

**APPEAL REF: APP/Z0116/W/15/3131829**

**541-551 FISHPONDS ROAD, BRISTOL**

**APPEAL BY MCDONALD'S RESTAURANTS LTD**

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**CLOSING STATEMENT  
ON BEHALF OF THE LOCAL PLANNING AUTHORITY**

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Abbreviations used in this document:

LPA – Local planning authority

LGF – Laurence Fallon

RfR – Reason for refusal

AJM – Allan Mendelsohn

MfS2 – Manual for Streets 2

MC – Matt Carpenter

DMRB – Design manual for roads and bridges

NH – Nick Hemstock

XIC – Examination in chief

XX – Cross examination

**INTRODUCTION**

1. Following the conclusion of the evidence, the LPA maintains that it was correct to refuse planning permission for a new drive through restaurant on the appeal site on highway safety grounds.
2. The relevant reason for refusal was that:

*The proposed development, due to the site's location, and the failure to provide appropriate arrangements for access and turning by servicing vehicles without conflict with designated parking spaces and the resulting traffic and pedestrian movements associated with the proposed development and its excessive parking provision, will result in unacceptable highway safety conflicts between users of the bus lane, general vehicular traffic, servicing vehicles and pedestrians, contrary to Policy BCS10 of the adopted Bristol Core Strategy (June 2011) and Policy DM23 of the adopted Bristol Site Allocations and Development Management Policies (July 2014) as well as section 4 of the National Planning Policy Framework (March 2012)*

3. As I said in opening, leaving aside the issue of parking provision which is no longer in dispute, the RFR can be broken down into two key issues:
  - a. The existence of unacceptable highway conflicts between road users resulting from the traffic and pedestrian movements generated by the proposal; and
  - b. the arrangements for deliveries and servicing.
4. The key development plan policies, referred to in the RfR, are BCS10 and DM23. The relevant passages were set out in my opening statement and are not repeated here. In essence, they require that development should provide safe access arrangements. Conflicts between different road users are to be avoided, and development should not give rise to unacceptable traffic conditions. Delivery and servicing arrangements should be effective and efficient.
5. In this plan-led system, the adopted development plan is paramount. This proposal does not comply with BCS10 or DM23. As a consequence it does not accord with the development plan as a whole.
6. There are no material considerations sufficient to justify granting permission contrary to the development plan. Many of the matters relied on by the Appellant are, on proper analysis, legally irrelevant. The remainder are of insufficient weight to tip the balance.
7. The remainder of this document is structured as follows:
  - a. Unacceptable highway conflicts
    - i. Overarching points
    - ii. Existing highway conditions
    - iii. Highway conflicts arising from the proposal
  - b. Servicing arrangements
    - i. Turning movements in and out of the site
    - ii. Internal layout
    - iii. Practicality/effectiveness of the proposed arrangements
  - c. Overall assessment under s. 38(6).
    - i. Approach
    - ii. Accordance with the development plan
    - iii. Other material considerations
  - d. Conclusion

## UNACCEPTABLE HIGHWAY CONFLICTS

### Overarching points

8. There are three overarching points of principle to be made.
9. **First**, the case turns on issues of judgment.
10. Relevant development plan policy requires consideration of whether proposed access arrangements are “safe”, whether traffic conditions will be “unacceptable”, and whether delivery and servicing arrangements will be “effective” and “efficient”. The policies do not contain any further elaboration as to any threshold or further test which should be applied to determine whether or not these requirements are met.
11. It is obvious that the policy requirements are not concerned with matters of objective fact, which can be proved or disproved by pointing to some piece of data or evidence. Instead, the development plan policies require an exercise of judgement about what is likely to happen in the future, based on an assessment of the current situation and the likely effects of the appeal proposal. Both Mr Fallon and Mr Mendelsohn have approached the issues in this way.
12. In the same way, you will need to form your own judgement, in light of the evidence you have heard, as to whether the development plan policy requirements will be complied with or not. We invite you to accept Mr Fallon’s judgments about the existing highway situation in the vicinity of the site, and the impacts of the proposal.
13. **Second**, the NPPF does not indicate that proposals should only be refused if impacts on highway safety are severe.
14. The NPPF is a relevant material consideration and contains guidance on highway matters which needs to be taken into account. Both the LPA and the Appellant prepared their cases on the basis that highway safety issues were subject to the third bullet point of para 32 NPPF, that “development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe”.<sup>1</sup>

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<sup>1</sup> Appellant’s opening para 10, LPA’s opening paras 8 and 9

15. However, the High Court has interpreted para 32 as applying only to matters of highway capacity and congestion and not to safety matters, on the basis that “it cannot be the case that the Government considers anything other than severe impact on highway safety would be acceptable”.<sup>2</sup> The parties agree that is binding for the purposes of this appeal.
16. **Third**, it is appropriate and indeed necessary to focus on the worst case scenario when considering a highway safety issue.
17. Mr Fallon was criticised in cross examination for basing his opinion on an analysis of the worst case. However, Mr Mendelsohn agreed that he too had sought to identify and assess highway impacts in worst case conditions (i.e. peak highway flows and peak periods of restaurant demand), because it was necessary to see that no period of operation would give rise to unacceptable risks, and you need to be satisfied that the access proposal will operate safely in all traffic conditions.<sup>3</sup>
18. It is the LPA’s clear view that, when dealing with safety issues, it is appropriate and indeed necessary to focus on a worst case scenario.
19. In this case, it means that you should be satisfied that the appeal proposal will not only operate safely in free flowing conditions where large gaps appear between vehicles (as shown in Mr Mendelsohn’s video surveys, and in the S-Paramics model based on those videos), but that it will also operate acceptably when queues build up and Fishponds Road becomes congested, and when there are queues in one direction but free flowing traffic in the other. You need to be satisfied that the proposal will not only operate safely where only one vehicle is trying to perform a movement, such as a right hand turn in or out of the site, but that it will also operate safely where two or more vehicles are waiting to perform the movement. You need to be satisfied that the proposal will not only operate safely when two different movements are being carried out at the same time (e.g. conflicting right hand turns), but that it will also operate safely where multiple movements are occurring at once. Even if those scenarios do not occur with great frequency, they will occur and cannot be disregarded. They will be repeated across the weeks, months and years that that the drive-thru restaurant will exist if the appeal is allowed.

