such conditions could have a serious impact on the quarry operations. They suggest that such conditions could include restrictions on the permitted hours of operation of the Asphalt Plant and/or noise limit restrictions on the level of noise from the Asphalt Plant measured at the Property.

Legal Principles.

20. With the exception of an issue as to the relevance and or weight of evidence provided by the planning officer in relation to the decision-making process, there is no dispute between the parties as to the relevant legal principles. I shall first summarise those areas where there is no dispute as to the legal principles to be applied. This is drawn from the skeleton arguments provided by both Counsel for which I am grateful.

21. Planning applications are required to be determined in accordance with the statutory development plan unless material considerations indicate otherwise (S38(6) Planning and Compulsory Purchase Act 2004 and S70 Town & Country Planning Act 1990) [AB/1 and 2]. Whether or not a consideration is a relevant material consideration is a question of law for the courts: **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1WLR 759 at 780 [AB/6]. A material consideration is anything which, if taken into account, creates the real possibility that a decision-maker would reach a different conclusion to that which he would reach if he did not take it into account: **R (Watson) v London Borough of Richmond upon Thames** [2013] EWCA Civ 513, per Richards LJ at paragraph 28 [AB/16].

22. Decision-makers are under a duty to have regard to all applicable policy as a material consideration: **Muller Property Group v SSCLG** [2016] EWHC 3323 (Admin) [AB/14]. National Planning Policy is set out in the National Planning Policy Framework ("NPPF") and the National Planning Practice Guidance ("NPPG"). National planning policy is "par excellence a material planning consideration": **R oao Balcombe Frack Free Balcombe Residents v West Sussex CC** [2014] EWHC 4108 (Admin) at paragraph 22 [AB/15]. The weight to be given to a relevant material consideration is a matter of planning judgement. Matters of planning judgement are within the exclusive province of the local planning authority: **Tesco Stores Ltd** (supra).

23. An OR is not susceptible to textual analysis appropriate to the construction of a statute. **Oxton Farms and Samuel Smith Old Brewery v Selby DC** [1997] WL 1106106 [AB/12]); **South Somerset District Council v Secretary of State for Environment** [1993] 1PLR 80. The OR should not be construed as if it was a statutory instrument: **R (Heath and Hampstead Society) v Camden LBC and Vlachos** [2007] 2 P&CR 19. The OR must be considered as a whole, in a straightforward and down-to-earth way, and judicial review based on criticisms of the OR will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which are left uncorrected before the relevant decision is taken.

24. An OR is to be construed in the knowledge that it is addressed to a knowledgeable readership who may be expected to have a substantial local and background knowledge. There is no obligation for an OR report to set out policy or the statutory test, either in part or in full. **R v Mendip DC ex p Fabre** [2000] 80 P&CR 500 [AB/11]. Policy references should be construed in the context of general reasoning: **Timmins v Gelding BC** [2014] EWHC 654 (Admin) paragraph 83 [AB/17]. An OR is written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. A decision-maker does not need to rehearse every argument relating to each matter and every paragraph: **Seddon Properties v Secretary of State for the Environment** (1981) 42 P&CR 26 [AB/13]. These principles apply equally to a delegated application report.

25. The legal principles set out thus far are not in dispute. In this case Natalie Snowball, the Planning Officer, has provided two Witness Statements setting out, amongst other things, how she asserts she reached her decisions in relation to matters under challenge. It was suggested on behalf of the Claimant that this evidence was inadmissible as amounting to ex post facto rationalisation. As already indicated, I granted permission for both Witness Statements to be adduced in these proceedings, indicating that I would consider relevance and weight at a later point.

26. Having revisited the submissions made to me in relation to these matters, I conclude that there is in fact no real difference between counsel on the law to be applied in the circumstances. The law is helpfully set out by Green J in **Timmins v Gelding BC** [2014] EWHC 654 (Admin) at paragraphs 109 -113 (AB/17). In that case, Green J had regard to certain admissions made in the evidence of the principal planning officer (see paragraphs 47 and 55). Only at paragraphs 109 -113 did he deal with the more general issue of the relevance of witness statement evidence from the decision maker.

27. What is clear, for the reasons listed in paragraph 109 of Green J's judgment, is that there are a number of circumstances in which witness evidence can be properly received from a decision maker. In order to decide whether to accept or reject such evidence, is necessary for the court to identify the basis upon which the impugned statement is relied upon. It is equally clear that it should be rare for a court to accept ex post facto explanations and justifications which risk conflicting with the reasons set out in the decision. In support of that conclusion Green J referred to the decisions of the Court of Appeal in **Ermakov v Westminster City Council** [1995] EWCA Civ 42, and **Lanner Parish Council v the Cornwall Council** [2013] EWCA Civ 1290. Mr Lopez submitted that there is nothing in Miss Snowball's Witness Statement which conflicts with the reasons set out in her OR which formed the basis for the decision in this case. I accept that submission, and I do not understand it to be challenged by Miss Wigley.

28. However, the courts are also reluctant to permit elucidatory statements if produced for the purpose of plugging a gap in the reasoning. Green J refers to this principle at paragraph 113, citing the judgment of Ouseley J in **Ioannou v Secretary of State for Communities and Local Government** [2013] EWHC 3945. In my judgement this is where the issue lies between the parties in this case. Mr Lopez submits that the Witness Statements are not plugging any gap in the reasoning, whereas Miss Wigley submits that is exactly what the Witness Statements are designed to do. Thus, the issue is one of construing the basis upon which the Witness Statements are relied upon, rather than an issue of law. In those circumstances I shall return to this issue when dealing with the relevant Grounds.

The Grounds

29. The Claimant's grounds of challenge are as follows:

i) Errors as to the scope of the decision making process including as to the ability of the Environmental Health Officer to object to the proposed development and as to the ability of the Defendant to control the development (including to refuse the application). [3/24]

ii) Taking into account an immaterial consideration, namely that the Property is occupied "by a long-standing local family aware of the presence of the adjacent quarry". [3/27]

iii) Failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy. [3/28]

iv) Failure to take into account the impact on the Claimant of the fact that the Minerals Permission is due to be reviewed in 2025 and that, at that time, onerous conditions could be imposed on the Claimant's operation as a result of the grant of the Permission. [3/28]

v) Irrational failure to take into account all relevant considerations when deciding not to include all the conditions recommended by the IP's own noise consultant. [3/29]

Grounds 1 and 2

30. As both Counsel did in their submissions before me, I propose to deal with these two Grounds together. The full Grounds are set out in paragraph 29 above. However, in essence, each of these Grounds amounts to an allegation that the Environmental Health Officer ("EHO") constrained her consideration of the issues in this case by reason of the fact that the development of the Property had already taken place, and that the Property was already occupied. Ground 2 suggests a further and more specific constraint on the decision-

making process, namely that the Property was not simply already occupied, but that it was occupied by a long-standing local family aware of the presence of the adjacent quarry. The Claimant asserts that this implies that the family in residence will be more willing to accept the noise from the quarry operations than might be the case for future occupiers, and that it is an improper and irrelevant consideration.

31. In relation to the more general point under Ground 1, Miss Wigley submitted that the EHO has erroneously assumed the principle of residential development in this location has already been accepted and that the options to control or mitigate noise are limited by the fact that the dwelling is complete and occupied. The way the EHO approached the matter is set out verbatim in the OR report at [14/94]. Miss Wigley relies upon the fact that the EHO indicated that if Environmental Health had been consulted initially, it is likely they would have objected to the development. The EHO then states that as the barn conversion is complete and occupied, she considers it appropriate to assess whether the noise impact can be mitigated and reduced to provide an acceptable level of amenity for the residents and also that the existing quarry operations can be protected.

32. Miss Wigley submitted that there cannot be two different standards of what is acceptable, one to be applied to a planning application for a future development which has not yet been commenced, and one for a property which is already occupied. She submitted that the EHO's assessment has been influenced by the fact of occupation and amounts to an attempt to squeeze the application through on the basis of what the IP wants because the property is already occupied. Whilst the EHO asked for a noise assessment, Miss Wigley pointed to the fact that the scope of that assessment is itself limited by reference to the fact that "…. The building has already been constructed, limiting the potential options for facade sound insulation design". (Apex Report, paragraph 3.2; [17/123]) Miss Wigley submitted that the assessment by the EHO as to what is acceptable is tainted by that approach, in effect adopting a starting point that "There's not much we can do in terms of design and layout". She submitted that the fact that the development has taken place should not preclude a finding that the mitigation needed to deal with noise does involve changes in design or layout.

33. Mr Lopez made the point that it is inevitable that the planning authority will approach this application on the basis of what has been built, precisely because it is an application to regularise the position. He submitted that the planning authority cannot consider the matter in a vacuum. For a future application, the planning authority of necessity considers plans and proposals; for an application to regularise the position, of necessity, they consider what has in fact been built. He submitted that does not mean they have restricted themselves, but simply that they have adopted a practical and sensible starting point. He also pointed out that whilst the EHO had said it was likely they would have objected to the development if consulted at an earlier stage, there is no certainty in that respect.

34. During her submissions in reply to Mr Lopez, I asked Miss Wigley to make the following assumptions in relation to a hypothetical property which was a sensitive receptor for noise. I asked her to assume, if an application for permission had been made prior to development, that it would have been granted with a noise mitigation package including alterations in design and layout. I further asked to assume that for the same property but already built, a perfectly proper package could be achieved to address the noise issues but without involving alterations in design and layout. I suggested to her that in those circumstances it was hard to see how it could be said that a grant of planning permission with the lesser noise package (by which I meant the package without alterations in design and layout) could be challenged on the basis that the local authority should have approached matter as if based on plans rather than actual build. Miss Wigley very properly conceded that would be a proper approach for the planning authority to take, provided it can truly be said that the package of noise measures for the property as built is a proper package, and even if the planning authority might have preferred something different had it been considering the matter at an earlier stage on the basis of plans only.

35. However, Miss Wigley submitted that concession did not invalidate Grounds 1 and 2 in this case. She submitted that the concern behind Grounds 1 and 2 is that the threshold of acceptability in terms of noise mitigation measures has been compromised by the fact that this is a retrospective application for permission in respect of an occupied dwelling. In my judgment, it follows from that concession, that the

true source of complaint here is not that the EHO has imposed improper constraints by considering the property as built, but rather that the package of noise mitigation measures produced is unsatisfactory for other reasons. There is nothing in the EHO's advice to the planning officer, or in the OR to suggest that either the EHO or the planning officer did not understand that this was an application that could be rejected, or that either failed to understand that mitigation measures going beyond those desired by the IP could be imposed if the planning authority thought that was the right thing to do.

36. Turning specifically to Ground 2, Miss Wigley submitted that the EHO's reference to the Property "….being occupied by a long standing local family aware of the presence of the adjacent quarry" ([21/149] and adopted verbatim in the OR [14/94]) shows that the assessment of appropriate noise mitigation measures has been compromised by an assumption that the environment need not be so good for a local family already occupying an unlawful development. Miss Wigley submitted that this was a curious statement to include if it has no relevance to the matter. She submitted it must have been included as factoring into the assessment on the impact on amenity, as in "This family is perhaps more tolerant of noise than others".

37. I agree that it is not immediately obvious why the fact that the Property is occupied by a long standing local family aware of the presence of the adjacent Quarry needs to be mentioned by the EHO or by the planning officer. However, it is a significant leap from the fact of that mention, to the assertion that the effect was that the EHO and the planning officer were effectively treating this as a personal planning application for a family more likely to put up with the noise because they were already occupying and aware of the Quarry. There is absolutely nothing in the documentation to suggest that an error of that sort was made. The statement about the occupation of the family could equally well be proffered to explain why the current occupiers may not have complained about noise, with the implication that future occupiers might. I cannot accept that single sentence evidences a constraint of the type argued for by Miss Wigley. In my judgment, if relevant at all, the issues raised under Grounds 1 and 2 are more relevant to and supportive of the complaint in Ground 3. It follows that I reject Grounds 1 and 2.

Ground 3

38. Ground 3 is the alleged failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy. At the time of the Permission decision, the relevant NPPF was the 2012 version. In this judgment all references to the NPPF are to the 2012 version. Paragraph 123 NPPF provides (so far as relevant) that planning policies and decisions should aim to:

> i) avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of a new development
>
> ii) recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established.

The above are the first and third bullet points in Paragraph 123 NPPF.

39. The PPG on noise defines the "Significant observed adverse effect level" as "….the level of noise exposure above which significant adverse effects on health and quality-of-life occur" [33/226]. For ease of reference I shall refer to this level as "SOAE" or "SOAE level", as appropriate. In a section entitled "How to recognise when noise could be a concern", there appears the following paragraph:

> "Increasing noise exposure will at some point cause the [SOAE level] boundary to be crossed. Above this level the noise causes a material change in behaviour such as keeping windows closed for most of the time or avoiding certain activities during periods when the noise is present. If the exposure is above this level the planning process should be used to avoid this effect occurring, by use of appropriate mitigation such as by altering the design and layout.

> Such decisions must be made taking account of the economic and social benefit of the activity causing the noise, but it is undesirable such exposure to be caused." [33/226]

40. The same section contains a table summarising the noise exposure hierarchy, based on the likely average response. Noise that is noticeable and disruptive crosses the SOAE level and should be avoided. This is described as follows

> "…. noise which causes a material change in behaviour and/or attitude, eg avoiding certain activities during periods of intrusion; where there is no alternative ventilation, having to keep windows closed most of the time because of noise. Potential for sleep disturbance resulting in difficulty in getting to sleep, premature awakening and difficulty in getting back to sleep. Quality of life diminished due to changing acoustic character of the area." [33/227]

It should be noted that the most serious noise in the table, described as noticeable and very disruptive, and of unacceptable adverse effect, should be prevented, rather than simply avoided [33/227].

41. The PPG goes on to consider what factors influence whether noise could be a concern, pointing out that the nature of noise is subjective such that there is not a simple relationship between noise levels and the impact on those affected. A number of general factors to consider are listed, followed by more specific factors to consider when relevant, including the following:

> "consideration should also be given to whether adverse internal effects can be completely removed by closing windows and, in the case of new residential development, if the proposed mitigation relies on windows being kept closed most of the time. In both cases a suitable alternative means of ventilation is likely to be necessary. Further information on ventilation can be found in the Building Regulations" [33/228]

42. I now turn to the Apex Report, which is the noise assessment prepared for the IP at the request of the EHO. Apex Acoustics measured weekday noise levels at the facade of the Property exposed to noise from the Quarry and the Asphalt Plant. As requested by the EHO the tests were carried out under British Standard, BS 4142: 2014. Under BS 4142:2014 the methodology is to obtain an initial estimate of the impact of the specific sound by subtracting the measured background sound level from the rating level. Typically, the greater this difference, the greater the magnitude of the impact. A difference of around +10dB or more is likely to be an indication of a significant adverse impact, depending on the context [38/380].

43. The results in the Apex Report indicated a SOAE for both daytime and night time periods. The differences between the background sound level and the rating level were reported by Apex Acoustics as +35dB for daytime, and +43dB for night-time [17/126; table 5]. I have a Witness Statement from Dr Paul Cockcroft, a specialist Acoustic Consultant engaged by the Claimant. He explains that the generally accepted rule is that a change of 10 dB(A) corresponds roughly to halving or doubling the loudness of a sound. The noise level for the night-time assessment, which is recorded as +43dB above the background sound level, would be eight times as loud as the level representing a significant adverse impact. [26/182].

44. The Apex Report proposes two alternative ways to address the noise issue and to meet internal noise criteria. Section 8 of the report deals with "Facade acoustic design to meet internal criteria". The internal criteria referred to are the noise criteria. The report sets out a proposed provision to meet the issues, whilst emphasising that it is not intended to constitute a ventilation strategy design, which is the responsibility of the mechanical engineers [17/127, paragraph 8.7]. In order to achieve the desired internal noise levels, the Apex Report recommends the glazing and ventilator performance specifications shown in the summary table, which is table 1 in the report. The author adds that the current construction design will need to be reviewed to comply with these requirements [17/128, paragraphs 8.24 – 8.25]. Table 1 contains the author's summary of **minimum** facade sound insulation treatment included in the assessment calculations (my emphasis added). Both options set out in Table 1 contain minimum glazing performance requirements, and continuous mechanical ventilation, Option A being for mechanical extraction with the

use of a single trickle vent to each of the bedrooms for make-up air, and Option B being frame of continuous mechanical supply and extract with heat recovery, which does not require any trickle ventilators [17/122: Table 1].

45. Paragraph 2.8 of the Apex Report refers to the proposals in Table 1 as "…a set of minimum glazing and ventilation strategy options, interpreted from Approved Document F (AD-F)" [17/121]. The summary goes on to refer to the glazing options and concludes at paragraph 2.13 as follows: "On this basis it is considered that any [SOAE Level] impacts on internal noise levels are avoided…" [17/121].

46. As already mentioned, the proposal includes glazing options, and paragraph 8.13 of the Apex Report refers to the acoustic performance of the proposed glazing. There is no dispute in this case that the glazing currently installed at the Property meets the acoustic performance recommended. The Apex Report continues at paragraph 8.14 (still under the heading of "Glazing") "Opening windows may be acceptable to provide purge ventilation; all opening lights should be well fitted with compressible seals."

