

IN THE MATTER OF:

THE CALA MANAGEMENT COMPANY

And

**THE PROPOSED RESIDENTIAL DEVELOPMENT AT OUGHTONHEAD LANE,
HITCHIN, HERTFORDSHIRE.**

And

**SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990 [AS
AMENDED]**

ADVICE

Section 1 - Introduction

1. I am asked to advise Ms Charlotte Coyle of DAC Beechcroft LLP on behalf of Cala management company (“Cala”) who have submitted an undetermined planning application to North Hertfordshire Council (“the LPA”) for the development of land at Oughtonhead Lane, Hitchin, Hertfordshire (“the site”) for residential development of 43 dwellings [Ref:23/00563/FP].
2. Under the Town and Country Planning Act 1990 (as amended) the LPA can grant or refuse planning permission. Currently the application remains undetermined.
3. The fundamental question is what would be the prospects of success on any appeal if the members of the planning committee decide to refuse the application and Cala decide to appeal the decision and what would the likelihood of costs be if such an appeal was made.
4. I had a physical conference in chambers on Monday 11 March 2024 and I am now asked to put into writing a summary of the advice I gave.

Section 2 – The factual background

5. The following matters are important to understand the factual background to this matter:
 - 5.1. Cala are a national housebuilder.
 - 5.2. The site is about 1.8 hectares and is a large rectangular field which lies on the western edge of the existing settlement and is not in the Green Belt. Hitchin Cricket Club lies immediately to the south and west of the site.
 - 5.3. On the northern boundary of the site lies Oughtonhead Lane which is a restricted byway.

- 5.4. In order to gain access to the site by vehicles that lane has to be crossed either by way of access from Westbury Close or Long Innings. Both routes required by definition to cross Oughtonhead Lane.
- 5.5. It is actually allocated in the development plan as set out immediately below.
- 5.6. The development plan comprises the North Herts District Local Plan which was adopted on the 8 November 2022. It is important to note the following:
- 5.6.1. Hitchin is identified as a main town in Policy SP 2.
- 5.6.2. Housing growth during the plan period will be supported by allocations identified in the plan as set out in Policy SP 8.
- 5.6.3. Seven sites are allocated for housing in Hitchin and set out after paragraph 13.128 of the plan.
- 5.6.4. Policy HT 3 deals with land south of Oughtonhead Lane and allocates the site for 46 homes subject to the following four criteria:
- *Access from Westbury Close or Long Innings whilst maintaining the general integrity and character of Oughtonhead Lane (Restricted byway Hitchin 003);*
 - *Consider and mitigate against the potential adverse cumulative impacts of sites in this area on Oughtonhead Lane SSSI;*
 - *Retain and reinforce planting along western and southern boundaries to ensure the integrity of revised Green Belt boundary; and*
 - *Sensitive design to minimise impacts upon landscapes to the west including longer views from the Chilterns AONB.*
- 5.6.5. In early 2023 Cala made two applications to the LPA namely the access application and the application for the 43 dwellings.
- 5.6.6. The application for the creation of a vehicular and pedestrian access from Lower Innings to Land south of Oughtonhead Lane [Reference Number – 23/00555/FP] was considered first by the LPA. That application was considered by the Planning Committee on 2nd August 2023 when it was resolved to grant planning permission. The planning officer's recommendation was to grant permission and it is important to note from the officers report the following points:
- 5.6.6.1. 68 objections were received.
- 5.6.6.2. That there was no objection from the Highway Authority (HCC).
- 5.6.6.3. The access is intended to serve the 43 dwelling scheme currently before the LPA.

- 5.6.6.4. The key issue identified for consideration was, inter alia, the impact upon the safe operation of the nearby public highways and Oughtonhead Lane.¹
- 5.6.6.5. The matters under consideration are limited principally to the impacts of the proposed access only.²
- 5.6.6.6. The proposed access would be in accordance with the site-specific policy set out within Policy HT 3 of the NHLP, it is considered that the development is acceptable in principle.³
- 5.6.6.7. HCC consultation response confirmed that the design of the access has measures to enhance safety for pedestrians, cyclists, and horse riders.⁴
- 5.6.6.8. Given the absence of any objection from HCC highways, it is considered that the proposed development and its design would not result in any unacceptable harm to the safe use of nearby public highways.⁵
- 5.6.6.9. The proposed access would result in the interruption and crossing of the Oughtonhead Lane Restricted Byway.⁶
- 5.6.7. A decision notice was issued on the 2 August 2023. The following conditions were imposed:
- 5.6.7.1. *Condition 3 - No development approved by this application shall commence until detailed technical plans, based on the principles set out in the planning application (drawings 18182.OS.109.02 & 18182.OS.109.06), are submitted to and approved in writing by the Local Planning Authority, in consultation with the Highway Authority, which show the detailed engineering designs and construction of the vehicle access and associated highway works concerning the connectivity of the access road with Lower Innings. These works shall be constructed in accordance with the approved details to the Highways Authority and Local Planning Authority's satisfaction and completed before commencement of any other development on the land allocated by Local Plan policy HT3.*

Reason: To ensure the provision of a vehicle access which is safe, suitable, and sustainable for all highway users

¹ See paragraph 4.3.1 of the POR.