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<sup>2</sup> *Mayowa-Emmanuel v LB Greenwich CO/2633/2015*, 2 December 2015, Para 62

<sup>3</sup> XX of AJM, and see AJM PoE para 6.1.4.

### **Existing highway conditions, against which the proposal should be assessed**

20. Both Mr Fallon and Mr Mendelsohn have approached their assessments of highway safety by first establishing their understanding of the existing highway conditions in the vicinity of the appeal site, as forming the baseline, before going on to consider the implications of adding the appeal proposal.

#### ***Movement and Place and MfS2***

21. There has been discussion about whether the highway in the immediate vicinity of the site serves more of a 'movement' function, or more of a 'place' function for the purposes of the guidance in MfS2. This is relevant in terms of driver expectations and therefore behaviour.

22. Both parties agree that Fishponds Road is an arterial road, and that at least one 'high street' occurs along its length. Both parties agree that the relative importance of movement and place varies along the length of arterial roads, and that the 'place' function is most important in the 'high streets' along arterial roads.

23. We invite you to accept Mr Fallon's judgment that the highway in the vicinity of the site is a transitional area, between a movement-focussed section between Huyton Road and Star Lane and the place-focussed section between Station Road and Manor Road (which constitutes the 'high street'). Whilst it is true that the site itself is within a 'town centre' designation for the purposes of certain policies in the adopted SADMP document, that is not synonymous with the concept of a 'high street' for the purposes of MFS2. In any event, the area of the highway which Mr Fallon identifies as the High Street contains solely primary shopping area, whereas in the transitional area this gives way to secondary frontages, before the town centre designation then runs out along the south side of Fishponds Road.

24. Further indicators that the appeal site is not within the place-focussed High Street, but is transitional, include the fact that the speed limit increases from 20mph to 30mph in the vicinity of the site (whereas it is 20mph within the High Street) and the fact that a bus lane and the fact that pedestrian crossing facilities are less frequent.<sup>4</sup>

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<sup>4</sup> There is a 365m length of highway with no crossing facilities, as confirmed in AJM appx 7.4 [126]

25. The part of Fishponds Road in the vicinity of the appeal site does not currently serve a significant place function.<sup>5</sup> The movement function of this arterial road is dominant. As a result, the focus of any access or junction design should be on facilitating or enhancing the smooth movement of vehicles through the area, and not on slowing or disrupting the flow of traffic. Drivers will have greater expectations of progressing along the road and will be less tolerant of interruptions and delays. This can be seen in Mr Fallon’s footage, where there were various examples of vehicles diverting their course to get round queues of traffic rather than waiting for other drivers to carry out manoeuvres.
26. The Appellant is of course correct to point out that the characteristics of the highway are not fixed and can change over time.<sup>6</sup> But the introduction of a McDonald’s drive-thru restaurant will not of itself turn this area into a High Street or a ‘place’. The movement function will remain dominant.

***Varying traffic conditions at different times and on different days***

27. The Appellant has not carried out full analysis in the AM peak. Nor has there been any analysis of weekdays other than Friday. The impacts of the development have instead been assessed against the Friday PM and Saturday peak periods, in respect of
- a. Turning movements to/from Fishponds Road from Drummond Road and other side roads,
  - b. Queue lengths at the uncontrolled side road junctions,
  - c. Traffic queuing past the site and length and duration of queue,
  - d. Number of pedestrians crossing,
  - e. S-Paramics.
28. This was done on the basis that the Friday PM and Saturday peaks are the busiest times in McDonald’s restaurants.
29. It is acknowledged that the committee report described the absence of such an assessment within the transport statement as “reasonable due to assessing the worst impact”,<sup>7</sup> however following further reflection when preparing for this appeal (and in particular in light of Mr Mendelsohn’s description of the AM peak as characterised by

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<sup>5</sup> It should also be noted that ‘high streets’ have “both a relatively high movement and place status level”: AJM appx 27 [462] para 2.1.3

<sup>6</sup> XX of LGF, XX of AJM

<sup>7</sup> LGF appx 4.10 p. 21

free-flowing SW bound traffic<sup>8</sup>) the highway authority now considers that it is necessary to consider the AM peak separately, and also to consider weekdays other than Fridays.<sup>9</sup>

30. Dealing first with the AM peak, Mr Mendelsohn's decision to rule out further analysis of that period was based on his assessment that the 2015 recorded flows for the AM peak hour were "notably lower" than those recorded for the PM and Saturday peak hours.<sup>10</sup> However, in reality the AM peak hour flows were comparable with those recorded in the Saturday peak hours – the same magnitude of difference in the number of vehicle movements was described in the same part of the evidence as being only "slightly higher" in the context of the comparison between 2014 and 2015 flows.
31. Similarly, there is no substantial difference in terms of likely demand at the restaurant, and therefore trip generation, as between the Friday AM and the Friday PM peak periods. The difference between the Friday PM and Friday AM figures amounts to only 7 arrivals and 23 departures across a 3 hour period.<sup>11</sup>
32. Although the AM peak period is comparable in terms of flows and trip generation with other peak periods, the LPA is clear that the highway conditions are not the same in AM and PM periods. This is why the period needs to be separately considered - since the appeal proposal must operate safely in all conditions, it is necessary to understand how it would operate when traffic flows and trip generation are equivalent to other peak periods, but traffic conditions are materially different.
33. The parties are largely in agreement as to the typical conditions in the PM peak periods. At these times Fishponds Road is subject to queues of traffic in the NE bound direction. These can be seen to block back across the site access at times. The SW bound carriageway tends to be more free flowing.<sup>12</sup> These are the conditions shown in Mr Fallon's video evidence for Tuesday 10 November 2015.
34. This situation is reversed in the weekday AM peak. At these times, traffic is typically static or very slow moving SW bound, with more intermittent queuing and congestion NE bound, but with periods of static and slow moving traffic occurring in both directions.