47. Miss Wigley submitted that there is a nexus between mechanical ventilation and purge ventilation, a nexus which she submitted is recognised both in the BS 4142:2014 and in Building Regulations. In BS 4142:2014 in Section 11 on "Assessment of the impacts" [of sound], amongst the pertinent factors to be taken into consideration is the following:

> "The sensitivity of the receptor and whether dwellings or other premises used for residential purposes will already incorporate design matters that secure good internal and/or outdoor acoustic conditions, such as:
>
> i) facade insulation treatment;
>
> ii) ventilation and/or cooling that will reduce the need to have windows open so as to provide rapid or purge ventilation; and
>
> iii) acoustic screening" [38/381]

48. (AD)-F of the 2010 Building Regulations deals with Ventilation. The "Key terms" are set out in Section 3 and include the following of relevance to this case;

> "***Background ventilator*** is a small **ventilation opening** designed to provide controllable ***whole building ventilation***.
>
> ***Purge ventilation*** is manually controlled ventilation of rooms or spaces at a relatively high rate to rapidly dilute pollutants and/or water vapour. Purge ventilation may be provided by natural means (e.g. an openable window) or by mechanical means (e.g. a fan).
>
> ***Whole building ventilation*** (general ventilation) is nominally continuous ventilation of rooms or spaces at a relatively low rate to dilute and remove pollutants and water vapour not removed by operation of ***extract ventilation, purge ventilation*** or ***infiltration***, as well as supplying outdoor air into the building. For an individual dwelling this is referred to as ***'whole dwelling ventilation'***." [36/244-245]

49. Paragraph 5.7 of (A-D) F provides as follows:

> "***Purge ventilation*** provision is required in each ***habitable room…..*** Normally, openable windows or doors can provide this function …, otherwise a mechanical extract system should be provided…." [36/257]

Miss Wigley also referred me to Table 5.2a where there is reference again to the need for purge ventilation for each habitable room, where it is also noted "There may be practical difficulties in achieving this (e.g. if unable to open a window due to excessive noise from outside), and "As an alternative… a mechanical

fan…. could be used" [36/261]. I note that the same wording is repeated in each of Tables 5.2b [36/263], 5.2c [36/265] and 5.2d [36/266], with the addition, in the latter two cases, of an indication that expert advice should be sought in such situations.

50. Miss Wigley submitted that it is clear from the above matters that purge ventilation is not a binary matter. Where there is another form of ventilation, the need for purge ventilation will be reduced. She pointed out that the acknowledgement in the Apex Report that opening windows may be acceptable to provide purge ventilation is against a background of the recommendations in that report that a mechanical ventilation system is also needed. She further submitted that the alternative ventilation strategy to opening windows is a mechanical system (per Paragraph 5.7 (A-D) F set out in paragraph 48 above), and that there is no question of trickle vents alone providing this function. She also referred me to paragraphs 4.15 and 4.16 (A-D) F. It is clear from paragraph 4.15 that purge ventilation is ventilation of a separate type to whole building ventilation. Furthermore, purge ventilation is intermittent and required only to aid the removal of high concentrations of pollutants and water vapour released from occasional activities such as painting and decorating or accidental releases such as smoke from burnt food or spillage of water. It is noted that purge ventilation provisions may also be used to improve thermal comfort although this is not controlled under the Building Regulations [36/251, paragraph 4.15].

51. In paragraph 4.16 there is reference to trickle ventilators being used for whole dwelling ventilation and windows for purge ventilation [36/251]. Miss Wigley submitted that trickle vents are plainly for useful background ventilation of the whole building and are not a substitute for purge ventilation by the opening of windows and/or the use of a mechanical system.

52. As set out in paragraphs 12 -13 above, the IP did not wish to install mechanical ventilation and there were discussions between the EHO, the planning officer and the IP's agent concerning ventilation. The agent provided the email [18/147] from the building surveyor set out in paragraph 13 above. Miss Wigley submitted that discussion relates entirely to background ventilation, or whole dwelling ventilation and that no consideration was given to purge ventilation and whether purge ventilation would be adequate, given that mechanical ventilation was not being provided as recommended in the Apex Report.

53. Miss Wigley very properly accepted that the fact that there is no express reference by the EHO or the OR to the PPG is not, without more, a ground for challenging the reports of either officer. She submitted, however, that it must be clear that the issues concerned have been fully covered. There is no dispute between the parties that the PPG is a significant material consideration because it is government policy. The application of the policy is of course a matter of planning judgement and depends upon the facts of the case. The significance of the relevant policy will also depend on the facts of the case. Miss Wigley submitted that in this case the PPG is central, particularly as the noise mitigation relied upon in this case is closed windows, when the PPG clear policy is to try and avoid this. She pointed to the fact that there is no reference to any of these factors in the advice of the EHO or in the OR. She submitted that the OR shows that the planning officer placed total reliance on the EHO response on these matters as the OR sets out verbatim the EHO's final recommendations. Miss Wigley submitted there is no evidence at all that the EHO has considered the applicability of the PPG and, in particular, the desirability of avoiding relying on windows being closed to address the noise issues. She submits that the EHO has in effect cherry picked from the Apex Report, and simply relied upon the email from the building surveyor (wrongly described as Building Control by the EHO but nothing turns on this) which "…… confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation", and that they met the Requirements under the Building Regulations.

54. All the e-mail from the Building Surveyor does is to confirm that the sealing of certain trickle vents to assist with reducing sound in the building will not reduce the background ventilation provisions required by Building Regulations. Plainly, that email does not address in any way at all, the impact of noise and the proposed control of noise into the building by the use of closed windows. It simply deals with the adequacy of background ventilation. Obviously, it cannot address, and does not purport to address, how the residents of the Property might be affected by noise if, for example, they wish to keep windows open for lengthy periods of time during hot weather. Indeed, the Building Regulations themselves make it clear

that they do not control the use of purge ventilation for thermal comfort (see paragraph 49 above). Miss Wigley relies upon the fact that nowhere is there any indication that the EHO or the planning officer considered that PPG advises that the SOAE level identified in the noise assessment, (a document expressly asked for by the EHO), should be avoided and is undesirable. She acknowledged that this is obviously not an absolute requirement, but it is nevertheless relevant policy and the council is required to have regard to it and take it into account. She submitted that the council should either have ensured that the mitigation measures overcame or avoided the SOAE level, or it should have been balanced against other considerations and an explanation given as to why it was not to be avoided in this case. She submitted that all the guidance in the PPG (quoted at paragraphs 39 – 41 above) contains a link between mechanical ventilation and the need to open windows, but no one at the council considered this.

55. She submitted that the EHO and the OR both state that internal noise levels can be met with glazing and the windows being closed, without any consideration as to the need for mechanical ventilation. Whilst the Apex Report allows for windows to be used for purge ventilation, it does so in the context of and contingent upon the provision of alternative mechanical ventilation, something Miss Wigley submitted, which has been completely missed by the council officers both in construing the Apex Report and in failing to consider the guidance in the PPG.

56. On behalf of the Council, Mr Lopez submitted that the treatment of the noise issues has been perfectly properly carried out and is consistent with the PPG guidance. He pointed out that both the NPPF and PPG indicate that planning decisions should aim to avoid noise from giving rise to significant adverse impacts, but neither is prescriptive. He further submitted that there is no rule that purging must be avoided and, therefore, that it is a matter of planning judgement for the decision taker to consider the acceptability of purging. There is nothing in the PPG identifying an acceptable degree of purging, subject to the issue of noise. Mr Lopez submitted that it is possible to depart from the guidance without their necessarily being an error. That is plainly right, and Miss Wigley accepted that in her submissions.

57. Mr Lopez submitted that it is plain on the face of her report dated 12 March 2018 that the EHO has carried out her own independent assessment and concluded that some purging would be acceptable. He submitted this is a matter of planning judgement and not open to challenge. The passage in question appears in the EHO report at [21/150] and is repeated verbatim in the OR at [14/94]. I shall refer to the passage from the OR as this was the passage addressed by Mr Lopez in his submissions. Under the heading "Impact on amenity" there appears the following:

> "BS 4142 recognises that not all adverse impacts will lead to complaints and it's not intended for the assessment of nuisance. [The Property] is occupied by a long standing local family aware of the presence of the adjacent quarry. BS 4142 also allow scope look at absolute noise levels rather than just relative levels and for other standards such as BS 8233 to be considered. It was therefore recommended that the applicant considered BS 8233:2014 'Guidance on sound insulation and noise reduction for buildings' as part of their assessment in order to see whether the recommended guideline indoor and outdoor noise levels can be achieved. The report shows that guideline indoor levels can be achieved with a combination of glazing and ventilation and that some areas of the garden can offer an acceptable amenity space in accordance with BS 8233.
>
> With regards to internal noise levels, the noise assessment recommended certain glazing and ventilation options all entailing the use of mechanical ventilation in order to achieve the recommended noise levels. However, the applicant does not propose to use mechanical ventilation and has forwarded documentation from Building Control who have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation. I note the view of Cemex that windows should be sealed shut to protect residents, however, I consider that the option for windows to be openable for the purposes of purge ventilation to be acceptable." [14/94]

58. Mr Lopez emphasised the use of the word "However". He submitted that marks a clear transition. He submitted that prior to the transition the report shows that the EHO was aware of the contents of the Apex Report. The transition shows that the EHO has moved on to make an assessment based on her knowledge that the IP did not want to use mechanical ventilation. He submitted the transition represented by the word "However" supports the fact that there has been a separate assessment by the EHO. He submitted the EHO has stood back, with the knowledge and understanding that mechanical ventilation would not be used but has concluded in her own assessment that purging was an acceptable way of addressing matters. He submitted that relates not just to the issue of ventilation, but also to the issue of noise.

59. Mr Lopez reminded me that the Claimant's challenge on this Ground is not a reasons challenge, or an irrationality challenge. He submitted that the Claimant's challenge is that the EHO has either forgotten the fact that the IP did not want mechanical ventilation or has forgotten that the Apex report was all prefaced on mechanical ventilation. In my judgment that is not an accurate statement of the Claimant's challenge. The challenge is a failure to have regard to policy and guidance in the PPG relating to the reliance on keeping windows closed as a mitigation strategy.

60. Miss Wigley accepted that Ground 3 is neither a reasons nor an irrationality challenge. Her challenge is that the policy and guidance has simply not been considered, and because of that there are no reasons given for departing from policy, and thus there are no reasons to challenge. Further there is no irrationality challenge which could only follow from an assessment which had been undertaken. The whole thrust of the Claimant's submissions in support of Ground 3 is that there is no evidence of an independent assessment or any independent calculations carried out by the EHO.

61. Mr Lopez submitted that the EHO was clearly aware of the Apex Report, a report which gave options, but which was not saying these are the only options. He submitted it was therefore open to the EHO to depart from the options proposed in the Apex Report, and to say why she had done so. He submitted she did not need to go into figures and that she had everything in front of her to entitle her to make the judgement she made. He submitted it was completely unreal to suggest that the EHO had not exercised her own judgement and made a wholly separate assessment, separate from the Apex Report. He submitted there is nothing in the EHO's report which signposts back to the Apex Report, and he refuted the suggestion put forward on behalf the Claimant that the EHO has effectively cherry picked from the Apex Report, taking background ventilation alone and not considering the ventilation strategy as a whole.

62. Whilst I accept that the EHO has clearly recognised that the IP did not wish to use mechanical ventilation, I am wholly unpersuaded by the suggestion that the EHO has necessarily carried out a wholly separate and independent assessment. The word "however", is at the beginning of a sentence which goes on to place reliance on the documentation described as being from Building Control and relies in that sentence on the fact that Building Control have confirmed that the current ventilation arrangements are acceptable without the need for mechanical ventilation. That is of course a reference to the email set out in paragraph 13 above. As I have already said, that email was dealing simply with whether the background ventilation provision after the sealing of certain trickle vents satisfied the ventilation requirements in the Building Regulations. In my judgement the straightforward reading of the sentence commencing with the word "however" is that the provision of the information from Building Control is such that it can properly be concluded that mechanical ventilation is not needed. The e-mail from "Building Control" [19/147; quoted at paragraph 13 above] refers to the provision of background ventilation. As already set out, the Building Regulations address ventilation, not noise in this respect.

63. Mr Lopez made much of the fact that the EHO is a scientific officer. He asserted that she is just as much an expert as Dr Cockcroft, the Claimant's acoustic expert, although there is no evidence as to the EHO's qualifications. In any event, whatever her qualifications, they do not protect her from the possibility of making a mistake, any more than the professional qualifications of Dr Cockcroft, or indeed the qualifications of any of the lawyers in this case, protect each or any of them from the possibility of making mistakes. Human beings all make mistakes. Mr Lopez repeatedly submitted that it was unreal to suggest that the EHO had not made her own independent assessment taking into account not just ventilation, but

also noise impact. Miss Wigley suggested that the reason he kept relying on something being unreal, was precisely because he had no other point to put forward.

64. The court is plainly not constrained to assume it is unreal that officers may not have carried out their functions properly. If that were the position, the jurisprudence as to the need for reasons for decisions to be provided would be wholly otiose. Indeed, there would be no need for this court to have a reviewing function, as it would be obliged to assume that all officers had done what they were required to do, and had done it properly, whether or not they had signposted that fact in the relevant documents.

65. I accept Miss Wigley's submissions that nowhere in the EHO's report or the OR is there any indication that, having set aside the provision of mechanical ventilation as recommended as a minimum in the Apex Report, the EHO then made a separate assessment of her own as to the noise impacts in the light of the policy guidance as to the undesirability of managing noise by keeping windows closed. Of course, it is not an absolute requirement, but it is relevant policy which the Defendant is required to have regard to and to take into account. In those circumstances, the Defendant should have ensured either that appropriate mitigation measures were in place designed to avoid the SOAE level for internal noise at the Property or have taken the policy into account and balanced it against other considerations to justify any position which did not seek to avoid the SOAE level internally. I recognise this is not a reasons challenge, but the absence of any reasons or explanation designed to show why it is appropriate in this case (if indeed it is) to allow a scheme of glazing and background ventilation which does not avoid the SOAE level, particularly in the face of the Apex Report setting out minimum requirements to achieve that and which are being expressly rejected for the purposes of the Permission application, suggests to me that no such independent assessment was carried out. Alternatively, if it was carried out, in my judgment, it is not clear that it was taking the documents at face value, and recognising they are addressed to a knowledgeable readership, and must not be read in an over legalistic way. In my judgment, the Claimants challenge on Ground 3 is made out.

66. I have before me two Witness Statements from Natalie Snowball [28/198-204] and [29/205-209]. Both are addressed to issues arising under Grounds 4 and 5. Unsurprisingly, Natalie Snowball does not address the reasoning in relation to Ground 3 as she adopts the advice of the EHO. There is no Witness Statement from the EHO, Lindsey Wilson. I regard that as unsurprising. Any evidence which she might purport to give on this subject would, of necessity, involve plugging gaps given the findings which I have made.

67. By Section 31(2A) Senior Courts Act 1981 the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. I do not consider Section 31(2A) assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the PPG guidance been considered in the context of the need to avoid closing windows as a way of controlling noise, it might be the case that mechanical ventilation would have been required as recommended in the Apex Report. Equally, some other form of mitigation might have been proposed. These are matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment.

68. It follows that Ground 3 succeeds and the planning permission in this case must be quashed. Whilst that is sufficient to dispose of the proceedings, I should plainly also consider Grounds 4 and 5 in this judgment.

Ground 4

69. Ground 4 is the alleged failure to take into account the impact on the claimant of the fact that the minerals permission is due to be reviewed in 2025 and that, at that time, onerous conditions could be imposed on the claimant's operation as a result of the [grant of planning] permission. [3/28]

70. In relation to noise effects and existing businesses, the PPG states as follows

> "The potential effect of a new residential development being located close to an existing business that gives rise to noise should be carefully considered. This is because existing noise levels from the business even if intermittent (for example, a live music venue) may be regarded as unacceptable by the new residents and subject to enforcement action. To help avoid such instances, appropriate mitigation should be considered, including optimising the sound insulation provided by the new developments building envelope. In the case of an established business, the policy set out in the third bullet of paragraph 123 of the Framework should be followed." [33/227]

The third bullet of paragraph 123 of the NPPF is set out in paragraph 38 above.

71. There is no dispute in this case that the EHO properly recognised at the outset that she had to consider the potential impact on the quarry operations of a grant of planning permission for the Property. This is clear from her initial response of 23 May 2017 as set out in paragraph 10 above. The Claimant relies on the fact that the existing Minerals Permission requires that noise from the Claimant's mineral operations shall not exceed a noise limit of 55dB (A) for the two properties named in condition 17 [23/167]. As is clear from AP1, the two named properties are 1131m and 652m from the Asphalt Plant. The Property is only 64m from the Asphalt Plant. Miss Wigley submitted that the fact that such conditions were considered necessary to protect the residential amenity in relation to those two dwellings, indicates a strong likelihood that a similar condition would be considered necessary in relation to the Property, at which the effects on residents are likely to be more acute given how much closer it is to the Asphalt Plant. The Claimants rely upon the fact that the Apex Report demonstrates that if such a condition were imposed in relation to the Property, it would be immediately breached.