² See paragraph 4.3.3 of the POR.

³ See paragraph 4.3.6. of the POR.

⁴ See paragraph 4.3.8. of the POR.

⁵ See paragraph 4.3.11. of the POR.

⁶ See paragraph 4.3.12. of the POR.

5.6.8. *Condition 4 - Prior to the first occupation/use of the development hereby permitted the vehicular access shall be installed in accordance with the approved detailed technical plans and thereafter retained and maintained at all times at the position shown. Arrangement shall be made for surface water drainage to be intercepted and disposed of separately so that it does not discharge from or onto the highway carriageway.*

Reason: To ensure satisfactory access into the site and avoid carriage of extraneous material or surface water from or onto the highway in accordance with Policy 5 of Hertfordshire's Local Transport Plan (adopted 2018).

5.6.9. *Condition 5 - Prior to first use of the access route across Oughtonhead Lane by any construction traffic, the surface of Oughtonhead Lane must be protected from any surface and side damage, and that any accidental damage must be repaired to the satisfaction of the area Rights of Way Officer.*

Reason: In the interests of protecting the Oughtonhead Lane Restricted Byway (Hitchin 003) for users of the public right of way.

5.7. It is of note that there is no restriction on implementation of this permission relating to the residential application. In simple terms in law once Cala have satisfied the conditions, they can then implement the permission irrespective of whether permission is granted or not for the related residential application.

5.8. On the 24 August 2023 Cala submitted the necessary details to satisfy Condition 3 and the application was validated but no approval has yet been forthcoming.

5.9. The application for the 43 dwellings was also submitted and was taken to committee on the 15 February 2024. The POR again recommended approval and the important points to note on the POR are as follows:

5.9.1. 97 objections were received with many alleging no safe access to the lane and that the use of Oughtonhead Lane would be inappropriate or harmful.

5.9.2. HCC Highways again had no objection.⁷

5.9.3. The site would be accessed from the north via Lower Innings. A separate application for the access has been granted planning permission under the

⁷ Paragraph 3.4. of the POR.

application reference number 23/00555/FP. The access arrangements to the site and design are considered acceptable.⁸

- 5.9.4. It is considered that the development would not have an unacceptable impact on the highway network and is in compliance with national and local planning policies.⁹
- 5.9.5. The proposed development would comply with the site-specific criteria set out within Policy HT 3 of the Local Plan.¹⁰
- 5.9.6. There then followed a list as is normal of suggested conditions. Condition 8 stated:

No development shall commence until detailed technical plans are submitted to and approved in writing by the Local Planning Authority, in consultation with the Highway Authority, which show the detailed engineering designs and construction of the vehicle access and associated highway works concerning the connectivity of the access road with Lower Innings, as shown in the Transport Statement. These works shall be constructed to the specification of the Highway Authority and Local Planning Authority's satisfaction and completed before commencement of work of the development.

Reason: To ensure the provision of a vehicle access which is safe, suitable, and sustainable for all highway users.

- 5.9.7. There was an update produced by officers to members prior to the committee meeting. Condition 8 was removed due to “Its inclusion within the previously approved application 23/00555/FP.
- 5.9.8. Notwithstanding the officer recommendation members resolved to defer the application on the grounds of concern about access.

Section 3 – The legal background

6. The key points of law are as follows:

⁸ Paragraph 4.3.24. of the POR.

⁹ Paragraph 4.3.49. of the POR.

¹⁰ Paragraph 4.3.83. of the POR.

- 6.1. Section 70(2) of the Town and Country Planning Act 1990 requires that in dealing with any application for planning permission the authority shall have regard to the provisions of the development plan, so far as material to the application and to any other material considerations.
- 6.2. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that if regard is to be had to the development plan for any determination to be made under the Planning Acts the determination must be made in accordance with the development plan unless other material considerations indicate otherwise.
- 6.3. Priority therefore must be given to the development plan per Lord Clyde in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R 1447.
- 6.4. In essence Section 38(6) raises a presumption that planning decisions will be taken in accordance with the development plan, but the presumption is rebuttable by other material considerations.

Section 4 – The questions I am asked.

7. I am asked to address two questions:
 - 7.1. Question 1 – If the LPA decide to refuse the planning application on the grounds of access what are the prospects of success on appeal?
 - 7.2. Question 2 – What would be the prospects of getting a costs award against the LPA in such circumstances?

Section 5 – Analysis

Question 1 – If the LPA decide to refuse the planning application on the grounds of access what are the prospects of success on appeal?