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<sup>8</sup> AJM PoE para 6.2.7

<sup>9</sup> LGF PoE paras 6.4.3-6.4.5, 6.11.2 and 7.1.6-7.1.8

<sup>10</sup> AJM appx 6.1 [85] para 6.1.18

<sup>11</sup> Compare LGF PoE tables 7.1 and 7.3

<sup>12</sup> LGF PoE paras 6.6.1 and 6.8.1

35. It is of course acknowledged that Mr Mendelsohn's video evidence from the AM peak does not show the conditions described by Mr Fallon, and instead shows free-flowing traffic on Fishponds Road. It is also acknowledged that congested conditions were not seen on the site visit, which was during a Thursday AM peak period. Clearly the traffic conditions are not always the same on every weekday morning. There may be a whole range of reasons for that, some of which have been explored in evidence. Nevertheless, and necessarily, you have only been able to view a few limited snapshots of how the highway operates at different times and on different days and that evidence cannot reasonably be treated as conclusive.
36. Turning to weekdays other than Fridays, the parties both agree that in terms of traffic flows, Friday is comparable to other weekdays. It is also apparent that demand at the restaurant, and therefore trip generation, will also be similar.<sup>13</sup> However, Mr Fallon explained, that masks the fact that traffic conditions are typically very different. Traffic on Fridays is typically subject to noticeably lower levels of congestion. It can flow more freely, and there are larger gaps between vehicles.
37. The difference can be seen very clearly by comparing Mr Fallon's video evidence from Tuesday 10 November 2015 with Mr Mendelsohn's video evidence from Friday 5 June 2015. Whilst the traffic flows for those periods were similar, the video evidence clearly demonstrates that the traffic conditions outside the appeal site were not at all comparable.
38. In assessing the competing evidence of typical traffic conditions, we invite you to reject the approach, advocated by Mr Mendelsohn under cross examination, that weight should only be attached to evidence which demonstrates that particular traffic conditions existed on specific and identifiable days. You are fully entitled to take into account, and in the LPA's submission you should attach significant weight, to the oral and written evidence from those who know the area best. This includes the many local residents who have either spoken at the inquiry or submitted written statements, a large proportion of which detail the congestion problems experienced week in, week out on Fishponds Road.

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<sup>13</sup> C.f. AJM appx 13 [197] and LGF PoE para 7.1.7 and table 7.3 (as corrected in XIC). Although AJM cast doubt on LGF's survey of Sheene Road, no alternative figures were provided and it is apparent that there are a variety of reasons why the number of cars may not directly match the number of transactions.



39. It also includes Mr Fallon's evidence based on his experience of what is typical in this area. Unlike Mr Mendelsohn, Mr Fallon has been working in Bristol in transport development management for 8 years and in traffic data collection for a further 2 years and is therefore familiar with the transport network in the City and how it typically operates. Moreover, he actually lived in Fishponds for 11 years, 9 of which involved commuting into the City Centre. Between 2005 - 2009 and 2013 - 2015 he lived off Lodge Causeway. His assessment of what is normal and typical should be preferred to Mr Mendelsohn's assessment, which is informed by the on and off involvement he has had with this particular appeal over the last few years. It should also be preferred to the snapshots provided by the video evidence and site view.

***Traffic conditions and risk taking behaviour***

40. The degree to which this occurs, and the nature of the risks taken, varies depending on the prevailing traffic conditions. A number of examples from a single day were shown in Mr Fallon's video footage, and the full 12 hour video survey from 7am - 7pm has been submitted to the inquiry.

41. It is obvious that when the traffic is free flowing in both directions, as shown on Mr Mendelsohn's video evidence, larger gaps between vehicles exist (in particular in the SW bound direction as a result of the Lodge Causeway signals releasing platoons of vehicles). In these conditions it will be easier for drivers to perform turning movements, including conflicting movements. Drivers are able to make smooth progress, and levels of impatience and frustration will be much lower. That is readily apparent from a comparison of the Tuesday and Friday videos.

42. The extent and timing of congestion on Fishponds Road is a matter of dispute, but the evidence does clearly show that Fishponds Road currently experiences periods of congestion in one or both directions. This has been demonstrated by Mr Fallon's video evidence, and it is also accepted by Mr Stevenson, who created the S-Paramics model.<sup>14</sup> It is the daily experience of those who live in the area. Mr Fallon has drawn attention in his proof of evidence to various factors, such as the interventions on the bus network and the existence of the AQMA, which indicate that this is an area which suffers from congestion and queuing traffic.<sup>15</sup> The existence of the SW bound bus lane is a particularly clear indication - if SW bound traffic were not regularly subject to delays

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<sup>14</sup> LGF appx 5.5 pp.7 and 8

<sup>15</sup> LGF PoE paras 6.11.6 - 6.11.16

and congestion, it would not have been considered necessary to spend substantial sums of money on bus lane improvements to speed up journey times and avoid buses being caught up in traffic queues.<sup>16</sup>