72. In his Witness Statements ([25/172] and [27/194]) Mark Kelly, the Claimant's Planning Manager, gives detailed evidence as to the likely impact on the Claimant's business of the imposition of such a planning condition. Mr Lopez correctly makes the point that none of that evidence was before the planning authority at the time the decision was made. The objections before the planning authority made clear in general terms that there was the potential for adverse effect on the Claimant's business if the quarry operations were restrained in the future, but without the level of detail given in Mr Kelly's Witness Statements. Those statements give details as to potential impacts on the viability of the operation, and as a result the possible loss of employment for local people, and possible loss of business rates income for the Defendant. Mr Lopez invites me to disregard that detailed evidence on the basis that none of it was before the Council at the time it made the decision. In my judgement that submission must be correct. I should approach this on the basis of the information that was before the Council at the time it made its decision. What was before the Council, was the Claimant's concerns that its business might be restricted by planning conditions on the Minerals Permission in the future.

73. The Claimant's case is that the Council has failed to consider the risk that the Claimant's business could be the subject of unreasonable restrictions by reason of conditions imposed at ROMP as a result of changes in nearby land uses, namely the grant of a residential planning permission for the Property.

74. There is no dispute that North Yorkshire County Council (which is the minerals planning authority) confirmed that the grant of planning permission for residential use at the Property would not amount to a breach of the existing minerals permission. The following appears in the OR, (having been taken verbatim from the EHO's report at [21/151]):

> "Throughout this application I have been aware of the need to protect the existing quarry. I am also aware of the concerns of Cemex in this regard. I have therefore made enquiries with North Yorkshire County Council Mineral Planning with regards to the existing permissions for [the Quarry] and whether any noise limits would be applied to [the Property]. The reply from North Yorkshire County Council mineral planning advises that the conditions set out under the permission are the only conditions that they would refer to and enforce until such time that the permission may be subject to a review under the ROMP regulations or a variation, which at the present time is not applicable. They advised that the authority cannot

> impose new conditions which would consider any new development which may be nearer to [the Quarry] outside of these remits. The current planning permission names 2 properties were existing noise conditions apply. [The Property] is not one of those named" [14/95]

75. The Claimant's case is that neither the EHO nor the planning officer have considered the potential for the noise conditions to be expanded to include the Property on a review of the ROMP conditions, and that the risk of that happening and its consequences were not evaluated, assessed or taken into account by the Defendant.

76. The first point which Mr Lopez took in reply to this Ground was a highly technical point and one which I consider lacks merit. He referred me to the Order granting permission on this Ground, where John Howell QC sitting as a Deputy High Court Judge acknowledged that the planning officers considered the effect of the grant of planning permission on the Claimant's business pending the review of the Claimant's planning permission. Mr Lopez submitted that it follows from that that the Council has acted properly in relation to this issue in respect of the period between now and the ROMP review in 2025. He submitted that it would be open to the Defendant Council to issue a Noise Abatement Notice at any time between now and 2025, and that such a notice would address the same species of noise as would be addressed at a ROMP review. In the light of the permission order, Mr Lopez pointed out that the claimant could not argue that it would be wrong for the Council to issue an Abatement Notice at any stage during that period. He submitted that there was no qualitative difference between an assessment of an actionable noise subject to an Abatement Notice, and the tasks to be undertaken in relation to noise on a ROMP review. Since the result of an Abatement Notice might be to require the quarrying activity to be restricted in some way in order to bring about a satisfactory noise scenario, and given that this could be done legitimately prior to the ROMP review, Mr Lopez submitted there is no qualitative distinction between that which the Claimant cannot challenge (i.e. a Noise Abatement Notice), and that which the Claimant seeks to challenge (the impact of the ROMP review).

77. Whilst I accept that the scope of an Abatement Notice would target the same noise complaint that might be of concern at ROMP, I do not accept that the two procedures necessarily produce the same result. By way of example, if the Defendant received a noise complaint, it would be entitled to consider, amongst other things, whether the issues could be properly addressed by requiring occupants of the Property to keep certain windows closed. A ROMP review is directed solely to the Claimant's operations, and not the actions of the occupants of any noise sensitive receptor. In any event, the issue here is whether the Council failed to have regard to the possible effects on the Claimant's business of a ROMP review occurring after the grant of the Permission in this case.

78. Mr Lopez' next point is that this is a wholly speculative complaint. He referred me to AP2 which shows the locations of a further four dwellings which have received planning consent since the Mineral Permission granted to the Claimant in this case. Notwithstanding those four dwellings, he pointed to the fact that the Minerals Planning Authority (the "MPA") has not caused a review to take place notwithstanding the erection of those further dwellings. He relied on the letter of North Yorkshire County Council dated 24 February 2016 which postpones the ROMP review until 3 April 2025 [25/171]. He submitted, therefore, that the indications are that the Quarry is not an issue in noise terms. On the contrary, he suggests this is good news, reflecting the way the Quarry is operating with regards to all those dwellings. Whilst Mr Lopez accepted that he cannot say that the MPA would not impose a condition, he submitted that the Claimant cannot say that the MPA would impose condition in the light of the above, and that the Claimant's Ground is purely speculative. He pointed out it is not for the EHO or the planning officer to crystal ball gaze or constrain the ROMP review. He submitted, therefore, that there was nothing more that the EHO or planning officer could do other than have regard to the fact that the powers are available to the MPA at the ROMP review.

79. In response to these points, Miss Wigley pointed out that the postponement of the ROMP review to 2025 is no indication that the MPA is content with the impact of noise in relation to the further dwellings which have been built since the Minerals Permission was granted in April 2000. AP2 was produced by the Defendant on the second day of the hearing, and whilst Miss Wigley has not objected to it, she pointed to

the fact that the Claimant has had no opportunity to check the circumstances of the planning applications in respect of the four dwellings in question. She also pointed to the fact that they are all much further away from the Asphalt Plant than the Property is.

80. More significantly, she drew my attention to the statutory provisions which have resulted in the postponement of the ROMP review until April 2025. It is clear from the letter from North Yorkshire County Council, that the Claimant had requested a postponement of the periodic review of their mineral permission until 03/04/2025. It is equally clear that the planning authority had not responded to that within three months from the date of the receipt of the request. The letter therefore confirms that in accordance with Schedules 13 and 14 of the Environment Act 1995 the request for postponement is approved. I have the relevant provisions at AB3. By paragraph 7(1) of Schedule 13 Environment Act 1995, a company such as the Claimant may apply to the Mineral Planning Authority for the postponement of the date specified for a first review. By paragraph 7(10), where the Mineral Planning Authority has not given notice of a decision on such an application within a period of three months, the Authority shall be treated as having (i) agreed to the specified date being postponed and (ii) having determined that date should be substituted as the date for the next review. Miss Wigley made the point that the postponement of the ROMP review was therefore automatic as a result of the failure of North Yorkshire County Council to respond to the Claimant's request for it to be postponed, and does not represent any substantive consideration of the merits of the position, and the noise environment in particular. She submitted that the fact that there are other properties which have been built in the vicinity has no relevance as North Yorkshire County Council has clearly not undertaken any substantive consideration in relation to the Minerals Permission since the relevant dwellings were erected or converted.

81. Miss Wigley submitted that it is not mere speculation to look at the existing Condition 17 in the Minerals Permission, and to recognise that the concerns which led to the imposition of that condition are likely to feed into a similar condition in relation to the Property. She submitted it is not outlandish speculation to consider that a similar condition would be imposed in relation to the Property which is very much closer to the Asphalt Plant than the two properties named in Condition 17. She submitted it is a clear indication of the MPA's stance and what the MPA considers necessary to protect the residential amenity near the Asphalt Plant. I accept that submission. In my judgment that is a possibility that could, and should, have been considered when considering this planning application, and the impact for Cemex under the third bullet point of Paragraph 123 of the NPPF.

82. Mr Lopez' next point related to a further document which was provided to me on the second day of the hearing. This is an elevation plan showing the elevations of the Property, with various windows shaded in yellow. This was referred to at the hearing as the yellow window plan. I shall refer to this as the "YWP", as shorthand for the yellow window plan. This was simply handed to me and there is no evidence as to its provenance. Miss Wigley accepted that the yellow highlighting on the YWP accurately indicates the windows which were required to have the trickle vents permanently closed as part of the planning permission. That is all she accepts in relation to the YWP. Mr Lopez told me that this was a document that Miss Snowball had in front of her when considering the issues in this case, but there is no evidence to support that.

83. Mr Lopez relied upon the YWP as showing that the blocked up trickle vents are all within the elevations fronting the Quarry. The property is set at an angle and both the north-west and south-west elevations front the Quarry. Within each of the habitable bedrooms, there are windows on other elevations away from the Quarry where the trickle vents are not blocked up. Mr Lopez submitted that there is no evidence that opening of windows in those elevations would cause an actionable noise event. He submitted, therefore, that the EHO was entitled to exercise her own planning judgement and to conclude that there would be no noise issues on the elevations away from the Quarry, and that there is no merit in Ground 4.

84. Miss Wigley submitted that Mr Lopez had made an enormous leap from the Apex Report to the submission that because one window in each bedroom was not required to have the trickle vent removed, it meant that window could be opened without any unacceptable noise effects. In support of this she pointed to calculations in the Apex Report. In particular, she drew my attention to the fact that at

Paragraph 8.21 in the section dealing with "calculated internal noise levels", the cumulative impact is considered through all windows to the room under assessment. In the table at Paragraph 8.24, the upper limit of internal noise levels in the first column is right up against the limit and is calculated quite clearly after mitigation levels including both the glazing and mechanical ventilation. The fact that those items are included is made clear in Paragraph 8.25. In those circumstances, Miss Wigley submitted that Mr Lopez cannot assert that it is fine to open the non-highlighted windows on the YWP without there being any unacceptable noise. I accept that submission.

85. Further, and in any event, Miss Wigley submitted that there is no evidence at all that any of this was considered at the time by the EHO. Miss Wigley made the points again about trickle vents being background ventilation and not as a substitute for purge ventilation, a submission I have already dealt with and accepted.

86. I accept the points made by Mr Lopez that there is no power or option for the EHO to second guess what the MPA would do. Mr Lopez suggested that when the MPA, North Yorkshire County Council, replied to the EHO indicating that there would be no breach of the current planning restrictions, there is nothing to suggest that the MPA was not also forward-looking about conditions it might impose. He pointed to the fact that North Yorkshire County Council did not object to the grant of planning permission in this case. It does not seem to me to be necessarily within the remit of Yorkshire County Council to object to the planning application. However, what clearly was within the remit of the EHO and the Defendant was to consider the third bullet point in NPPF paragraph 123, and to recognise that the Claimant should not have unreasonable restrictions put on them because of changes in nearby land uses since the business was established.

87. I recognise that there will be matters of planning judgement in considering what restrictions might be imposed in the future, and whether such restrictions might amount to unreasonable restrictions on the Claimant in the future. If it was clear from the documents that these matters had been considered, that would be one thing. However, in my judgment, whilst the documents do show that the EHO, and through her the planning officer, recognised that the quarry business needed protection, I am not satisfied that any consideration was given to the likely impact that the grant of planning permission for the Property might have on a ROMP review. Whilst in her Witness Statement Natalie Snowball asserts that all of these matters were considered, I am of the view that amounts to evidence seeking to plug the gaps in the decision-making process. I regard it as of no assistance to me.

88. Furthermore, Natalie Snowball's evidence is to the effect that the future position on a ROMP review was considered in the context of all the information before her including "… the adequacy of the proposed development in noise impacts and attenuation terms…" [28/199, paragraph 5]. Given the conclusions I have reached in relation to Ground 3, and, in particular, the failure to have regard to the PPG relating to the reliance on keeping windows closed as a mitigation strategy, it follows, in my judgment, that failure would inevitably also feed through into the assessment which Natalie Snowball alleges she has undertaken. I recognise, as Mr Lopez repeatedly reminded me, that this is not a reasons challenge or an irrationality challenge. I equally appreciate that the comment I have made in this paragraph goes to the issue of reasons, but those being reasons which are provided ex post facto in the form of a Witness Statement. Had those reasons been provided in the OR, no doubt they would have been the subject of a challenge. As with Ground 3, there is no reasons challenge here precisely because the challenge is that nowhere in the OR is there any indication that the issues have been considered.

89. In my judgement Ground 4 is also made out. I am satisfied that the EHO set out to consider not only the current position as regards the Minerals Permission, but also to consider the future impact on the Quarry. However, based on the EHO reports and the OR, there is nothing to suggest that any consideration was in fact given as to whether a condition similar to Condition 17 of the Minerals Permission was likely to be imposed at ROMP, or that any consideration was given as to the risks such a condition would pose to the future operation of the Claimant's business, all matters which should have been considered as part of the consideration under paragraph 123 NPPF. I further note, in passing, that the EHO mentioned the 55dB being a limit in a fairly old permission and the absence of a tighter night time condition such as 42dB

[38/440]. This formed no part of the Claimant's case before me and forms no part of my decision in this matter, but it appears nowhere in the consideration of these issues.

90. In relation to Ground 4, again I do not consider Section 31(2A) Senior Courts Act 1981 assists me in this case. In my judgment I cannot possibly conclude that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Had the likely future impact of a similar planning restriction to Condition 17 of the Minerals Permission been considered, it might be the case that this would have informed the adequacy of proposed noise mitigation measures. It could be the case that mechanical ventilation might have been required as recommended in the Apex Report, or even that mitigation going to the physical building and/or it's layout might have been considered. It is even possible that the conclusion might have been reached that the grant of planning permission would not be appropriate. These are all matters of planning judgement, properly within the sphere of those qualified to make these decisions, and not matters upon which I could or should make any judgment of my own.

Ground 5

91. Ground 5 is the alleged irrational failure to take into account all relevant considerations when deciding not to include all the conditions recommended by the IP's own noise consultant.

92. The Claimant's case is that the conditions imposed in the Permission should have included conditions to ensure that the standard of glazing for the future was maintained and that those windows where the trickle vents were to be blocked up, could not have trickle vents reintroduced. The Claimant's case is that having required these factors to be included as noise mitigating measures, it is irrational not to include conditions in the Permission to ensure the mitigation measures are retained in place for the future. Ground 5 is drafted to include an irrationality challenge for the failure to include mechanical ventilation as a condition, but it seems to me that more properly forms part of Ground 3. This Ground is really based on the premise that even if the Permission was unobjectionable on the application of PPG, nevertheless there is still a challenge based on the failure to incorporate appropriate conditions. The oral submissions were based on the failure to include conditions relating to glazing and the retention of the blocked trickle vents.

93. Miss Wigley submitted that there was no consideration by the Council as to the retention of the specified glazing properties for the windows, nothing to keep the removal of the trickle vents in the yellow highlighted windows in place, and nothing to prevent the introduction of new trickle vents. She submitted that the EHO's report and the OR are silent on these matters, showing that there has been no consideration as to how to secure that these requirements stay in place. She submitted that looking at the documents there is a clear lacuna in failing to ensure that the mitigation measures endure.

94. The Defendant seeks to rely on Condition 3 of the Permission which abrogates the usual permitted development rights, and requires what would otherwise be permitted development to be the subject of a formal application for planning permission. The reason given for that Condition is that it is in the interests of the appearance of the proposed development and to reserve the rights of the local planning authority with regard to those matters [11/80]]. Natalie Snowball deals with this in her Second Witness Statement where she asserts that any work involving the replacement of the existing windows or glazing, the introduction of new opening trickle vents, the removal of blocked up trickle vents, or the insertion of new windows not incorporating necessary noise mitigation measures required under condition 4 would require there to be a full planning application by reason of Condition 3 of the Permission. She expresses her opinion that any such works would materially affect the external appearance of the building, and so would amount to development. She asserts that the question of whether proposed works would materially affect the external appearance of the building is a question of planning judgement [29/206; paragraphs 6-12]. In reliance on that, Mr Lopez submitted that Ground 5 is wholly misconceived and must fail.

95. In response to this Miss Wigley submitted that a change of the windows would not amount to development. She submitted that I should disregard the evidence of Natalie Snowball on these issues for the following reasons. Firstly, she submitted that this is ex post facto rationalisation which should not be permitted. Secondly, she relied upon the fact that the reasons now suggested are different from the stated

reason on the planning decision notice which relates to the appearance of the building and has nothing to do with noise mitigation measures. She further pointed to the fact that whilst in her first Witness Statement Natalie Snowball does rely on Condition 3 of the Permission, nowhere in that statement does she explain how she considers replacement windows would be development in any event. Miss Wigley submitted that Miss Snowball's thought processes were eked out over the course of the Witness Statements and are inherently unreliable. None of these reasons is given in the reports and she invited me to disregard them.

96. In response to this Mr Lopez submitted that these are quintessentially matters of planning judgement. He also pointed to Miss Snowball's evidence that the trickle vents had been permanently blocked and cannot be reopened. He denied that Condition 3 was limited solely to the appearance of the building, pointing to the second part of Condition 3 which refers to the reservation of the relevant rights to the local planning authority with regard to the permitted development matters. I accept that submission in relation to the reasons given for the condition. He submitted that if I accept that submission, there is no reason to attach less weight to the evidence of Miss Snowball on this matter.