8. I am of the view that the prospects of success on any such appeal would be outstanding if the LPA decided at the next consideration of the matter to refuse planning permission based on inadequate or unsafe access for the following reasons:

- 8.1. Reason 1 – The proposal accords with the development plan in all material respects.
 - 8.1.1. The issue of access is dealt with in terms in the allocation under HT3 where the LPA expressly endorse under the bullet point 1 that the access will be from Westbury Close or Long Innings. The application proposes access from Long Innings. The LPA had the ability to determine the criteria in the development plan and in terms have chosen an express route which has been followed to the letter

by the planning application. Therefore, the application benefits from the presumption in favour of the development plan. It is not contended in the committee report in February that there are any material considerations which justify setting aside the development plan and I am not aware of any.

8.2. Reason 2 – The principle of the access is not for consideration now having been permitted previously.

8.2.1. The February POR included a condition addressing the question of proposed access. That condition was removed in the update. That is the clearest acknowledgment by officers that the principle of the access was not a matter to be considered by this application by its removal. That judgment is weighty and material and also right.

8.3. Reason 3 – The access to the development is not a material consideration in this application in any event –

8.3.1. The LPA determined in August 2023 that the access proposed was acceptable – That is highly material for two reasons.

8.3.2. Firstly, they are required to be consistent in their decision taking. It is a fundamental principle of public law that authorities are required to make the same decision if the circumstances are the same. There has been no change in circumstance that affects the validity or challenges the conclusions reached in August 2023 whatsoever.

8.3.3. Secondly there is now a fallback in place which in law is a material consideration. When the pre-commencement conditions are approved Cala can go on site and implement the August 2023 consent. There is no preclusion in law to them doing so and in no way is it conditional on the grant of planning permission for the residential development. It is not parasitic in law in any way.

8.4. Reason 4 – The Highways authority have no objection of any kind –

8.4.1. Twice the HA (HCC) have confirmed they have no objection whatsoever to the proposal. Those two statutory consultations are highly pertinent and provide very strong evidence in favour of the proposal.

8.5. Reason 5 – The absence of any credible basis of objection –

8.5.1. I have not seen any credible or meaningful objection that could reasonably justify the refusal on safety, capacity, or any other highway grounds. There is a complete absence of evidence which could justify a refusal in any event.

9. Taken these five reasons together my judgment is that cumulatively the case for granting planning permission would be overwhelming for a development allocated in the development plan just 18 months ago for housing.

10. I would put the prospects of success around 80% and indeed the refusal of the LPA would unquestionably be deemed unreasonable for the reasons I will explore below.

Question 2 – What would be the prospects of getting a costs award against the LPA in such circumstances?

11. The NPPG gives Relevant policy on costs is contained in the PPG on Appeals.¹¹

12. An award of costs may be made against an LPA who has behaved unreasonably, and that unreasonable behaviour has caused another party to incur unnecessary or wasted costs.

13. Costs may be awarded on a procedural or a substantive basis.

14. This application is made on the substantive basis that the LPA has prevented development that having regard to the development plan and the NPPG and NPPF should without question be permitted as a matter of urgency.

15. The PPG provides the following examples of situations where a substantive award of costs may be made against a local planning authority:

Unreasonable behaviour in the context of an application for an award of costs may be either:

procedural – relating to the process; or

substantive – relating to the issues arising from the merits of the appeal.

Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals.

Examples of this include:

- *preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy, and any other material considerations.*

¹¹ <https://www.gov.uk/guidance/appeals#behaviour-that-may-lead-to-an-award-of-costs-against-appeal-parties>

- *failure to produce evidence to substantiate each reason for refusal on appeal.*
- *vague, generalised, or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.*
- *not determining similar cases in a consistent manner*
- *failing to grant a further planning permission for a scheme that is the subject of an extant or recently expired permission where there has been no material change in circumstances.*

16. In my view the prospects of Cala being awarded costs on an appeal again are outstanding because:

16.1. 5 of the examples of unreasonable behaviour by an LPA leading to a substantive award of costs are met.

16.2. The LPA is seeking to prevent the development of a site for housing which was allocated by them in November 2022 which is an allocation in an up-to-date development plan.

16.3. There is no evidence which currently in any way supports the potential reason of refusal that the access across the lane is unsafe.

16.4. There is no evidence which currently in any way supports the potential reason of refusal which shows that the first criteria should not have been imposed.

16.5. There would be a no justification for not determining the August 2023 application for the access in the say way as the planning application for housing.

16.6. There is an extant permission which can be implemented until August 2026 for the access.

16.7. I am not aware, and none is claimed of any material change of circumstance relating to highway policy or the operation of the highway since the August 2023 decision was taken.

17. I cannot think frankly of a stronger case for costs that this situation. The prospects would be incredibly strong in the circumstances of this case.

Section 6 – Summary and Conclusions.

18. In conclusion I am of the view that if the LPA chose to refuse the planning application for 43 houses on the basis of the proposed access arrangements, then:

18.1. The prospects of success on appeal would be outstanding.

18.2. The prospects of getting a full award of costs on any such appeal would also be outstanding.

19. If there are any matters arising from the advice contained herein then those instructing me should not hesitate to contact me in chambers.

18 March 2024.

**SASHA WHITE K.C.
LANDMARK CHAMBERS.**