43. Congested conditions create delay for drivers. Levels of frustration and impatience increase. Drivers are more focussed on making progress and finding gaps in traffic, and are likely to pay less attention to other movements going on around them (whether by other vehicles, cyclists or pedestrians). They may be more reluctant to give way to other vehicles.
44. These considerations led the Inspector in the Ewell decision<sup>17</sup> to conclude that where queues build up and reduce the ability to make turns (in that case, right turns out of the site) “it could lead to drivers leaving the appeal site at inappropriate times due to frustration”,<sup>18</sup> and that there would be conflicts between exiting drivers and other turning movements “on the basis that the exiting drivers’ attention would be on looking for opportunities to exit quickly rather than on other highway users trying to turn onto or off London Road, especially where there is queuing traffic...”.<sup>19</sup> Whilst it is acknowledged that the Ewell site is different to the appeal site, the Inspector’s findings about the effect of queuing on driver behaviour are of general application and are clearly correct, coinciding with common experience.
45. From a highway safety perspective, scenarios where traffic is static or slow moving in one direction but more free-flowing in the other are even more problematic. Cars are either allowed out, or force their way out, across slower moving traffic and attempt to join faster moving traffic without full visibility and without the exit path being clear. It is more difficult to time such movements correctly, and this often leads to obstructions to the flow of traffic, which again adds to driver frustration.
46. Even when traffic on Fishponds Road is not very heavily congested, Mr Fallon’s evidence shows that vehicles divert their courses to avoid queuing traffic, whether that diversion is into the opposing carriageway to turn right into Brentry Road, into the broken bus lane to avoid vehicles waiting to turn right into the appeal site, or undertaking along the

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<sup>16</sup> LGF XIC

<sup>17</sup> Inquiry document 2

<sup>18</sup> Inquiry doc 2, para 31

<sup>19</sup> Ibid para 37

nearside of vehicles waiting to turn left into Drummond Road.<sup>20</sup> These are all examples of unorthodox and risk-taking behaviour, over the course of just two days.

47. It is clear that Mr Fallon and Mr Mendelsohn have very different views about what the video evidence shows, and whether the manoeuvres flagged up by Mr Fallon are risky or not. In Mr Mendelsohn's assessment, the video shows the highway operating safely and vehicles performing various manoeuvres without giving rise to any safety concerns. We invite you to reject that as being a somewhat blasé and overly positive assessment of the situation.

### ***Accident data***

48. In the Appellant's analysis, the collision data shows that in the area close to the appeal site, Fishponds Road has a good safety record and is safe. Mr Mendelsohn kept going back to the accident data in cross examination as demonstrating that the proposed access arrangements would operate safely. The Appellant says that if vehicles were really undertaking unsafe movements, that could be expected to show up in the accident data,<sup>21</sup> and because there have only been a handful of collisions in the immediate vicinity of the site, the conditions cannot be as unsafe as is suggested.

49. In the LPA's view the accident data tells only part of the story.

50. In the first place, an absence of accidents does not necessarily mean there is no safety risk. Mr Mendelsohn eventually accepted under cross examination that the fact that a particular movement does not lead to a collision does not mean that the movement was safe. He agreed that when considering a highway safety issue it is right to take account of near misses and risky movements. We do not have to wait until risky behaviour results in a collision before the planning system can respond. As set out above, there is currently significant risk taking behaviour in the immediate vicinity of the site. It is fortunate that it has not led to more accidents, but that does not mean that the conditions are acceptable or that you should not be concerned about adding further traffic movements to that situation.

51. Secondly, whilst the accident data is the best evidence available in terms of the level of collisions which occur, it is well known that the data is incomplete and that there are significantly more accidents which do not get reported to the police. The DfT's own

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<sup>20</sup> LGF video footage Tues 10 November 2015 at 07:35, 17:20 (actual time), and Sat 14 November 2015 at 11:32, 13:28, 13:39, 14:36 (all actual time)

<sup>21</sup> XX of LGF

estimate is that roughly  $\frac{3}{4}$  of accidents which result in personal injury go unreported, and do not therefore appear in collision data. Some examples of unreported collisions were given by Mr Tickner in his oral evidence. The accident data cannot be taken as being exhaustive of safety concerns on the highway.

52. Notwithstanding the limitations of the evidence, the accident data is useful in that it shows patterns. In particular (and perhaps unsurprisingly) it shows that around half of the recorded collisions have involved turning movements. The data also shows that significant numbers of accidents involve interactions between vehicles using the SW bound bus lane and other road users. It follows that particular attention should be paid to these aspects of the proposal.
53. Although the PPG indicates that transport assessments and statements should consider an analysis of accident data for the most recent 3 years “in the vicinity of the site access”, or a 5 year period if the site has been identified as “within a high accident area”.<sup>22</sup> The Appellants have provided an analysis over a five year period, and Mr Fallon has presented 6.5 years’ worth of data. The area of highway between Brentry Road and Drummond Road was in fact identified by the highway authority as an accident cluster site at the time Mr Mendelsohn originally prepared his evidence, on the basis that there had been 5 or more collisions over a three year period within a 40m stretch of road. The site had been identified by the highway authority as a “high accident area” (note that the PPG provides no definition, and it is therefore left to the LPA to decide how to identify such areas), and therefore an extended analysis was appropriate. Although the highways outside the site would no longer meet the criteria for identification as a cluster site, the fact that it has been so identified in the recent past is a matter to which weight can be attached when considering the existing highway conditions.

### **Highway conflicts arising from the proposal**

54. Both the Appellant and the LPA have produced detailed evidence regarding the various movements which will take place if the appeal is allowed. Vehicle tracking evidence has been produced on both sides to illustrate the combinations of movements which will occur and as a visual tool to discuss the potential conflicts and safety implications. I will not repeat most of that evidence here. I invite you to accept Mr Fallon’s assessments.