97. It is right that I should record that I mentioned that I was aware, from sitting on other cases, that not all planning officers necessarily regard a change of windows as amounting to development. I therefore suggested that a future planning officer might not take the same view as Miss Snowball as to whether windows amounted to development and whether Condition 3 applied. In response to that Mr Lopez pointed out that any planning decision taker imposing a condition cannot unduly or improperly bind the authority or other planning officers moving forwards. The planning decision taker must simply exercise his or her own planning judgement. Mr Lopez submitted that any concern I might have that a future person might reach a different view is irrelevant. It is a matter for the planning judgement of the relevant officer at the relevant time. It seems to me that must be correct. He further submitted that for this challenge to succeed, the Claimant would have to say that the planning officer's judgement in this case that a change to the windows would amount to development is irrational. He pointed to the fact that there is no evidence put forward on behalf of the Claimant to suggest that such a conclusion is irrational.

98. Whilst accepting that she has no evidence on that point, Miss Wigley did not accept that it was necessary. She submitted that it was plainly irrational for Miss Snowball to assert that any works to replace windows, for example simply with different glazing, or simply with a different slot vents, would always materially affect the external appearance of the building. She submitted that is irrational, and that Miss Snowball's evidence on this is simply not credible. She submitted that this simply was not considered at the time of the grant of the Permission and there no decision at all was taken which was designed to retain the mitigation measures for the future. She submitted it is not acceptable to rely on the convoluted evidence of Miss Snowball in seeking to plug the gaps, particularly where such a serious issue of noise exists.

99. In response to questions from me as to whether, rather than this being an issue of planning judgement, it was a matter of law as to the construction of Section 55 Town & Country Planning Act 1990 which defines development, Miss Wigley reminded me that if a future occupier wanted to assert that a change of windows would be lawful development, the procedure would be for the occupier to make an application for a Certificate of Proposed Lawfulness on the local planning authority. It would then be for the local planning authority to decide whether that amounted to lawful development, and any appeal against their decision would lie to a Planning Inspector.

100. Having considered the submissions, I do not consider I could properly conclude that Condition 3 is not capable of covering any future work in relation to the windows given that there is plainly a matter of planning judgement to be made as to whether or not any works proposed amount to lawful development. I recognise that Miss Snowball's evidence is once again ex post facto rationalisation. However, even if the need to keep the mitigation measures for the future was not addressed by the decision-makers, if there is a route by which they can properly address those issues in the future, then the fact they failed to consider them would make no difference.

101. I have come to the conclusion that Ground 5 is made out in that there is nothing on the face of the documents to suggest that any consideration was given to the retention of those noise mitigation measures

which the EHO and the planning officer thought were necessary and sufficient in this case. I do consider that the evidence of Natalie Snowball is evidence attempting to plug the gaps in this case. However, in relation to this Ground, I would not grant relief on the basis that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. I consider that the fact that there are matters of planning judgement involved in the application of Condition 3 of the Permission means that Condition 3 can be used as a method to secure the retention of mitigation measures in the future. Indeed, it allows for a degree of flexibility in the future and for the imposition in future applications of measures which might not be available now, but which become available with advancements in technology, development materials and the like.

102. In summary, I reject Grounds 1 and 2. I accept Grounds 3, 4 and 5 are proved. I decline to give any relief on Ground 5 on the basis that Section 31 (2A) Senior Courts Act 1981 applies in relation to that Ground. However, I also find that Section 31 (2A) has no application when considering Grounds 3 and 4. It follows that the planning permission in this case must be quashed.

Appendix IV

England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2018] EWHC 2239 (Admin)
Case No: CO/454/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
PLANNING COURT

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS
22/08/2018

B e f o r e :

HHJ DAVID COOKE

Between:

R (oao Ornua Ingredients Ltd)	**Claimant**
- and -	
Herefordshire Council	**Defendant**
Barratt Homes	**Interested Party**

Jenny Wigley (instructed by Burgess Salmon LLP) for the Claimant
Hugh Richards (instructed by internal solicitors) for the Defendant
Peter Goatley (instructed by Shakespeare Martineau LLP) for the Interested Party

Hearing date: 5 July 2018

HTML VERSION OF JUDGMENT APPROVED

HHJ David Cooke :

1. The claimant challenges the decision of the defendant council on 21 December 2017, acting by officers under a delegated authority, to approve reserved matters including the layout of a housing development at Ledbury. That decision was taken in relation to outline planning permission for building 321 houses on the site that had been granted by an Inspector on appeal in April 2016. The claimant is the owner of a factory making cheese adjacent to the site. The Interested Party is now the owner of the development site, having bought it with the benefit of the outline planning permission.

2. The claim proceeds on one ground only, for which I gave permission on 27 March 2018, that the council failed to take into account a material consideration in that it did not take any account of representations made by the claimant on 15 December 2017 including a report by acoustic engineers on its behalf which, it says, casts doubt on a conclusion previously reached that it would in principle be possible to produce a scheme for mitigation of noise emitted by the claimant's factory such that it would be reduced to acceptable levels at houses built to the proposed layout.

3. It is not in dispute that the council received the representations and report concerned, and it is accepted that no consideration was given to them before the reserved matters decision was taken. The position of the council and the Interested Party is that this did not amount to an error of law because the outline permission was in any event subject to a condition (Condition 21) that before any development the council must first have approved "a scheme of noise mitigation for outdoor living areas, bedrooms and living rooms" for the houses to be built which would "include details of proposed ameliorative measures to mitigate against noise from operations within the nearby industrial estate… including the [claimant's] cheese factory…". The reserved matters decision did not amount to discharge of this condition, so that if it turned out in due course that acceptable noise mitigation could not be achieved with the approved layout no development could in any event begin and the developer would have to produce a revised layout, for which acceptable noise levels could be achieved. The representations on noise issues were thus, it is said, not material considerations at the point of approving the layout and no error was committed by ignoring them.

4. The claimant's commercial concern of course is that it should not be at risk in future of claims for noise nuisance by occupiers of the houses that might cause it to have to curtail its operations or pay for noise mitigation measures of its own. Insofar as such measures are necessary, it no doubt wants the developer to undertake them at the outset at its own expense, but it says that to the extent the developer has engaged in any discussion with it as to the measures it is prepared to undertake, they are not capable of producing acceptable levels given the proposed layout. It fears that if the layout is approved, in practice the council will come under pressure (and might even be obliged) to approve a scheme of noise mitigation which could be presented as the best practically achievable with that layout, but which would not be sufficient to protect it from future claims and the trouble and expense they would bring.

5. In return the council says there is no question of it being obliged to accept inadequate noise mitigation, and it would be fully entitled to withhold approval for discharge of condition 21 even if that meant revision of the layout previously approved.

6. It is obvious that there is a linkage between questions of layout of houses on the development and the noise mitigation measures that may be required to produce an acceptable noise level at and within those houses. The nearer a house is to the emitter of a given noise the louder that noise will be, as heard at the house itself, so that more effective measures of noise reduction or attenuation may be required to render it acceptable. Noise received in gardens will be less if the gardens are sited on the far side of the house from the source, and so shielded to some extent, than if they are on the near side. Noise heard in a given room, such as a bedroom, will also be affected by whether that room is on the near or far side from the source. In principle no doubt the two issues could be considered entirely separately, but in reality anyone seeking to design a layout would be bound to have some regard to this interaction and the likely effect of noise on the

houses, not least because it might be very inefficient and expensive to have to revisit the layout if it emerged later that the noise condition could not be satisfied. I do not doubt either that in practice once a layout had been approved there would be a risk that the developer might seek to exert pressure on the planning authority to accept noise reduction measures it proposed, if the alternative was to revisit that layout with the possible delay disruption and expense that might cause. That does not mean of course that the authority would be necessarily bound to accede to any such pressure.

7. Noise was an issue before the Inspector. Her decision letter includes the following:

> "Dominant noise sources likely to affect future occupiers are the adjacent industrial units and traffic on Leadon Way and Dymock Road. The appellant's noise report sets out various mitigation measures that could be secured by condition. The measures that provide the baseline for the conclusions in the report do not, it transpires, take account of the proposed roundabout on Leadon Way which would, potentially, introduce noise from vehicles braking on approach, and accelerating away from it. I have no reason to suppose, however, that associated noise would preclude development on the appeal site and am satisfied that an appropriately worded condition would deal with the matter and would ensure that acceptable living conditions were provided for future occupiers.
>
> … As referred to earlier, a scheme of noise attenuation is necessary to ensure acceptable living conditions for future occupiers "

8. The application for approval of reserved matters was submitted in December 2016. It included, amongst other matters, the proposed layout for the site. It was referred by officers for consultation to the council's Environmental Health Department, and it is plain from the consultation responses that the officers in that department were significantly concerned by the potential impact of noise on the proposed houses, and wanted to be satisfied that appropriate mitigation measures could in principle be devised for the layout proposed. The developer's acoustic experts, Wardell Armstrong were asked to submit noise modelling reports to supplement reports they had prepared at the time of the original planning application in 2014 and 2015. These were sent in January and April 2017, and in the consultation response dated 8 May 2017, the Environmental Health Department set out what appear to be fairly serious concerns about the information provided.

9. They said they did not agree with Wardell Armstrong that the appropriate limit for noise garden areas was 55 dB, that the acceptable limit ought to be 50 dB but the modelling provided showed levels between 55 and 60 dB. This was described as "not acceptable", and although this particular point seems to be directed at traffic noise, may indicate that the EHO considered that Wardell Armstrong were tending to seek to apply inadequate standards. In relation to noise from the cheese factory, it was noted that the mitigation levels proposed in the April report produced a worse result than had been suggested in the January report with noise levels "likely to be around 5 dB above background sound levels… This is not desirable."

10. It was noted that in the 2015 report Wardell Armstrong had anticipated that the houses closest to the cheese factory would have their gardens facing away from the factory so that they would be screened by the houses, but the layout now proposed included two houses where this was not the case. Further, the original report had suggested noise mitigation measures being taken on the factory premises but these were now omitted (though it was noted that this might have to be reconsidered). Further information was requested on this and also in relation to night-time noise where it was noted that "our concern is that closest residents may be adversely impacted in their bedrooms at night time when much lower background noise levels exist. Please can the applicants supply further noise contours of the closest dwellings… to evaluate the impact of this noise."

11. Further noise contour drawings were provided by Wardell Armstrong on 23 May, and the EHO made a site visit before submitting a further consultation response on 7 June. In that response it was noted "At visits to the proposed site both during the day and late evening officers from our department noted the constant humming noise emanating from [the cheese factory]… which was identified as the dominant noise source

in the locality and was accompanied by a hissing (pressure relief type) noise every few seconds. Without mitigation, this would seriously impact on the amenity of residential properties in close proximity to the site. Mitigation of the 24/7 sound source on the roof at [the cheese factory] has been mentioned as an option in a number of Wardell Armstrong reports… Despite this at our meeting 26 May 2017 it would appear that… there has been no discussion with [the claimant] on this issue." It was also noted that the information provided indicated that during the daytime noise levels from the cheese factory would be between 5 and 10 dB above background level "thus indicating a likely adverse impact, depending on context." Further, the difference at night time was suggested to be between 23 and 26 dB, significantly more than the level of 10 dB which the relevant British standard suggested would be "likely to be indication of a significant adverse impact depending on context."

12. Further concern was expressed about low-frequency noise measurements, where the council's own measurements showed a significant difference from those provided by Wardell Armstrong. This was evidently a serious concern; this document concluded "we would strongly recommend the Wardell Armstrong proposed option to mitigate the [cheese factory] sound at source and this needs to be further explored with [the claimant]. Alternatively we recommend the site layout and design should be further reviewed to assess the suitability of siting dwellings close to [the cheese factory]… There must either be attenuation of this noise at source or a buffer zone on the site where there is no residential development or a combination of the two so that we could be satisfied that noise from [the cheese factory] (including low-frequency noise) does not impact on the amenity of residents when their windows are open as well as closed."

13. A further response was sent by Wardell Armstrong on 16 June, in relation to which the EHO commented on 5 July 2017 "the proposal for mitigation of the noise [from the cheese factory] at source has been dropped after repeated references to this in earlier submissions. The noise consultants advise that the low-frequency noise can be addressed by residents keeping their windows closed night time. Our submission is that this is not a reasonable expectation on residents… and is contrary to World Health Organisation guidelines… Our low-frequency noise assessment and the officers' site observations would support the BS:4142 assessment findings in that the [cheese factory] noise source is likely to have a significant adverse impact on the dwellings closest to the noise source. This is especially so at night time…" The "strong recommendation" that mitigation measures and or a change of layout be considered was repeated.

14. This led to a yet further proposal by Wardell Armstrong, which was sent on 10 October. That document provided, as had been requested, a specification for proposed mitigation measures on the cheese factory site, in the form of a 3 m high acoustic fence in combination with sound insulation measures at the principal sources of noise from the factory. This led the EHO to send an email to the planning officer dealing with the matter on 17 October in which she said "The proposed mitigation works… will be satisfactory for the site with windows open… as long as the mitigation at the [cheese factory] site namely a) acoustic fencing and b) extract plant mitigation… are undertaken."

15. An officers' report was then prepared for the meeting of the planning committee. It is accepted that it contained an adequate summary of the consultation that had been undertaken with the EHO and the result that had been reached. Members were informed that the layout had been referred to the EHO who had initially been concerned that it might not be possible to achieve acceptable noise mitigation but that "the work that has been completed by [Wardell Armstrong] has demonstrated that there are measures that can be taken. The provisions of condition 21 remain in force and it is incumbent upon the developer to provide further information for the condition to be discharged, but officers are sufficiently content that noise from [the cheese factory and the road] can be mitigated on the basis of the layout shown above."

16. The minutes of the committee meeting make clear that members of the committee were concerned about noise. They record that they were told by the officer "it was not a requirement of the reserved matters application to address all the conditions imposed by the inspector. With reference to condition 21 relating to noise, for example, the Environmental Health Officer had to be satisfied that a scheme could be implemented to mitigate that issue. It was then incumbent upon the developer to submit a suitable scheme to enable the application to proceed. The absence of the detailed scheme at this stage was not a ground

upon which to refuse a reserved matters application." The committee resolved that (subject to conditions not relevant for present purposes) delegated authority be given to officers to issue the reserved matters approval.

17. It was only after this that the claimant became aware of the matters that had been under discussion. There had been no consultation by planning officers or the EHO with the claimant (it is not suggested there was any obligation to undertake such consultation) and the measures that Wardell Armstrong proposed by way of noise mitigation, which would require to be executed on the claimant's land, had not been agreed with the claimant. On 15 December 2017 the email that forms the basis of this challenge was sent, enclosing a report prepared by Hayes McKenzie, the claimant's acoustic consultants, and:

    i) drawing attention to the fact that in its calculations of noise impact the latest Wardell Armstrong report had dropped a 6 dB "tonal penalty" that had been applied in its 2014 and 2015 reports, and stated that in their opinion further measurements showed that the sound from the cheese factory was not tonal in quality. However Hayes McKenzie had performed their own measurements which, in their view, showed a distinct tonal quality as a result of which the relevant British standard required a tonal penalty to be applied.

    ii) Referring to further background noise data collected by Hayes McKenzie, including measurements for evening and night periods that had not previously been assessed.

    iii) Stating that Hayes McKenzie's opinion was that in light of these factors the proposed mitigation measures would not prevent a significant adverse impact on residents likely to give rise to complaints, and that with the layout proposed, it would not be possible to achieve suitable mitigation.

18. The email requested that determination of the reserved matters application should be delayed "until this issue has been properly addressed and a suitable scheme agreed by [the claimant and the developer]". It is not clear exactly what happened on receipt of that email; the planning officer did not however refer the matter back to the EHO for any comment, nor did he ask the developer or Wardell Armstrong to respond to it, nor did he refer the matter back to members of the planning committee. There is no note or other record, or other evidence, showing what if any consideration was given to the email and the Hayes McKenzie report. Thus, although the position of the council now is that any information casting doubt on the advice the EHO had given was irrelevant because it could all be addressed as and when an application was made to discharge condition 21, there is no evidence at all that the relevant planning officer considered the matter and came to that conclusion at the time.

19. In fact, as Mr Richards points out, the email may have somewhat overstated Hayes McKenzie's opinion in relation to proposed mitigation. It is apparent from the content of the report that, whilst it strongly disputes Wardell Armstrong's conclusion that the tonal penalty should not be applied, stating that its measurements show "a tone at around 600 Hz which has a tonal audibility greater than 10 dB confirming the requirement for a 6 dB rating correction under BS 4142" the conclusion reached was that "it is therefore possible that the only way of achieving an acceptable external noise environment is through greater separation distance between the factory and nearby housing." This, Mr Richards says is not a conclusion that adequate noise mitigation *is not* possible, but only that it *may not* be possible.

20. It cannot however be said that this is the reason why no action was taken in relation to the email; there is simply no evidence that any planning officer considered it all came to any view of it at all.

21. Ms Wigley's submission is that the law in relation to what is a material consideration and the obligations on officers acting under a delegated power when a material matter arises after a delegated power is given to them but before they exercise that power to make a decision is set out on the judgment of Jonathan Parker LJ in *R (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370, in which he said:

    "*"material considerations"*

121 In my judgment a consideration is "material", in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.

"have regard to"

122 In my judgment, an authority's duty to "have regard to" material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind – albeit that the application was not specifically placed before it for reconsideration.

123 The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.

124 At one extreme, it cannot be a sensible interpretation of section 70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated*, prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.

125 On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

126 In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision."

22. Issues relating to noise were, she submitted, inevitably material considerations in addressing the reserved matters application because of the link between layout and perceived noise at the houses, notwithstanding the existence of the separate condition specifically requiring acceptable noise mitigation. The council was obliged, she submitted, to be satisfied at least that acceptable mitigation was possible in principle before approving a given layout, even if the detail was then left to a later application to discharge the condition. Alternatively, if the council was not obliged to take noise issues into account at that stage it was entitled to

do so if it wished, and since the council had in this case plainly chosen to take noise into account at the reserved matters stage it had become a material consideration even if it need not have been treated as such.

23. As to the first point, that noise was an obligatory consideration, Ms Wigley submitted that it must be so, since otherwise when an application was made to discharge condition 21 it would be argued that the council could not lawfully refuse that application on the basis that acceptable mitigation was not possible unless the layout was changed. She pointed to *Thirkell v Secretary of State* [1978] JPL 844, holding that reserved matters approval could not be withheld on a ground that had already been decided in principle at the grant of outline planning permission as that would be to reopen an issue already decided and frustrate the permission granted. She accepted this could not be read across directly to the position where a condition is considered after reserved matters approval, but submitted the same would apply by analogy; the council having approved a layout at one stage could not make it impossible to implement that layout by adopting standards for what constituted acceptable noise levels that could not practically be achieved with that layout.

24. Mr Richards submitted that there was no question of frustration. The permission granted was dependent on both an acceptable layout and acceptable noise mitigation; the fact that one layout had been approved did not preclude the developer submitting another and the council would be perfectly entitled to refuse discharge of condition 21 if not satisfied with the mitigation measures proposed, leaving the developer with the option of submitting revised mitigation measures or a revised layout, or a combination of the two.

25. Counsel are agreed there is no prior authority either way directly in point. For my part, I can see force in Ms Wigley's submission, and I do not find particularly persuasive the argument that because the layout was approved as a reserved matter the planning authority could in effect compel submission of a revised layout by a conclusion that the one approved could not result in satisfaction of an outstanding condition as to noise. Such a condition might equally be imposed on a grant of full planning permission, or on a grant of outline permission where layout was not one of the reserved matters. If it might be argued (as presumably it could) that refusal to discharge a condition amounted to frustration of a permission in those forms, why should it make a difference that the permission in place is a composite of an outline permission and a reserved matter approval, as here?

26. No doubt it would be fairly rare for a condition imposed to be absolutely impossible to fulfil. For instance, a condition as to noise could in principle always be discharged by procuring the cessation of the source of noise. In practice, the argument would no doubt be that refusal to discharge the condition made it impossible in the real world to implement the permission because the measures required were impractical or uneconomic (eg perhaps if noise mitigation to the standard required involved the closure of a road or factory). It is fairly easy to imagine circumstances in which such an argument could arise, so it cannot be said that it is so fanciful that the duty argued for cannot exist.

27. In the end however I have concluded that I do not need to decide that point in the present case, because Ms Wigley succeeds on her secondary argument. The interaction of layout with satisfaction of the noise condition was in my view plainly such that the council was entitled to have regard to it in considering the reserved matters application. It is evident from the consultation, the officers' report and the minutes of the meeting that it did so, and approached the matter on the basis it required to be satisfied that satisfaction of the noise condition would not be rendered impossible. The advice given to members was expressly on the basis that having regard to the measures the developer had proposed officers and the EHO were satisfied the condition was capable of discharge without changing the layout, and the delegated authority given to the officers was plainly premised on that advice.

28. In this context it is clear, it seems to me, that further information coming to light that cast significant doubt on the validity of that advice amounted to a material consideration. It would, adopting the test set out in *Kides*, have been bound to tip the balance of consideration to some extent- if for instance members at the meeting had been told that the acceptability of the revised proposals depended on the developers experts having apparently watered down the standards applied by excluding a tonal penalty on a basis that now appeared open to challenge it is not realistic to say this would not have been considered relevant. This is

particularly so given the history of concern on the part of the EHO, including apparent concern that Wardell Armstrong had sought to apply standards the EHO considered inadequate and provided measurements that did not appear to be supported by her own observations.

29. Such information would not I think be an entirely new material consideration, arising for the first time after the grant of delegated authority, such as Jonathan Parker LJ appeared to be envisaging in the passage quoted in *Kides*, but best considered as material bearing on a matter already taken into account. I am bound to say I have some difficulty in reconciling what he said at para 122, which seems to envisage that a new matter must have been considered by the authority before a delegated power is exercised, but not necessarily by the officer referring it back to the authority, and para 125 which seems to indicate that if the new material is received immediately before a decision is taken it must be referred back to the planning authority, ie members. But in the present context I think the resolution is that the delegated authority itself confers on officers a degree of power to consider for themselves new relevant information bearing on the exercise of the power they have been given such that, depending on the terms of the authority conferred, they may properly take a view as to whether in light of such information they should proceed to make a decision or refer the matter back to the members. If they do so, the new information has been considered by the planning authority, at the level of the officers acting under delegated powers, before the decision is taken and its duty is satisfied.

30. There may of course be issues that arise in a particular case whether the scope of the delegated authority is sufficient to allow officers to take their own decision on information they in fact receive, or, if it is, whether the decision they reach on that information is rational. But no such considerations arise in this case, because on the evidence before me the officers did not give any consideration at all to the 15 December email or the report it attached.

31. Mr Richards submitted that even if such consideration had been given, the result would inevitably have been the same because officers would have concluded that the matters raised could (indeed must) have been left to be addressed later on discharge of the condition. But this it seems to me flies in the face of the way the matter had been dealt with previously both by officers and members. Although Mr Richards points to textual matters in the email and the attached report that he says might have led to a conclusion they did not raise a strong enough doubt about the previous advice to prevent the decision proceeding, these are not such that the email and report must inevitably have been dismissed out of hand. It cannot be said, it seems to me, that responsible officers who had advised members they and the EHO were satisfied the noise condition was capable of discharge would inevitably have proceeded to a decision on considering new information, apparently supported by expert advice, casting doubt on what members had been told, without referring that information to the EHO or members or both.

32. It follows in my judgment that an error of law was committed. The error may be considered either as a failure by the planning authority to consider, either at the level of members or officers, a material factor in the form of the information provided with the 15 December email, or as a failure by officers properly to exercise the delegated power they had been given by evaluating and coming to a conclusion on that information.

33. In either case, the result is the same and the decision taken must be quashed and remitted to the authority for redetermination.

34. I will list a hearing at which this judgment will be handed down. I do not require attendance on that occasion, though if there are matters arising that can be conveniently dealt with in 30 minutes I will take them at that hearing. If a longer or later hearing is required, counsel should submit and agreed time estimate and joint availability so that it can be listed.

Appendix V

The Planning Inspectorate

Appeal Decision

Hearing Held on 28 August 2019
Site visit made on 28 August 2019

by John Dowsett MA DipURP DipUD MRTPI

an Inspector appointed by the Secretary of State

Decision date:11th November 2019

Appeal Ref: APP/P4605/W/18/3217413
18-20 Albion Court, Frederick Street, Birmingham B1 3HE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Part 3, Class O of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
- The appeal is made by Seven Capital (Albion) Limited against the decision of Birmingham City Council.
- The application Ref: 2018/03393/PA, dated 25 April 2018, was refused by notice dated 14 June 2018.
- The development proposed is a change of use of a building from office use (Class B1(a)) to a 21no. residential apartments (Class C3).

Decision

1. The appeal is dismissed.

Application for costs

2. Prior to the hearing an application for costs was made by Seven Capital (Albion) Limited against Birmingham City Council. At the hearing, a third party, Albion Court Action Group, made applications for costs against both Seven Capital (Albion) Limited and Birmingham City Council. These applications are the subject of a separate Decision.

Procedural matters

3. As originally submitted, the appeal proposal sought Prior Approval for the creation of 23 flats within the appeal building. Before the hearing, the appellant submitted an amended drawing that removed two proposed flats within the basement level of the appeal building from the scheme. The Council and third parties were made aware of this amendment and did not raise any objections to it. It was subsequently agreed at the hearing that the description of the proposal should be amended to read 21no. residential apartments.

Main Issue

4. Class O of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), hereinafter the GPDO, grants planning permission for the change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the

Schedule to the Use Classes Order[1], to a use falling within Class C3 (dwellinghouses). It is not in dispute that the building was in a use falling within use Class B1(a) on 29th May 2013, and that the appeal site is not within a safety hazard area or military explosives area, nor is the building a listed building or scheduled monument. The Council accept that the change of use would constitute permitted development.

5. Planning permission granted by Part 3, Class of the GPDO is subject to a condition that, before beginning the development, an application is made to the local planning authority for a determination as to whether the prior approval of the authority will be required in respect of the transport and highways impacts of the development; contamination risks on the site; flooding risks on the site; and the impacts of noise from commercial premises on the intended occupiers of the development. The Council resolved that its prior approval was required, and this was subsequently refused. It is common ground between the main parties that the proposed development would not have any adverse effects in terms of transport and highways and that there are no risks to the development from contamination or flooding. The sole matter in dispute is the efficacy of the noise mitigation measures proposed by the appellant and the effect that noise from nearby premises in commercial use may have on the future residents of the proposed flats.

6. Therefore, the main issue in this appeal is the effect of noise from nearby commercial premises on the future occupiers of the proposed development.

Reasons

7. The appeal building is a two storey structure with a semi-basement level. At the time of the hearing site visit, a further floor had been inserted into the roof space of the building as part of works commenced, and later suspended, under a previous prior approval. It is located within the city's Jewellery Quarter, which is predominantly commercial in nature with some small enclaves of residential uses. In the vicinity of the appeal building are several licenced premises that hold licences for live and recorded music, in particular the 1000 Trades public house which immediately adjoins the appeal building and Acapella on the junction of Albion Street and Frederick Street, opposite the appeal site. The Council state, and it is not contested by the appellant, that the licencing conditions of these premises allow recorded or live music until 03:00 on certain days.

8. Both parties recognise that these premises will be a source of noise that would affect the appeal building. Paragraph 182 of the National Planning Policy Framework (the Framework) seeks to ensure that new development can be effectively integrated with existing businesses and community facilities, which includes music venues, and that such businesses should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Paragraph 182 further states that where the operation of an existing business would have a significant effect on new development nearby, the applicant/appellant should be required to provide suitable mitigation as part of the development.

9. In order to mitigate the potential for noise nuisance, it is proposed to install secondary glazing behind the existing windows in the appeal building and to

[1] The Town and Country Planning (Use Classes) Order 1987 (as amended)

provide sound insulation on the party wall between the appeal building and the adjoining 1000 Trades public house. During the course of the appeal the specification of these mitigation measures were changed from that originally proposed, however, all the relevant parties have had the opportunity to comment on the revised specification. Mechanical ventilation would be provided throughout the building to provide the air changes required by the Building Regulations.

10. The Council have not challenged the technical findings of the appellant's noise assessments, although these are challenged by Albion Court Action Group who are third party objectors to the proposal and were represented at the hearing. The Council's primary concern is that the mitigation measures relied upon by the proposal would result in the future occupiers of the building having to keep the windows of the flats and the secondary glazing closed to prevent noise ingress, which would result in unsuitable living conditions.

11. Although it was argued by the appellant that Part 3, Class O makes no reference to living conditions and that there are no policy preclusions on sealed windows, in making a determination on a prior approval application, decision makers are required to have regard to the provisions of the Framework, so far as they are relevant to the proposal. Paragraph 127 of the Framework requires that new development should create places which promote health and well-being, with a high standard of amenity for existing and future users. The Planning Practice Guidance also identifies that if proposed noise mitigation relies on windows being kept closed this may have an effect on living conditions.

12. In addition, from the wording of Paragraph O2 (1)(d) of the GPDO, which deals with the conditions subject to which permission is granted, the effect of the proposal on living conditions is implicit in the consideration of the impacts of noise from commercial premises on the intended occupiers of the development. Within this context it is clear that the manner in which it is proposed to mitigate the noise is an integral and non-severable part of assessing the potential effect of noise on the future occupiers.

13. The appellant confirmed at the hearing that the secondary glazing to be installed at the appeal building would be openable and it was also confirmed that the proposed mitigation would only be effective if the windows and secondary glazing are closed.

14. There is no formal policy basis in the Framework that precludes the use of sealed windows, and the Council accepts that the use of mechanical ventilation would meet the requirements of the Building Regulations. Although there may be a psychological effect of living in an environment where it is not possible to open the windows, this is difficult to objectively quantify as it would affect different people in different ways. The Council do not generally support the use of sealed windows or fixed glazing, nevertheless, there is no persuasive evidence that would support the contention that fixed glazing would automatically result in poor living conditions.

15. Whilst the use of sealed windows would not necessarily result in unacceptable living conditions, the key test in this case that has to be met in order to meet the requirements of the GPDO is the effect of noise from commercial premises on the future occupiers and whether that noise can be suitably mitigated in

order to integrate the proposal with existing businesses. The appeal proposal specifically does not include sealed windows or fixed secondary glazing.

16. Although it is suggested by the appellant that people moving into city centre housing are prepared to make compromises in return for the convenience and lifestyle offered by city centre living, future occupiers would nevertheless have expectations regarding their quality of life and it cannot be assumed that any or all future occupiers of the development would necessarily be more tolerant of noise, nor can it be assumed that future occupiers would keep windows closed, even during events that resulted in noise. Whilst a planning condition could ensure that a noise mitigation scheme was put in place, it cannot thereafter ensure that it is used or operated as intended. Regardless of the provision of mechanical ventilation, future occupiers may wish to open the windows for access to fresh air or other reasons, and the actions of the future occupiers are not within the control of either the appellant or the Council.

17. The principal noise sources at this point in time result from evening uses and so windows in the appeal building could potentially be opened without detriment to the occupiers during the day. However, there is no evidence that the activities at the music venues is restricted or do not occur during the daytime. The surrounding area is commercial in nature and other nearby commercial users could at a future date introduce noisier uses or daytime activities that are not necessarily controllable, and the Framework is explicit that existing businesses should not be unreasonably restricted by development permitted after they were established. The ability to open the windows and secondary glazing would, therefore, fatally undermine the effectiveness of the proposed mitigation scheme.

18. In these circumstances, regardless of whether the enhanced glazing and sound insulation on the dividing wall would result in an acceptable internal noise climate and suitable living conditions for the future occupiers, the mitigation proposed is compromised by its reliance on the actions of a third party, namely the future occupiers, which is beyond the control of either the appellant or the Council, and, consequently, the proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development.

19. I have had regard to Inspector's decision on 50 Frederick Street opposite the site which allowed flats to be created above the premises now known as Acapella and the Inspector's conclusion that as a result of the mitigation measures proposed in that case, the impact of noise from commercial premises on the intended occupiers of the development would be acceptable. However, I note that this resulted in flats that had sealed, non-opening, windows and it was apparent from my site visit that the upper floor windows of this building are sealed units. This is materially different from the case in the present appeal, where the existing opening windows are being retained and openable secondary glazing is being installed. It is not proposed to replace the existing windows in the appeal building with fixed glazing. Nonetheless, I do not consider that this approval represents a precedent to allow the appeal proposal.

20. I have also had regard to the other cases cited by the appellant where the use of sealed windows has been permitted or openable windows have been found acceptable. I do not have the full details of these cases and so cannot be

certain that the circumstances are similar to the case now before me. I note that the Council state in respect of the planning permissions that it has granted that there were other regeneration benefits that outweighed the disadvantages of sealed windows, and I also note that these schemes are markedly different in scale to the appeal proposal. In respect of the appeal decision at Perry Barr[2], whilst I note that the Inspector concluded that openable windows were acceptable and that the proposal would provide a suitable residential environment, I do not have any details in respect of the nature or proximity of the noise sources, or of the prevailing noise climate in the area. I therefore cannot tell if this is comparable to the case before me, where there are multiple late night noise sources extremely close to the appeal building and, as a result, I can give little weight to this.

21. A number of conditions were discussed at the hearing relating to noise mitigation. Paragraph W of Schedule 2, Part 3 to the GPDO does allow for conditions that are reasonable related to the subject matter of the prior approval. However, the matter of noise mitigation is in itself a condition of the development permitted by the GPDO, is the principal matter in dispute between the parties, and goes to the heart of the main issue in this appeal. In these circumstances it would not be appropriate to require the submission of a further noise mitigation scheme as this would, in effect, reopen the prior approval process.

22. I conclude that the appeal proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development. It would conflict with the relevant requirements of the Framework which seeks to ensure that new development new development can be effectively integrated with existing businesses and community facilities; that where the operation of an existing business would have a significant effect on new development nearby, suitable noise mitigation is provided as part of the development; and that new development provides a high standard of amenity for future occupiers.