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<sup>22</sup> PPG: “Travel Plans, Transport Assessments and Statements” para 15, Ref: 42-015-20140306

55. In the LPA's view the major issues of concern are firstly the number of conflicting movements which will take place, and secondly the conflicting right hand turning movements. There are also specific issues regarding cyclists and pedestrians, which are addressed below.

***Number of conflicting movements***

56. MfS2 advises that "crossroads and multi-armed junctions have much higher numbers of conflicting traffic movements and therefore tend to perform worse in terms of road safety".<sup>23</sup> Despite Mr Mendelsohn's attempts to argue otherwise, that statement is clearly correct. Although there is no proposal to move from a three-armed junction to a multi-armed junction, the overriding point is that the more arms there are, the more conflicts there are; and the more conflicts there are, the worse the situation is from a road safety perspective. There is more going on, which drivers need to be aware of.

57. Mr Fallon's 'conflict matrix'<sup>24</sup> shows that in the immediate vicinity of the appeal site there are 47 conflicting movements to be considered (some of which only arise if there are two or more vehicles waiting to perform a particular movement). These are conflicts in the sense that they are movements which cannot occur at the same time, because the vehicles performing them will need to occupy the same piece of road at some point. The matrix is based on a similar methodology to the traffic signal phasing matrices, such as that presented in Mr Stevenson's public inquiry evidence in respect of Lodge Causeway.<sup>25</sup>

58. The appeal proposal would have an impact on 30 of the identified conflicts, by introducing additional traffic movements. Although a number of the conflicting movements involve movements which are not be associated with the appeal proposal (e.g. the conflict between right hand turns in to Drummond Road and traffic proceeding along the SW bound carriageway), they will not go away if planning permission is granted. They will continue to exist, and the increase in other conflicting movements in the same area of the highway simply adds to the complexity of the situation and increases the risk associated with any particular pair of movements.

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<sup>23</sup> Para 9.4.4, quoted in LGF PoE para 12.1.1

<sup>24</sup> LGF Rebuttal p. 21, table 8.1

<sup>25</sup> Para 2.9.3

59. Similarly, the claimed benefit of rationalising two site accesses to one is offset by the fact that the level of movements associated with the appeal proposal far exceeds any of the previous existing or proposed uses.
60. As explained above, in order to consider how the access arrangements would operate in all scenarios it is critical to consider not only what will happen if two vehicles are trying to perform conflicting movements, but also what will happen if there are more than two movements being attempted at any one time.
61. The proposed arrangement may well work adequately and without causing risk in a 'perfect world' scenario where conflicting manoeuvres are only attempted by single vehicles, and where those vehicles strictly obey traffic rules and behave courteously, allowing other vehicles to complete manoeuvres before attempting their own manoeuvres. That is the basis on which Mr Mendelsohn has assessed the proposal, as his rebuttal to Mr Fallon's conflict matrix makes clear.<sup>26</sup>
62. However, we do not live in a perfect world. There is absolutely no reason why there would only ever be two conflicting movements being attempted at any one time. It is common ground that peak hour traffic flows along Fishponds Road are between 1300 and 1700 two-way movements.
63. During the same hours it is anticipated that there would be between 142 and 199 two-way movements in and out of the site access, together with between 75 and 90 two-way pedestrian crossing movements. Those levels of additional competing movements gives cause for real concern in terms of highway safety, given that they would be added in to a situation which already involves a large number of conflicting movements in an area where drivers already take risks as a result of the various traffic conditions which arise.
64. The number of turning movements proposed represents a very substantial increase on either the previous informal car parking use (2 to 3 two-way movements in the Friday PM and Saturday AM peak hours), or the previous lawful B8 use (6 two-way peak hour movements weekday AM and 35 weekday PM), or the likely trip generation from the 2013 retail/residential planning application (39 and 48 two way movements in the weekday AM and PM peak hours respectively). The relevance of these, and other possible future uses of the site, is addressed further below.

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<sup>26</sup> See e.g. Inquiry doc 7, AJM's comments on his conflict numbers 84, 85, 88.

### ***Right hand turns***

65. The major safety concern for the highway authority involves right-turning vehicles. The appeal scheme would provide two right turning lanes to serve the site and Drummond Road.
66. Because of the arrangement of the site access and Drummond Road, these lanes have to be hooking lanes rather than facing lanes,<sup>27</sup> which necessarily limits their length. It is clear from the evidence that the DMRB is not to be applied strictly, and it is also correct to note that there are other right turn facilities on Fishponds Road which do not comply with DMRB standards.
67. However the fundamental problem - which does not affect any of the other right turn facilities referred to by Mr Mendelsohn<sup>28</sup> - is that the right turn lanes which are proposed are only long enough to hold one vehicle at a time.
68. Mr Mendelsohn has asserted at a number of points in his evidence that it will be rare for more than one vehicle to be waiting to turn right turn into the site at any time.<sup>29</sup> This is one of the reasons why the right turn lanes are considered to be acceptable.
69. Mr Mendelsohn's analysis is based on the fact that the traffic approaching the site in a SW bound direction is controlled by the Lodge Causeway traffic signals, which release 76 platoons of traffic per hour. It is said that, taking account prevailing traffic flows, there will be on average less than one right turning vehicle in each cycle of the traffic lights.<sup>30</sup> Clearly that is correct, assuming the right turning vehicles are equally spaced out within the SW bound traffic. That average distribution the pattern that could be expected to emerge over a long period of time. However, in real life the evenly spaced averaged distribution of vehicles will not always occur. Indeed it may occur very rarely.
70. Mr Mendelsohn accepts that there will 'on occasion' be more than one vehicle - as he must, because even limited viewing of the S-Paramics modelling shows that to be the case.<sup>31</sup> There is no further explanation as to how 'occasional' this would be (and S-Paramics does not assist in this regard because queue length data is only provided in

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<sup>27</sup> XXof AJM

<sup>28</sup> AJM appx 22 [321-324]

<sup>29</sup> Inquiry document 7, AJM's comments on his conflict number 24 (right turn from Fishponds Road into the site conflicting with straight ahead movement southwest bound on Fishponds Road when more than one car is queuing).

<sup>30</sup> AJM XIC

<sup>31</sup> AJM XIC and LGF appx 5.7

respect of the three approaches to Lodge Causeway<sup>32</sup>). Plainly the right turning vehicles could arrive in any combination within the SW bound peak-hour flows on a given day. It is therefore essential to consider how the access arrangements perform in the event that more than one vehicle arrives at the site access.

71. Mr Mendelsohn's overriding argument is that the 'keep clear' markings in the NE bound carriageway will ensure that a right turning vehicle can always enter the site without difficulty, because vehicles will obey the markings and keep the access clear in more congested situations.
72. This cannot be guaranteed to be effective. There is no sanction for blocking a keep clear box and in any event in slow moving queues drivers are unlikely to have clear visibility of the road markings. In congested situations drivers are more focussed on opportunities to progress and less willing to allow other vehicles to impede them by making turning movements. In any case, the keep clear markings would only assist right turners in congested situations; but it is actually likely to be more difficult for right turning vehicles to make the manoeuvre when the NE bound traffic is flowing more freely, because it will be moving faster. Vehicles approaching the Lodge Causeway signals are also less likely to stop and give way, because they will be wanting to continue making progress along the road, consistent with the dominant movement function of this area of the highway network.
73. The arrangement of the right hand turns is such that a second vehicle waiting to turn into the site will either block the right turn lane which would serve Drummond Road, or it would jut out into the SW bound carriageway. Mr Mendelsohn accepted that the latter was more likely, on the basis that in his opinion drivers are more likely than not to observe and adhere to road markings.<sup>33</sup> As detailed in footnote 20 you have seen video footage of drivers diverting course to avoid queuing traffic. We invite you to conclude that similar behaviour is likely to occur if through traffic is impeded by a vehicle or vehicles waiting to turn right into the site. However in this case the drivers will be pulling out to undertake the waiting vehicles, and will be swerving into the path of buses, taxis, motorcyclists and cyclists.<sup>34</sup> This presents an obvious risk given the

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<sup>32</sup> MS report 4 August 2016 p. 4 fig. 2.2 and section 5.2

<sup>33</sup> XX of AJM

<sup>34</sup> The bus lane is of course broken at the Drummond Road access. Nevertheless, whether the bus lane itself is present and/or operational, it is still in regular use by vehicles and cyclists and it is the safety of those individuals which lies at the heart of the LPA's concerns on this issue, not the possibility of the bus lane regulations being breached.



existence of the blind spot and the likelihood that drivers will be focussing on continuing their progress. The accident data shows that failure to observe and account for bus lane users is a significant cause of collisions on Fishponds Road, and it is often cyclists or motorcyclists – the less visible road users – that are hit.<sup>35</sup> Although most of the bus lane accidents involve vehicles turning across the bus lane, there are examples of accidents caused by vehicles diverting course and in any case the root cause of both types of accident is the same, namely that drivers have insufficient visibility or simply fail to check for or see bus lane users.

### ***Cyclists***

74. There are two main concerns regarding cyclists from a highway safety perspective.
75. The first, which I have just foreshadowed, is their vulnerability. This puts them at increased risk in the context of the typical highway conditions and the number of conflicting movements and which will be taking place in the highway immediately outside the site if the appeal is allowed.
76. The second is a more specific concern about the junction design, which provides a carriageway width on the NE bound side of 3.5m alongside the right turn lanes and hatching.<sup>36</sup>
77. MfS2 advises that the needs of cyclists should be expressly considered when determining lane widths, and that the ideal minimum width for a car travelling at 30mph to overtake a cyclist in comfort is 4.3m.<sup>37</sup> Lane widths of 3m or less will make it less likely that drivers will try to squeeze past cyclists,<sup>38</sup> whereas standard lane widths of 3.65m can be unsatisfactory for cyclists because there is insufficient room to pass them comfortably.<sup>39</sup>
78. Even with the carriageway widening which is proposed, the NE bound lane width would be in the grey area between the width that would discourage overtaking and a width that would allow for overtaking to take place comfortably. The proposed highway intervention would add a further element of risk to what is an already busy and

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<sup>35</sup> See e.g. the accidents referred to in LGF appx 6.8 for the following dates: 9 June 2011 (moped), 23 Sept 2011 (motorcycle), 23 Nov 2011 (2 cyclists), 24 Nov 2011 (cyclist), 26 April 2012 (cyclist), 15 Aug 2013 (motorcycle)

<sup>36</sup> AJM appx 11.2 [184]

<sup>37</sup> Inquiry Document 28, paras 8.6.7 and 8.6.8

<sup>38</sup> Ibid. para 8.6.9.

<sup>39</sup> Ibid. para 8.6.1.

unpleasant road for cyclists. The fact that many, perhaps even the majority, of cyclists travelling NE or SW will use the Bristol-Bath cycle path instead of the road is nothing to the point<sup>40</sup> – the evidence shows that Fishponds Road is still used regularly by cyclists and their safety still needs to be considered.

79. This is a further drawback of the appeal scheme.

### ***Pedestrians***

80. Turning to pedestrians, the Appellant emphasises the fact that the site is within a 365m stretch of Fishponds Road where there are no crossing facilities, and that notwithstanding this, there are 75 two-way pedestrian movements in the Friday PM peak hour and 90 in the Saturday peak hour. It is therefore argued that the provision of a pedestrian refuge will be an added benefit.