Other Matters

23. It was argued on behalf of the third parties that allowing the proposal would have a detrimental effect on the operation of the 1000 Trades public house as a music venue. Whilst this pre-supposes that there may be complaints from the future residents in respect of noise, it is also difficult to objectively quantify the likely prospects of success of such complaints. In any event, as this application is for prior approval rather than an application for planning permission, the matter that is before me is ultimately whether the proposed development would provide suitable living conditions for the future occupiers of the proposed development taking into account the existing commercial noise sources in the area and the proposed mitigation measures. It is not for me to determine whether those existing noise sources constitute an actionable noise nuisance but rather whether the proposed noise mitigation is appropriate.

24. The third parties also raised concerns in respect of increased car parking in the area as a consequence of the development. The appeal site has good access to public transport within a short distance of and is within reasonable walking distance of large parts of the city centre. No substantive evidence was submitted in respect of current and future parking demand, or which would

[2] Appeal reference: APP/P4605/W/18/3201108

demonstrate that the area suffers from parking stress. I also note that the Highways Authority have not raised any objections to the proposal. Based on the evidence, I have no reason to conclude differently.

Conclusion

25. For the above reasons, I conclude that the appeal should be dismissed.

John Dowsett

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ms N Pindham	Barrister, No. 5 Chambers
Mr K Fenwick	Pegasus Group
Mr N Mann	White Young Green
Mr A Moore	Pegasus Group
Mr L Kelter	White Young Green

FOR THE LOCAL PLANNING AUTHORITY:

Mr D Wells	Principal Planner, Birmingham City Council
Mr M Key	Regulatory Services, Birmingham City Council
Ms A Do	Planning Officer, Birmingham City Council

INTERESTED PERSONS:

On behalf of Albion Court Action Group:

Ms S Clover	Barrister, Kings Chambers
Mr B Albon	Sandy Brown Associates
Mr J Stapleton	1000 Trades
Mr J Todd	1000 Trades
Mr P Rose	Birmingham Jazz
Mr D Mahoney	Jewellery Quarter Development Trust

DOCUMENTS SUBMITTED AT THE HEARING

Updated drawings showing 21 flats (basement flats omitted)

Updated suggested conditions

Written submission from Jewellery Quarter Development Trust

Written submission from Birmingham Jazz

Appendix VI

The Planning Inspectorate

Appeal Decision

Site visit made on 10 June 2020

by A Caines BSc(Hons) MSc TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 June 2020

Appeal Ref: APP/M4510/W/19/3234440
Land to South of Walker Road, Formerly Saint Peters Scrap Yard, 304 Walker Road, Newcastle upon Tyne NE6 1AH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Alamoudi (Yasser Alamoudi Limited) against the decision of Newcastle-upon-Tyne City Council.
- The application Ref 2016/1060/01/DET, dated 22 June 2016, was refused by notice dated 28 March 2019.
- The development proposed is residential development comprising of 58 units in 3 interlinked blocks of 5-6 storeys including a lightweight penthouse level together with associated hard and soft landscaping and 64 car parking spaces with access from Walker Road.

Decision

1. The appeal is dismissed.

Procedural Matters

2. I have taken the appeal site address from the Council's decision notice as it is more precise than that given on the planning application form.

3. Prior to the determination of the planning application the scheme was amended and the description of development changed to that set out in the header above. This was the basis upon which the Council determined the scheme and so shall I.

4. The Council's second reason for refusal references a requirement for an open space and recreation contribution of £145,880. It has been clarified that this was a typographical error and should have been £45,880.

5. Since determination of the planning application the Council's Development and Allocations Plan 2015-2030 (DAP) has been found sound, subject to a number of main modifications. Given the advanced stage of the DAP, I have given due weight to the relevant Policies contained within it.

Main Issues

6. The main issues are:

   - Whether the site is an appropriate location for the development, with particular regard to the effects of odour on the living conditions of future occupiers; and

- Whether appropriate provision would be made for affordable housing and other requirements arising from the development.

Reasons

Odour effects

7. The development would be arranged in three linear interlinked blocks utilising the existing access from Walker Road, which passes initially along the western boundary before turning east into the narrow L-shaped site.

8. Immediately to the north west and adjoining the appeal site is the Byker Waste Treatment and Transfer Station (BWTTS) operated by SUEZ Recycling and Recovery UK Ltd on behalf of Newcastle City Council.

9. The BWTTS is a Mechanical and Biological Treatment waste handling facility, which I am informed is the principal waste treatment and transfer facility for Newcastle City's municipal waste collection service. It processes a large amount of household, commercial and industrial waste, including both inert wastes and organic material (such as animal tissue, food waste and green waste) under permit from the Environment Agency (EA).

10. There is no dispute that the BWTTS is a known source of odour and that the residential development falls within the high sensitivity receptor category. Due to the prevailing wind direction, the development would lie directly downwind from the odour source. This, together with the proximity of the development to the odour source and an expectation that residents would want to open windows and enjoy outdoor space within the development, means that the pathway effectiveness from odour source to receptor should be regarded as highly effective.

11. During the planning application, the appellant provided an Odour Impact Assessment[1]. The assessment utilised sniff testing of odour intensity at locations within the site and predicted the likely odour effect to be moderate adverse on the two blocks that have since been removed from the proposals, and slight adverse on the three blocks comprising the appeal scheme. The Council commissioned its own Odour Assessment[2], which utilised a qualitative risk-assessment approach, together with a review of the appellant's assessment. It predicted moderate adverse odour effects across the whole of the development, but its overall conclusions are similar to the appellant's assessment. Both consider the western part of the site to be at risk of potentially significant odour effects from the BWTTS, with the risk decreasing further to the east where the three residential blocks are proposed to be sited.

12. However, the conclusion of the Council's odour assessment is qualified with a statement that odours are still likely to be detectable across the entire site from time to time. Furthermore, the appellant's sniff test results show that on two separate test days unpleasant municipal waste odour was detectable at the eastern end of the site. This is consistent with the history of odour complaints against the BWTTS from greater distances than any part of the development. There is nothing substantive before me to support assumptions that these complaints were a result of abnormal operations at the BWTTS or abnormal meteorological conditions.

[1] By Spectrum environmental support, dated 8 May 2017
[2] By Air Quality Consultants, dated 4 September 2017

13. The objection from the EA, a statutory consultee, is a very weighty matter. It indicates that in 2018 there was a significant spike in the number of complaints about odour from the BWTTS within as much as a 1km radius of the development. This is corroborated by the objection from the Council's Waste Management Section, adding that the spike in 2018 complaints came despite efforts made by the facility to control odours after a peak of complaints in 2014-2015. This indicates that even with reasonable odour reduction measures at the source and effective operational pollution regulation in place, the surrounding area still experiences effects from residual odour caused by the BWTTS.

14. I am also mindful that the BWTTS is permitted to operate 24 hours per day, 7 days a week. Accordingly, the potential exists for the facility to operate more intensively than at present. The objection from the operator of the facility highlights the importance of flexibility to be able to work longer hours should the need arise, or if waste management requirements and targets change over time. In addition, the Council's Waste Management Section advises that mandatory weekly food waste collection may be introduced in the future. These factors could further increase the risk of odour effects from the facility.

15. Moreover, I am cognisant that the access for the development closely hugs the western boundary with the BWTTS. It is common ground that the western part of the site could be exposed to potentially significant odour effects. Therefore, irrespective of whether the remaining residential blocks to the east would be exposed to unacceptable odour effects, it is likely that future occupiers of the development could experience the unpleasant odours from the BWTTS on a regular basis as they enter and leave the site, by foot and by vehicle. Whilst this would be for short periods each time, cumulatively, this experience could cause annoyance and increase the potential for odour complaints against the BWTTS.

16. In addition, the amendments introduced a "grass amenity" area in the western part of the site where one of the residential blocks was removed from the scheme because of potentially significant odour exposure in that location. As such, it would be likely that its users could be regularly exposed to unpleasant odours, particularly during warmer weather, thereby impacting on their health and well-being, as well as increasing the potential for odour complaints against the BWTTS.

17. The introduction of dense planting along the western boundary may assist in the dispersion of odour to part of the site, but there is no substantive evidence that it would be highly effective in mitigating the effects of odour exposure from the BWTTS. Indeed, the appellant's odour assessment acknowledges that this should not be considered as a mitigation plan which is certain to reduce the impact of odour exposure to the proposed development.

18. Drawing all these matters together, I cannot rule out the possibility that future occupiers of the development could be exposed to harmful odour effects from the BWTTS. There is also a realistic prospect that the proposal could lead to further odour-related complaints against the BWTTS. This could result in further costly measures and restrictions being placed on its operations. Not only would this disadvantage an existing business, but it could also unacceptably prejudice the Council's essential waste management and

recycling infrastructure and services. In these circumstances, I consider that a precautionary approach is a necessity.

19. For all these reasons, I conclude that the site is not an appropriate location for the development, with particular regard to the effects of odour on the living conditions of future occupiers. Thus, the development would be contrary to Policy CS14 of the Core Strategy and Urban Core Plan for Gateshead and Newcastle upon Tyne 2010-2030 (CSUCP), which requires that the wellbeing and health of communities is maintained and improved by among other things, preventing negative impacts on residential amenity and wider public safety from air quality. It would also conflict with Policy DM23 of the DAP, which includes a requirement for development to provide a high quality environment and a good standard of residential amenity for existing and future occupants, ensuring among other things, that smells, fumes and other harmful effects from surrounding land uses and/or associated operations will not have an unacceptable adverse impact on residential amenity.

20. The development would also be contrary to paragraphs 127f, 180 and 182 of the National Planning Policy Framework, which seek to ensure a high standard of amenity for all existing and future users; that development is appropriate for its location taking into account the likely effects of pollution on living conditions; and that existing businesses and facilities do not have unreasonable restrictions placed on them as a result of development permitted after they were established.

Affordable housing and other requirements arising from the development

21. The Council has identified the need for the provision of 15% affordable housing, a financial contribution of £45,880 towards open space and recreation improvements in the vicinity, a Training Employment Management Plan, internal estate road and footpath management details, and the monitoring costs associated with the obligations. These have been identified and calculated on the basis of the specific development proposed and the Council's adopted development plan policies and supplementary guidance.

22. On the evidence before me, there is no suggestion that these provisions are anything other than necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development. I am therefore satisfied that they would comply with the relevant tests for planning obligations as set out in the Framework and in Regulation 122 of the CIL Regulations.

23. The appellant has indicated willingness for all of the above mentioned requirements and contribution to be secured by a legal agreement, but there is no legal agreement before me. I have noted the request for the provision of a legal agreement to be conditioned; however, the Planning Practice Guidance (PPG)[3] states that a positively worded condition which requires the applicant to enter into a planning obligation is unlikely to pass the test of enforceability. The PPG also adds that a negatively worded condition limiting the development taking place until a planning obligation is entered into is only appropriate in exceptional circumstances, citing more complex and strategically important development, which the proposal would not constitute.

[3] Paragraph: 010 Reference ID: 21a-010-20190723

24. Accordingly, in the absence of any legal agreement, it is the case that the development would not make appropriate provision for affordable housing and the other identified requirements arising from the development. Thus, it is contrary to CSUCP Policies DEL1, CS5, CS11, CS13, CS18, saved UDP Policies OS1.1, OS1.2 and T7.1, and DAP Policies DM14 and DM27, in so far as they require new development to be made acceptable through the provision of affordable housing, and refer to the specific obligations and infrastructure requirements that have been identified.

Other Matters

25. The proposal would make effective use of previously developed land, which is identified for housing potential in the Walker Riverside: Area Action Plan. It would also add to the supply and choice of housing in the area, create employment opportunities and make a contribution to the local economy from additional revenue and expenditure from future occupiers. These are meaningful benefits of the proposal, but they do not outweigh the significant harm identified and the proposal's failure to comply with the policies of the development plan as a whole.

26. I have noted the variety of other issues raised by interested parties that have not been encapsulated above. This includes concerns regarding noise, design, traffic, wildlife, privacy, flooding, archaeology, land contamination and stability. However, these matters did not feature in the Council's refusal reasons and as I am dismissing the appeal for other reasons, it is not necessary to consider these matters any further, as any findings in these respects would not change the appeal outcome.

Conclusion

27. For the reasons given, the appeal should be dismissed.

A Caines

INSPECTOR

Appendix VII

VISSIM MODEL REVIEW

for

ETM RECYCLING & MANHEIM AUCTIONS BRISTOL

METROWEST PROPOSALS

at

WINTERSTOKE ROAD / ASHTON VALE ROAD JUNCTION

carl TONKS consulting

www.tonks-consulting.co.uk

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APPENDICES

A **cTc** Letter of 7th March 2018

Client:		ETM Recycling & Manheim Auctions Bristol	
Project Name:		Ashton Gate	
Project Number:		2018-F-008	
Report Title:		VISSIM Model Review	
Created by:	Adani Zafira	**Date:**	November 2019
Proofed By:	Matt Millard Jacqueline Ireland	**Date:**	November 2019
Approved by:	Malcolm Neil Carl Tonks carl@tonks-consulting.co.uk	**Date:**	November 2019

1. INTRODUCTION

1.1 Background

1.1.1 **carl TONKS consulting** (**cTc**) is commissioned by ETM Recycling to advise on operational implications of the proposals promoted by North Somerset Council (NSC) in regard to the proposed MetroWest Phase 1. A preliminary review of this model was undertaken by **cTc** early in 2018, at which time numerous attempts were made to engage the scheme promoters and their transport modellers in discussion concerning **cTc**'s preliminary observations. Unfortunately these attempts remained unsuccessful and the points raised at that time remain unanswered.

1.1.2 **cTc**'s preliminary views in regard to the adequacy of the modelling undertaken were portrayed in a letter to the Planning and Legal consultant of the occupiers of Ashton Vale Industrial Estate, who made these matters known to the promoters of this scheme. No material response was received. A copy of that letter is included herewith at Appendix A.

1.2 Traffic Model Detail

1.2.1 In order to move these matters forward, **cTc** has undertaken a more detailed technical review of the documentation currently in the public domain, with support from specialist traffic modellers, SYSTRA. The VISSIM modelling which has been reviewed has been prepared by CH2M on behalf of North Somerset Council (NSC).

1.2.2 The following documents were provided for the review:

- peir-appendix-16-1-transport-assessment_final.pdf
- peir-chapter-16-transport-access-and-non-motorised-users_final.pdf
- appendix-p-vissim-modelling.pdf
- appendix-h-level-crossing-assessments.pdf

- appendix-e-transport-modelling.pdf
- appendix-c-survey-reports.pdf

1.2.3 As the brief provided to SYSTRA by **cTc** focuses on the VISSIM modelling, the review has focused upon “appendix-p-vissim-modelling.pdf” and “appendix-c-survey-reports.pdf.“ No models were available therefore this review is based upon the documentation only.

2. BASE MODEL REVIEW

2.1 Introduction

2.1.1 The base model was created to assess the impact of the MetroWest Phase 1 scheme on the performance of the Winterstoke Road / Ashton Vale Road junction and adjacent level crossing.

2.1.2 The VISSIM base year model was built to represent a 2017 Base Year.

2.1.3 The model extent included Winterstoke Road / Ashton Vale Road / Marsh Road junction and the adjacent level crossing on Ashton Vale Road. The model has then been used to assess mitigation options for the MetroWest scheme.

2.1.4 The model review utilises the following classifications where issues are thought to be present, or the reviewer has a query which needs to be addressed:

RED – serious issue which could significantly influence the reported results;

AMBER – minor issue which could influence the reported results;

BLUE – clarification / more information required.

2.2 Traffic Data Collection

2.2.1 The following traffic data was collected to inform the VISSIM base model:

- Classified turning counts;
- Journey time surveys;
- Pedestrian flows.

2.2.2 The data was collected on Tuesday 9th May 2017 which was a neutral month and did not fall in the school holidays. This is in line with WebTAG requirements.

2.2.3 However the report states that on the survey day the left turn filter lane for Ashton Vale Road on the Winterstoke Road northbound carriageway and the footway on the northbound carriageway south of Ashton Vale Road were closed due to traffic management associated with the long term Metrobus construction. There are two concerns with this:

- **SERIOUS ISSUE** - That the presence of long term traffic management would mean that the traffic surveys underestimate peak hour traffic flows due to the associated congestion which would result in drivers re-routing or travelling at different times or via different modes. It is not clear if anything has been done to compensate for this in the modelling;

- **CLARIFICATION REQUIRED** - It is not clear from the VISSIM report whether the left turn closure and associated traffic management measures (like speed restrictions) have been included in the base year VISSIM model. For model calibration and validation to be accurate they should have been otherwise this could have a serious impact upon the validity of the base models and the accuracy of forecasting.

2.3 Model Set up

Network Extent

2.3.1 The network extent covers just one junction – the Ashton Vale Road / A3029 Winterstoke Road/ Marsh Road junction. This junction is very close to the A370 which is the key route taking traffic into Bristol.

2.3.2 **SERIOUS ISSUE** - Figure 2.1 indicates that congestion begins on the A370 and interacts with the modelled junction in the AM peak. Without including this interaction, the models cannot represent the current existing off-network congestion and will not include the impact of this in future year forecasts.

Figure 2.1 – "Typical" AM Peak conditions from Google Maps (Tuesday 08:45 but this is typical for the 07:30 to 09:30 time period)

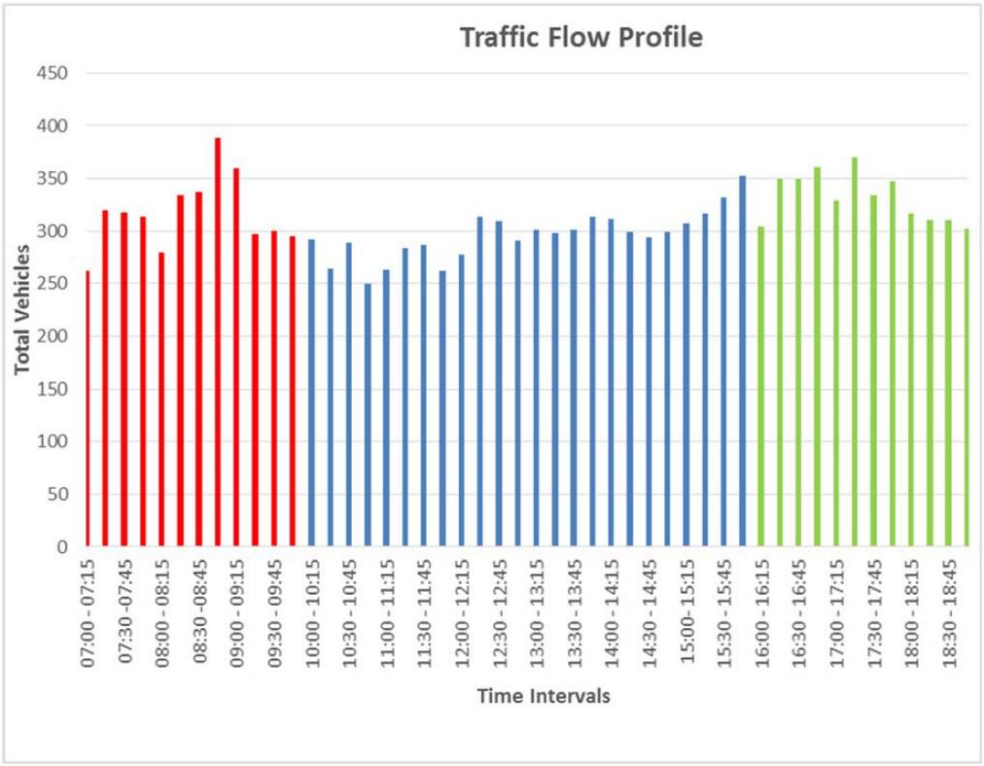
Time Periods

2.3.3 It has been noted that the time periods modelled were 07:00-10:00 for AM peak and 16:00-19:00 for PM peak.

2.3.4 **CLARIFICATION REQUIRED** - Model outputs have been presented for each of these hours but there does not appear to be a modelled pre-peak or post-peak. Without these, the first and last hour of modelled results are incomplete and inaccurate – so it is assumed that the first hour is the pre-peak and the third is the post-peak. Therefore the focus of model validation and future year analysis should be the middle peak hour 08:00 – 09:00 and 17:00 – 18:00.

2.3.5 **SERIOUS ISSUE** – The above paragraph would be an acceptable methodology – except that Figure 2.2 of the model validation report (Figure 2.2 below) suggests that the actual peak hours of this junction are 08:00-09:00 and 16:30-17:30. The PM peak model has not been validated for this time period and does not present results for it.

Figure 2.2 – Base Year Traffic Flow Profile



Model Parameters

2.3.6 The model parameters presented in the report are largely acceptable but cannot be truly verified without watching the models and the driver behaviour within them.

2.3.7 **MINOR ISSUE** - However, it is noted that the number of vehicles observed by a driver in the model has been set to 10 which is outside the acceptable range (up to 5) presented in the Highways England Microsimulation Guidelines. A value of 10 means that drivers are able to predict the movement of other drivers much further ahead which can lead to an unrealistic improvement in general traffic behaviour and a consequent reduction in delay.

2.3.8 **CLARIFICATION REQUIRED -** It is unclear from the report how the level crossing timings were coded in the model. It is assumed that the level crossing would close in the model according to train timetables, not by the frequency of trains but the methodology used should be clarified.

Model Network and Operation

2.3.9 The model files have not been provided for review so the accuracy of coding and vehicle behaviour cannot be commented upon.

2.3.10 **SERIOUS ISSUE -** It is noted that the traffic data was collected during a period of substantial roadworks within the modelled junction, which included a left turn flare closure to Ashton Vale Road, and associated speed restrictions. It is considered that these should have been included in the base year models for validation and subsequently removed in reference case and option models. It is not thought that this is the methodology followed.

2.4 Calibration and Validation Results

2.4.1 The VISSIM Modelling report presents model results for calibration and validation of the model. It has already been noted that the PM peak hour has not been presented, but the methodology and validity of those results presented has been commented on below.

2.4.2 **CLARIFICATION REQUIRED -** The link and turning flow calibration results are in line with WebTAG guidelines, however it is noted that WebTAG requires these measures to be presented for total vehicles and light vehicles. This has been calculated and the link and turn flow calibration for total vehicles does pass the WebTAG guideline as shown in Tables 1 and 2. It is requested that these measures are added to the LMVR.

2.4.3 **MINOR ISSUE –** It is noted that although they pass the guideline criteria the link and turn flows are generally low in the model. It is considered that this should be addressed as it is likely to be the cause of the underestimation of journey times (discussed below). Given that this is a single junction model it is thought that all links and turns should be able to calibrate accurately. WebTAG Unit M3.1 section 6.2.4 addresses this.

Table 2.1 - Links Flow for Total Vehicle

	AM Peak						PM Peak						
From Arm	Time Periods	Observed	Model Flow	Diff	% Diff	GEH	DMRB Flow	Time Periods	Observed	Model Flow	Diff	% Diff	GEH	DMRB Flow
A3029 North	07:00-08:00	1214	1181	-33	-3%	0.95	Pass	16:00-17:00	1365	1315	-50	-4%	1.37	Pass
Marsh Road		165	160	-5	-3%	0.39	Pass		121	119	-2	-2%	0.18	Pass
A3029 South		1268	1223	-45	-4%	1.28	Pass		1107	1037	-70	-6%	2.14	Pass
Ashton Vale Road		72	75	3	4%	0.35	Pass		222	200	-22	-10%	1.51	Pass
A3029 North	08:00-09:00	1340	1268	-72	-5%	1.99	Pass	17:00-18:00	1380	1389	9	1%	0.24	Pass
Marsh Road		195	198	3	2%	0.21	Pass		134	134	0	0%	0.00	Pass
A3029 South		1164	1168	4	0%	0.12	Pass		1163	1138	-25	-2%	0.74	Pass
Ashton Vale Road		77	76	-1	-1%	0.11	Pass		224	178	-46	-21%	3.24	Pass
A3029 North	09:00-10:00	1252	1105	-147	-12%	4.28	Pass	18:00-19:00	1240	1254	14	1%	0.40	Pass
Marsh Road		94	93	-1	-1%	0.10	Pass		86	87	1	1%	0.11	Pass
A3029 South		1063	1066	3	0%	0.09	Pass		926	915	-11	-1%	0.36	Pass
Ashton Vale Road		105	106	1	1%	0.10	Pass		90	95	5	6%	0.52	Pass

Table 2.2 - Turns Flow for Total Vehicle

		AM Peak							PM Peak						
	From Arm	Time Period	Observed	Model Flow	Diff	% Diff	GEH	DMRB Flow	Time Period	Observed	Model Flow	Diff	% Diff	GEH	DMRB Flow
A3029 North	Marsh Road	07:00-08:00	206	237	31	15%	2.08	Pass	16:00-17:00	311	329	18	6%	1.01	Pass
	A3029 South		1008	944	-64	-6%	2.05	Pass		1054	986	-68	-6%	2.13	Pass
Marsh Road	A3029 South		165	160	-5	-3%	0.39	Pass		121	119	-2	-2%	0.18	Pass
A3029 South	Ashton Vale Road		186	182	-4	-2%	0.29	Pass		55	20	-35	-64%	5.72	Pass
	A3029 Underpass		724	696	-28	-4%	1.05	Pass		695	671	-24	-3%	0.92	Pass
	A3029 North		358	345	-13	-4%	0.69	Pass		357	346	-11	-3%	0.59	Pass
Ashton Vale Road	A3029 Underpass		40	40	0	0%	0.00	Pass		94	91	-3	-3%	0.31	Pass
	A3029 North		11	11	0	0%	0.00	Pass		32	32	0	0%	0.00	Pass
	A3029 South		21	24	3	14%	0.63	Pass		96	77	-19	-20%	2.04	Pass
A3029 North	Marsh Road	08:00-09:00	294	256	-38	-13%	2.29	Pass	17:00-18:00	377	349	-28	-7%	1.47	Pass
	A3029 South		1046	1012	-34	-3%	1.06	Pass		1003	1040	37	4%	1.16	Pass
Marsh Road	A3029 South		195	198	3	2%	0.21	Pass		134	134	0	0%	0.00	Pass
A3029 South	Ashton Vale Road		174	173	-1	-1%	0.08	Pass		25	18	-7	-28%	1.51	Pass
	A3029 Underpass		664	665	1	0%	0.04	Pass		752	743	-9	-1%	0.33	Pass
	A3029 North		326	330	4	1%	0.22	Pass		386	377	-9	-2%	0.46	Pass
Ashton Vale Road	A3029 Underpass		39	37	-2	-5%	0.32	Pass		110	81	-29	-26%	2.97	Pass
	A3029 North		10	10	0	0%	0.00	Pass		37	28	-9	-24%	1.58	Pass
	A3029 South		28	29	1	4%	0.19	Pass		77	69	-8	-10%	0.94	Pass
A3029 North	Marsh Road	09:00-10:00	243	226	-17	-7%	1.11	Pass	18:00-19:00	296	319	23	8%	1.31	Pass
	A3029 South		1009	879	-130	-13%	4.23	Pass		944	935	-9	-1%	0.29	Pass
Marsh Road	A3029 South		94	93	-1	-1%	0.10	Pass		86	87	1	1%	0.11	Pass
A3029 South	Ashton Vale Road		171	161	-10	-6%	0.78	Pass		20	17	-3	-15%	0.70	Pass
	A3029 Underpass		598	606	8	1%	0.33	Pass		598	597	-1	0%	0.04	Pass
	A3029 North		294	299	5	2%	0.29	Pass		308	301	-7	-2%	0.40	Pass
Ashton Vale Road	A3029 Underpass		53	51	-2	-4%	0.28	Pass		46	44	-2	-4%	0.30	Pass
	A3029 North		15	16	1	7%	0.25	Pass		15	15	0	0%	0.00	Pass
	A3029 South		37	39	2	5%	0.32	Pass		29	36	7	24%	1.23	Pass

2.4.4 **SERIOUS ISSUE** – Travel time validation has been presented in the LMVR using the WebTAG guidelines which state that modelled journey times must be within 15% or 60 seconds of observed for 85% of journey time sections. However this is only valid if the guidelines for collecting data are also followed – which state that journey time routes should be longer than 3km. If this is not the case then modelled travel times must validate to within 15% of observed time for 85% of journey times sections. Although distances have not been presented here it is considered that all routes would be less than 3km, which would mean that the majority of travel times routes fail in both peaks with the modelled journey times being faster than observed. The impact of this is that the base models significantly underestimate congestion and that the future year forecasts are therefore optimistic.

2.4.5 **MINOR ISSUE –** It is also noted that no journey time data has been presented for Marsh Road. We consider that this should be provided given that no queue length data was gathered for checking the model accuracy here. As this application was for a Local Authority, TrafficMaster travel time data is available free from DfT. It is expected that this data source would have been available for validation of all links in the model – and it is also generally more accurate than the car follower method adopted here because of the higher sample rate of journeys. It is recommended that this data is gathered to complete the validation of the whole model.

2.5 Base Modelling Summary

2.5.1 There are some clear concerns over the methodology and results presented in the base model LMVR.

2.5.2 These concerns include time period choice, the travel time validation results and that the base model data was collected during roadworks – whilst unavoidable this should have been considered within the modelling methodology.

2.5.3 The review concludes that the base models require some amendment before they can be deemed fit for purpose.

3. OPTION MODELS

3.1 Introduction

3.1.1 The focus of this study is the introduction of passenger trains across the rail line which currently services only freight. Three different levels of additional services have been tested in the VISSIM models for all scenarios.

3.1.2 The resulting requirement for more rail green time at the traffic signals means that it is necessary to evaluate the impact of this upon road traffic, and to mitigate where required.

3.1.3 The with scheme option modelling undertaken has included three different scenarios, 'Do-Nothing', 'Ext Lt Lane', and 'MOVA Ext Lt Lane' scenario, as follows:

- Do-Nothing scenario implemented the MetroWest Phase 1 scheme with the existing junction layout and traffic signal operation;
- Ext Lt Lane scenario included the MetroWest Phase 1 scheme, and extended the left turn lane of Winterstoke Road northbound to Ashton Vale Road;
- MOVA Ext Lt Lane scenario included the MetroWest Phase 1 scheme, extended the left turn lane of Winterstoke Road northbound to Ashton Vale Road and added MOVA control into the signalised junction.

3.2 Forecasting

3.2.1 The VISSIM model report indicates that the opening year of MetroWest Phase 1 would be 2019, yet the Transport Assessment states it is likely it will be 2021.

3.2.2 **SERIOUS ISSUE** - No traffic growth has been applied to the models, so the options have been tested using base year traffic flows only. It is considered that this will be an underestimate of traffic flows passing through the junction and therefore the VISSIM models provide an underestimation of congestion. There are two reasons why it is believed traffic would increase:

- Tempro indicates traffic growth in the Bristol Area (the local district hasn't been checked) of 6% in both peaks and between 2017 and 2021;

- The removal of the MetroBus roadworks that the base year flows are calculated from could result in a further traffic flow increase;

- Low flow and underestimation of journey times in the base model underestimate future year delays.

3.2.3 **CLARIFICATION REQUIRED –** It is also noted that strategic modelling was undertaken for this study, but this hasn't been used to inform demand forecasting. The reasons for this should be clarified.

3.3 Level Crossing Rail Operations

3.3.1 **CLARIFICATION REQUIRED -** Review of the number of trains included in the model appears sensible, but it is unclear how the level crossing timings were coded in the model. Using timetables is more appropriate than frequencies to model train rate assumptions for more accurate observation on the impacts. Clarification of the methodology used is requested.

3.4 Network and Signal Methodology

3.4.1 **CLARIFICATION REQUIRED -** MOVA has not been modelled explicitly in the option models but the methodology explained is considered robust. It is assumed that MOVA was not present in the base year on-ground signal controller and this should be clarified.

3.4.2 It should be noted that the traffic models themselves have not been reviewed therefore the accuracy of coding and the vehicle behaviour has not been commented on.

3.5 Forecast Modelling Results

3.5.1 **CLARIFICATION REQUIRED -** Model results have been presented for the options. It appears in general that there are localised impacts in all scenarios and a small detrimental effect on the junction as a whole. The following observations have been made, and extra information is requested such the impact can be analysed:

- Results have not been presented for the actual PM peak hour which was 16:30 – 17:30.
- Network Performance stats have only been presented for a three hour time period. This dilutes the impact of the scheme in the peak hours, thus the peak hour results are requested. Noting the comments on the validity of the peak hour times in the base model this also makes it difficult to judge the impact in the peak times;
- The three hour Network Performance statistics indicate a large increase in total journey time compared to the base year for each scenario. Further information is required to understand when, where and how severe these impacts are;
- Travel time results have been presented for all arms except Marsh Road. It is requested that these are included;
- It is unclear whether the queue length results presented represent average or maximum queue lengths;
- It is clear that in all scenarios there is an impact on Ashton Vale Road. The statement in the VISSIM modelling report and the TA that queues on Ashton Vale Road cleared within two to three minutes following the re-opening of the level crossing is also believed to be false, as in many of the graphs (especially in the AM peak - Figure 6.10 is an example) it appears that queues do not return to base model levels for long periods of time.

It is noted that in both the AM and PM periods the peaks in queues even under the MOVA option are very regular, and even outside the peak hour they are forecast to reach or exceed the base year peak queues every few minutes;

- It should be noted that in the PM peak there is a severe impact on Ashton Vale Road journey time unless the MOVA option is included. In the AM peak hour there is a 30 second delay in all options even with the MOVA inclusion;

- It is noted that the models indicate that there is little impact upon Winterstoke Road journey times in any option – however this does appear to be at the expense of Ashton Vale Road, and the impact upon Marsh Road is unknown.

3.5.2 **SERIOUS ISSUE** - It should be further noted that it is considered that the option models are not an accurate portrayal of forecast traffic conditions unless the issues highlighted in the base year review and forecasting methodology are addressed. They are considered to contain an underestimate of congestion with the MetroWest Phase 1 scheme.

4. STRATEGIC MODELLING

4.1 **CLARIFICATION REQUIRED -** Little information has been provided regarding the Strategic Modelling undertaken for this assessment, but two clarifications are sought:

- Was the strategic model reviewed and locally validated for the strategic modelling assessment, and to which year?