81. The LPA does not agree. When accidents do happen they can be extremely serious. Both of the pedestrian accidents which took place at the Marlborough Street junction involved a pedestrian crossing queuing traffic in the SW bound carriageway and being hit by free flowing vehicles travelling in the adjacent bus lane. One accident was serious, the other fatal.

82. This is exactly the scenario which Mr Fallon is concerned about. When traffic is queuing SW bound (as is typical in the AM peak, when both the Marlborough Street accidents occurred), there is limited inter-visibility between a pedestrian crossing the traffic queue and users of the bus lane. Although Mr Mendelsohn has spoken about drivers being courteous and giving way to other road users, in the case of pedestrians crossing from north to south it can actually be dangerous. Neither the driver in the SW bound lane who is allowing the pedestrian to cross, or the pedestrian, are likely to have very clear visibility of traffic approaching along the bus lane. Both are more likely to be paying attention to each other than on other traffic possibly approaching on the nearside.

83. Whilst it is true that pedestrians do currently cross in the vicinity of the site, that is in a situation where there is not currently an active use on the appeal site which will act as an attractor for pedestrian crossings. The Appellant anticipates 50 additional two-way pedestrian crossings in the Friday PM peak and 40 in the Saturday peak,<sup>41</sup> which

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<sup>40</sup> As noted by AJM in XIC

<sup>41</sup> AJM PoE p. 48

amounts to an increase in pedestrian movements of over 50%. There is no assessment of the AM peak, although that is the time of day when typical traffic conditions are most dangerous from the perspective of pedestrians crossing from north to south.

84. There are other pedestrian refuges along Fishponds Road but, as Mr Fallon pointed out, none of them are outside sites which generate significant pedestrian movements.<sup>42</sup>
85. In addition, the current absence of pedestrian crossing facilities along the 365m stretch referred to by Mr Mendelsohn is likely to mean that some pedestrians choose to cross either earlier or later than they otherwise would do, in order to use the signal controlled crossings at either Lodge Causeway or Alcove Road. The provision of a new crossing facility may have the effect of displacing some of the movements which currently occur at the safer signal controlled crossings, and in so doing it would encourage additional people (not just McDonalds' customers) to cross in an uncontrolled way.
86. This is another aspect of the scheme which generates safety concerns. Rather than being a benefit, in the LPA's view it is a drawback of the proposal.

### ***Modelling***

87. At the application stage the Appellant tested the proposal using PICADY. This is a tool which only assesses one junction in isolation. It does not account for real life traffic conditions – for example the platooning of traffic, the existence of queues across the site access, incidents of unorthodox or risky driver behaviour (e.g. edging out). However, these factors can have a significant impact on the operation of the highway in this location.
88. These issues were raised by the highway authority and as a result the Appellant engaged Mr Stevenson to develop an S-Paramics microsimulation model. The amended access layout being promoted in the appeal was not tested using PICADY, and it is the S-Paramics model which is now relied upon.
89. The LPA's overriding issue with the S-Paramics model is that it is designed to address the question of how the proposal would affect the performance of the local highway network, specifically in terms of journey times and queues.<sup>43</sup> However this was never

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<sup>42</sup> LGF XIC

<sup>43</sup> See e.g. MS public inquiry evidence 28 October 2016 para 2.1.2 and report 4 August 2016 sections 5 and 6.2

part of the highway authority's objection, which was concerned with the effect of the proposal on highway safety. The same point was made in the committee report in respect of the PICADY analysis, where it was said that whilst the PICADY analysis "concludes that capacity may exist for the proposed vehicle movements", it "fails to address the potential conflicts".<sup>44</sup>

90. The S-Paramics model does not tell us whether the proposed access arrangements will be safe. At best, it can model aspects of highway operation which are relevant to judgements on safety.<sup>45</sup> However, to the extent that it does this, the accuracy of its predictions is entirely dependent on the data used to build it, and the extent to which it is representative of typical conditions.<sup>46</sup>

91. The model is based on 7 hours' worth of video footage, covering one Friday PM peak period and one Saturday peak period. The queue data and turning counts which are used in the model are also derived from the same footage. The model therefore predicts how the highway would operate with the appeal proposal, in highway conditions which are comparable with those shown in Mr Mendelsohn's video footage from 5 and 6 June 2015. It does not tell us anything about how the appeal proposal would impact on highway operation in different traffic conditions, such as the various conditions shown in Mr Fallon's video evidence (static/slow moving queues in both directions, static or slow moving in one direction and more free-flowing in the other). If the LPA is correct that typical highway conditions are different in the AM peak compared to the PM peak, or on Fridays compared to other weekdays, then the model can't tell us how the appeal proposal is likely to affect highway operation during those times.

92. Even in the highway conditions shown in Mr Mendelsohn's 5 and 6 June 2015 video surveys, and despite the existence of the 'keep clear' marking which was included in the model,<sup>47</sup> S-Paramics demonstrates that there will be times when more than one vehicle will be queuing to turn right into the site,<sup>48</sup> and that there will be times when queues of up to 7 vehicles will be waiting to exit, despite the fact that the gaps between vehicles are larger in the conditions seen in Mr Mendelsohn's video than exist during periods of congestion.<sup>49</sup> As stated above, it can actually be harder for vehicles to turn on to

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<sup>44</sup> LGF appx 4.10 p. 22

<sup>45</sup> XX of LGF

<sup>46</sup> XX of AJM, MS public inquiry evidence 28 October para 2.1.3

<sup>47</sup> XX of AJM

<sup>48</sup> LGF appx 5.7 and seen in the video which was shown during AJM's XIC

<sup>49</sup> LGF appx 5.10 and seen in the video which was shown during AJM's XIC

Fishponds Road when one or both carriageways are free-flowing. This delays vehicle progress and can lead to frustration, as explained in the Ewell decision.