- It appears from the screenshots in Appendix E of the Validation Report that there was redistribution as a result of the scheme but they cover a large area and it is difficult to see the effect on the Ashton Vale Road / Winterstoke Road junction. What was the impact at the junction modelled in VISSIM here?

- What assumptions have been applied in the model in regard to the future development of the Bristol Western Harbour, including whole-sale redesign of the highway network around Cumberland Basin?

- How sensitive are the model conclusions to potentially substantial reassignment of traffic flows in the vicinity of Cumberland Basin and the A370?

5. CONCLUSIONS

5.1 There are a number of issues which have been highlighted with the VISSIM base year models and it is considered that it is not a suitable base model for use in this assessment. Key issues include:

- Validity of traffic count data as the survey was carried out during roadworks;
- Modelling of pre and post-peaks / time period choice;
- It appears that the PM peak period is not the focus of calibration / validation;
- The model does not validate to travel times and underestimates congestion;
- The model underestimates traffic flow;
- The network extent would benefit from extension to the north to include the interaction with the road network here;
- No allowance appears to have been made to account for the future redevelopment of the Cumberland Basin and its associated significant amendments to local transport infrastructure.

5.2 This indicates that the forecasting has been undertaken on a basis that underestimates congestion. It is considered that in addition to the base modelling concerns:

- The model should have been forecast to 2021;
- The forecast model results are incomplete and a complete understanding of the traffic conditions cannot be determined;
- That there is a significant impact on Ashton Vale Road in all the scenarios presented but that the reports do not clearly conclude this.

APPENDICES

APPENDIX A

cTc Letter of 7th March 2018

carl TONKS consulting

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Our Ref. 2017-F-008
Date: 7th March 2018

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By email ***amanda@sutherlandpls.com***

Dear Amanda,

ASHTON VALE INDUSTRIAL ESTATE
IMPACT OF METROWEST PROPOSALS

I write further to our various meetings and having looked through the report received in regard to the above. There is a substantial volume of written submission and I have attempted to distil from it items of relevance to our clients and potential impact of the proposals on their businesses. In particular I believe that Appendix P of the submitted Transport Assessment, titled **ASHTON VALE ROAD / WINTERSTOKE ROAD VISSIM MODEL DEVELOPMNET AND ASSESSMENT** is the key document concerning impact on the accessibility of our clients' employment sites.

At this stage I have briefly reviewed the meat of the information in this report. I have not undertaken a forensic analysis as my preliminary consideration has identified a number of potential issues on which I would like more data from the modelling team. Although I could continue to effectively dismantle the report further in order to confirm whether or not the model is fit for purpose, my initial review has identified some significant questions arising. I think it reasonable to provide the traffic modellers (c2hm) with an opportunity to respond to these initial questions and hopefully thereby move discussion forward in a positive manner. It may be that some of my current questions are able to be answered by the modellers and that may enable me better to focus my consideration, avoiding the need to investigate in detail potential dead-end issues.

Continued…/

I summarise below some of my current concerns and perhaps these could be passed over to the scheme's promoters for transparency, whilst I make contact directly with the modelling team to move these concerns on. Some of these issues are fundamental and raise significant concern as to the suitability of the model and in particular, the base data from which the model has been constructed. This could potentially explain why the model results bear such scant resemblance to traffic conditions observed by our clients, who of course use this junction each day, hence are very familiar with traffic conditions.

Briefly; my current view;

- VISSIM is a micro-simulation traffic model, which is intended to replicate traffic conditions and present these in a visual manner which is more easily understood by members of the public than the more traditional traffic models, which output typically pages of numeric printouts and statistics. This is a reasonable tool to use for this analysis.

- Under the heading Traffic Input Data, Section 2.1 acknowledges that **"Due to traffic management at the junction associated with the Ashton Vale to Temple Meads MetroBus scheme bridge construction, the left turn filter lane for Ashton Vale Road on the Winterstoke Road northbound carriageway was closed. Consequently, traffic entering the Ashton Vale Road shared 'ahead' lane for Ashton Vale underpass. This will have impacted on queue lengths and journey times for vehicles on this arm. However, enumerators carrying the survey were of the view that any effect of this was likely marginal and that conditions were not significantly different from the norm."** This statement rasies very large concerns as to the validity of the model and I will discuss these in detail below.

- The model network is tightly constrained to the junction of Ashton Vale Road and Marsh Road with Winterstoke Road. This is appropriate to identify operational characteristics of that junction, however, it does require detailed and accurate data portraying traffic movements at the junction. Unless both the model input data and those used for validation purposes are accurate and comprehensive, the model can not be relied upon to reflect accurately the existing operational conditions. Until a model accurately and reliably reflects existing conditions it clearly cannot be considered a reliable forecasting tool.

- Highway geometry has been measured from aerial photography, which **"…acted as a base mapping, which allowed junction geometry to be checked to ensure that the network incorporated in the model was representative. Lane widths and flare lengths have been checked using the base mapping, together with site visit photos and Google Streetview."** No mention is made of highway geometry having been measured or verified on the ground.

Continued…/

- It is acknowledged in the report that the junction under investigation was at the time the model was constructed subject to highway works in association with the MetroBus and consequently there is potential for changes in lane geometry as part of those works. Aerial photography is a wholly inappropriate source of critical data for constructing an accurate model. It is essential that detailed and accurate measurements of highway geometry are made and these should be at street-level. There is no explanation of how the aerial photographs have been calibrated for scale and I have serious concerns over this methodology, which I believe presents substantial risk of error.

- Under the heading Matrix Development in Section 3.2, Paragraph 3.2.2 Assignment identifies that **"The Ashton Vale Level Crossing junction VISSIM model uses static assignment. Static assignment allows traffic, based on route movements, to be allocated a turning movement at the time they enter the simulation.**

  There is no route choice within the model network and so no need to run the models to achieve assignment convergence criteria." I concur that static assignment modelling is appropriate in this instance, indeed, given the tightly constrained model network there is in fact no choice in this matter; there is only one route between any modelled origin / destination pair, hence no route choice to make. However, characteristics of static assignment modelling carry through to the model's calibration and validation and I will discuss these below. I have very significant concerns as to the credibility of this model, which in my view fails a basic review of how it reflects observations on the ground and I suspect that this is where our clients' experience of this junction diverges from the model outputs. It strikes me that considerably more work is necessary to make this model appropriate and acceptable; it appears in my view not currently fit for purpose.

- In the Chapter titled **Base Model Calibration and Validation**, Paragraph 4.1 states that **"The model was calibrated to link and turn flows and validated to journey times."** I refer to the point discussed above, namely that this is a static assignment model. There is only one route between any origin / destination pair, hence, link and turn flows should by default always reflect observed link flows to absolute accuracy. There should therefore be no requirement to calibrate the model. The validation against journey times will simply confirm (or not) that the modelled speed characteristics are appropriately coded, as there is no route choice included in the model. I believe that this discussion in the report is intended to imply that the model is in fact more complex than it truly is.

Continued…/

Of greater concern, however, is the reliance on base data which, as acknowledged in the model report, is compromised. The MetroBus works resulted in lane closures, which will inevitably have altered journeytimes through this junction, by means of amending lane-choice. Clearly therefore if the model is to be relied upon it must be calibrated and validated using data which is anything other than wholly representative of normal traffic movements and conditions. I will discuss this further, below.

- The model has been assessed against DMRB and Webtag **"…guidance on the acceptability criteria"**, however, therein lies a concern in regard to our clients' issue. Both Webtag Unit 3.1 and DMRB (Traffic Appraisal in Urban Areas) define acceptable modelling characteristics in regard to urban trunk road assessments. The Trunk Road network in the UK exists specifically to cater efficiently for long distance, strategic traffic movement. Of critical importance to the operation of the Trunk network is the major through movement and movements on and off the dominant Trunk network are of secondary importance. Acceptance of a Trunk Road model is inevitably weighted towards accurate portrayal of queues, delays and journey times on the major road through movements, with scant concern to the minor turning movements. This raises important questions as to whether DMRB or Webtag methodologies are appropriate or sufficient to address the concerns of our client consortium.

- Table 4.1 summarises the **DMRB Calibration and Validation Acceptability Criteria** and I note the following;

1.	Total screenline flows (normally > 5 links) to be within +/- 5%	All (or nearly all) screenline
2.	Observed (individual) link flow < 700vph	Modelled flow within +/- 15% > 85% of links
3.	GEH statistic for individual link flows <5	➢ 85% of links
4.	Modelled times along routes should be within 15% (or 1 minute if higher)	➢ 85% of links

These criteria clearly apply to dynamic assignment models, however, the model used in this instance is a static model, with no route choice and consequently the quoted criteria of acceptance are little more than meaningless. Again I shall enlarge in this below.

Continued…/

- Section 4.2.2 Calibration Results is worded such as to "demonstrate" the claimed accuracy of the model, identifying that **"The link and turn count flow criteria exceeded the guidelines, with 100% of link flows and 100% of turns had a GEH<5"**. As identified above, this acceptance criteria is appropriate for a dynamic assignment model; given that the model presented is a static assignment model, this criteria is meaningless. Of greater concern is the statement that **"…the resulting value of R2 provides further confirmation that the traffic movements at the junction are comparable with observed data to a reasonably high degree…"**. The phrase "reasonably high degree" confirms in my view that this model is incapable of being relied upon for the very important purpose for which it is being tabled. I shall expand below on this issue.

- Tables 4.2 to 4.9 present the flow calibration results and identify the differences between observed and modelled flows, including the absolute and percentage differences. These demonstrate very substantial variance between the modelled flows and observations, especially concerning heavy vehicles to and from Ashton Vale Road. In light of this being a static assignment model, these differences should not occur and to my mind these differences confirm that the model is inaccurate and / ir incomplete. It is essential that discussions are held with the modelling team in order to understand how they maintain that this model is valid when to my reading of their report, it simply isn't.

To expand on some of the points raised above;

MetroBus Road Works

The VISSIM model is being presented as confirmation that the proposed regular closure of the Ashton Vale level crossing will have no material impact on accessibility of the Ashton Vale Industrial Estate. In order to present a believable, reliable model it is essential that the traffic conditions which have formed the base data input to the model and against which the subsequent model has been validated are reliable and reflect normal traffic flows. The report confirms that this is not the case and yet this is dismissed as inconsequential.

The three key links of concern to our clients comprise;

(i) the left turning lane into the Ashton Vale Industrial Estate;
(ii) the left turning lane out of the Ashton Vale Industrial Estate; and,
(iii) the right turning lane out of the Ashton Vale Industrial Estate.

That the report acknowledges one of the three links of concern being closed at the times of the surveys confirms that the traffic conditions surveyed cannot have been representative in regard to our clients' sites. The survey data is clearly compromised.

Continued…/

The report states that the enumerators do not consider this to have been a material concern, however, no information is provided to explain how this judgement has been reached. Where the enumerators familiar with the normal operation of this junction when these works are not underway? How many times had these enumerators used this junction under normal traffic conditions?

Closure of a key lane can only invalidate any model input, subsequent calibration and validation and consequently it is clear that no weight can be given to the results of this model unless and until reliable and representative input data is obtained. The model must then be re-calibrated and re-validated.

Static Assignment Models and Calibration / Validation Criteria

Whilst I see no issue with using a static assignment model and in regard to a single junction model the lack of route choice clearly leaves no alternative, I am concerned at the reliance placed in the report on calibration of traffic flows and model validation. Calibration is a method of ensuring that the model output accurately reflects the observed traffic conditions and is especially relevant to models which seek to replicate drivers' route choices. In this instance there is no route choice and the traffic assignment is static, in other words strictly defined at commencement of the modelling process.

My concern is that the demand matrices are set at the outset, hence all trips between points A and B, A and C etc are specified at the outset and no route choice is available, hence the flows using each link are effectively specified when creating the model. There is potential for vehicles passing through the model to travel at speeds which differ slightly from observations and this should be calibrated to improve the model's accuracy. Such differences may result in vehicles being within a link at the end of a period, rather than having passed through, hence small discrepancies in traffic flows may result, however, these should typically cancel one another out and in any case will be very small in quantum. I have concerns in regard to any static assignment model which considers modelled traffic flows with + / - 15% on 85% of links to be acceptable as clearly a 30% variance in flow across 15% of the model is significant to the outcome and no weight can be given to any decisions made on that basis.

Similarly, the GEH value is only relevant to accuracy of a dynamic assignment model. It has little, or even no relevance to a static assignment.

Summary

Having briefly considered the report provided I have substantial misgivings about the VISSIM model presented as justification of no apparent impact on accessibility of our clients Industrial Estate. The information provided raises many questions in regard to the accuracy and appropriateness of the work undertaken and further information is required before I can lend any weight to the conclusions of the report.

Continued…/

Observations on-site suggest traffic conditions which vary from those presented (and allegedly validated) in the traffic model and at this stage I anticipate that regular closure of the level crossing would have significant impact on our clients' access.

I will attempt to make contact with both the modelling team and with Bristol City Council in order to;

(i) Obtain further information / clarification of matters I currently consider to present errors in the model; and,

(ii) Confirm Bristol City Council's view of this scheme, which I conclude is likely to cause substantial impact on traffic conditions south of the river.

Kind regards.

Yours sincerely,

Carl Tonks BSc MSc MCIHT FIHE
DIRECTOR

carl TONKS consulting

Appendix VIII

SUTHERLAND PROPERTY & LEGAL SERVICES LTD

PLANNING & ARCHITECTURAL CONSULTANCY SERVICE
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25 February 2020

Dear Sirs

Metrowest DCO

We are instructed by ETM Ltd, Manheim Auctions Limited and Flynn Ltd of Ashton Vale Business Park, a site adversely affected by the proposed DCO. The Site comprises an industrial estate with a variety of business users but ETM and Manheim Auctions in particular require appropriate road access to continue operating their respective businesses. ETM is a waste recycling company with up to 250 vehicle movements a day and Manheim Auctions in a car auction operation with similar high levels of vehicular movements. The DOC process proposes inserting regular train journeys across the only vehicular access to the estate creating an untenable situation for these existing occupiers.

We have made submissions within the process for over three years and it was acknowledged at an earlier stage that these impacts would arise – at that stage the proposers entered into discussions to compulsory purchase land in order to create a new vehicular access to the rear of the estate. However, without discussion or explanation, the proposers determined not to continue this approach and have instead reverting to stating the highway data demonstrates the impact will not be significantly adverse.

Our transport consultant engaged earlier in the process with significant comment on the paucity of and basis for the highway assessments created by the proposers and the errors therein. We now make the following formal comments on the continued errors in the proposal that have not been addressed.

We object strongly to the proposal on a highways impact basis and will wish to address the inquiry.

Submission

Further to the comments submitted by cTc on behalf of the businesses resident within the Ashton Vale Business Park, the concerns over the validity of the traffic data used to compile the Linsig and VISSIM models are acknowledged by ch2m on behalf of the scheme promoters. In an attempt to address the concerns raised, the expected response would comprise a repeat of the traffic surveys on which the traffic models were compiled and which had been a primary source of criticism, followed by a “re-run” of the models themselves using the newly acquired survey data. This does not appear to have happened and the latest submissions appear to provide little more than a “sticking plaster” approach to the problems evident with the models, which continue to rely on unreliable survey data. The Do Nothing models do not reflect traffic conditions experienced by occupiers of Ashton Vale Industrial Estate and the reports submitted acknowledge significant variation in traffic conditions on the estate from day to day. The 2017 surveys on which the models continue to be based were undertaken on a day on which Manheim Auctions were inactive, hence wholly underestimate the traffic conditions. The modelling team have attempted to justify this by means of ATC surveys which do not present sufficiently detailed information to

enable any acceptable validation of the model, which does not allow for the commercial activities of one of the estates largest and busiest occupiers.

The impact of increased closures of the level crossing is illustrated in technical tables in the ch2m note, with raw numbers presented and little explanation or analyses of those numbers given, save to suggest that the impact of the increased frequency of closure is easily mitigated by the proposed minor improvement works. However, on investigating the values within the summarised model output it becomes clear that the proposals could potentially result in very substantial lost time available for traffic exiting Ashton Vale Industrial Estate.

From cTc's preliminary review, even allowing for the proposed mitigation, the capacity for traffic exiting the Ashton Vale Industrial Estate is reduced by at least 30% and potentially more than 50%. It is acknowledged that the congestion may take more than one signal cycle to clear and cycle times of the order of 160 seconds are mentioned in the report. Assuming "more than one" means at least two, this comprises 320 seconds or more. Adding to that the signal closure of 105 seconds results in significantly increased congestion for at least 425 seconds, or a little over 7 minutes. The report identifies potentially up to 5 closures per hour, or one every 12 minutes in the unlikely best-case scenario that they are equally spaced, meaning, on average 7 minutes of substantially increased congestion will be following by 6 minutes of relatively free flowing conditions (as current).

Such an impact will result in Ashton Vale Industrial Estate becoming unusable by its current occupiers for the business activities presently carried out there.

The proposers are aware of but have ignored the occupiers concerns.

Yours faithfully

Amanda Sutherland LLb. (Hons) PG Diploma LPC
PLANNING CONSULTANT
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