***Road safety audit***

93. Mr Fallon’s evidence is that, when the application was originally submitted, there was a in internal discussion with the internal road safety team, but the team were unable to devise an access arrangement which satisfactorily addressed all of the safety concerns.
94. The Appellant has commissioned a road safety audit for the purposes of the appeal, however limited weight should be attached to it because:
- a. The audit team did not have access to the full traffic data collected by the Appellant in 2014 and 2015;
  - b. The site visit carried out by the audit team was carried out on a Tuesday in July between 11:45 and 12:30, a 45 minute period during off-peak conditions;
  - c. The guidance in TD 15/19 advises that, unless extended recommendations are requested (which was not the case here), recommendations requiring major changes are unlikely to be acceptable and should not be made, because the audit team should proceed on the basis that strategic decisions such as junction type and departures from standards will already have been taken.<sup>50</sup> Therefore the road safety audit would not suggest any major changes, even if safety concerns did exist.

***Relevance of the previous retail application and the extant or possible future uses***

95. The Appellant draws attention to the fact that the highway authority raised no objection to a 2013 application for a mixed retail/residential use of the site. It is said that the fact that there was no highway objection to the previous retail application (13/03166/P), which according to the Appellant would have generated more traffic movements than the appeal proposal, demonstrates that the appeal proposal should also be acceptable to the LPA.<sup>51</sup>
96. It is not accepted that the trip generation of the previous retail application would have been higher than what is anticipated from the appeal proposal. The Appellant’s TRICS analysis is flawed on a number of levels, and is based on sites which are not comparable to what was proposed in that application. As a result it substantially overestimates the likely turning movements into and out of the site. This is explained in detail in Mr

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<sup>50</sup> Inquiry document 48

<sup>51</sup> AJM Poe para 3.2.10

Fallon's evidence<sup>52</sup> and was explored in cross examination of Mr Mendelsohn. The detail is not repeated here. The retail application would have generated less than a third of the turning movements proposed by the Appellant.<sup>53</sup>

97. Mr Fallon has already explained that, in his view, there should have been a highways objection to the retail application. Clearly the stance taken by the Highways Authority in the past is not binding on it; if a public body considers that a previous decision or approach was incorrect it must be able to depart from that. At most the failure to object to the previous retail application may be a material consideration, but it has been explained and in the circumstances it carries very little weight in the analysis.

98. It has also been said that, even if the appeal is dismissed, turning movements (and particularly right hand turning movements, which are of greatest concern) could still exist as a result of the lawful B8 use, and will exist in future in any redevelopment of the site. On this basis it is said that some level of turning movements into and out of the site has to be accepted.<sup>54</sup>

99. Dealing first with the permitted B8 use, there are a number of points:

- a. It is not clear whether this remains a lawful fallback use. The evidence is that the site was used for car parking for a period of time. It is possible that there has been a material change of use of the site, which prevents the resumption of the B8 use without planning permission.
- b. Regardless of whether or not that is the case, the proposal for an A3/A5 use on this site is premised on the lack of market demand for the B8 use.<sup>55</sup> It was on that basis alone that the loss of employment land was considered to be acceptable and the development was determined to comply with policies BCS8 and DM12. In those circumstances it would be wrong to take the B8 use into account when considering the potential for future turning movements at this location.
- c. Even if the B8 is to be taken into account for this purpose, the evidence before the inquiry is that it would have generated 6 two-way peak hour movements weekday AM and 35 weekday PM, which is very substantially lower than what is proposed by the Appellant's scheme.

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<sup>52</sup> LGF PoE section 7.3

<sup>53</sup> LGF PoE table 7.9 and para 7.3.14

<sup>54</sup> XX of LGF

<sup>55</sup> Committee Report, CT appx 2 p. 16-17; MC PoE paras 6.28 – 6.29

100. To the extent that the car parking use falls to be considered (although it has ceased and its planning status is unclear), the surveyed turning movements in and out of the site<sup>56</sup> show that it was generating only two or three movements in peak hours, which is negligible and in no way comparable to the appeal proposal.

101. Finally, it is clearly not the case that any future development on the appeal site will necessarily generate traffic turning movements. Planning policy does support main town centre uses in this location, but it also supports proposals which are designed to prioritise all other transport users above the private car<sup>57</sup> and which minimise the need to travel, especially by private car, and maximise opportunities for more sustainable travel modes.<sup>58</sup> There are maximum parking standards, but no minimum requirement for parking provision.<sup>59</sup> All other things being equal, a proposal for a main town centre use – including an A3/A5 use – which did not provide car parking and generate private car trips would receive a greater level of support than one that did.

#### ***Conclusions on highway conflicts***

102. This is a part of the highway which performs, and is expected to perform, more of a movement function than a place function. Drivers expect to make progress along the road, but that is often difficult to achieve as a result of the existing traffic conditions. Although at times the traffic is free flowing, there are also times when it is heavily congested in one or both directions. This has an impact on driver behaviour in this area, and the evidence clearly demonstrates that drivers currently take risks in order to continue their progress along the road. The introduction of significant levels of new turning movements will lead to unacceptable highway safety conflicts, given the location of the site access relative to Drummond Road and the consequences of that in terms of the physical constraints of the proposed layout.

103. As stated in the RfR: *“the proposed development, due to the site’s location ... and the resulting traffic and pedestrian movements associated with the proposed development ... will result in unacceptable highway safety conflicts between users of the bus lane, general vehicular traffic, servicing vehicles and pedestrians”.*

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<sup>56</sup> AJM appx 8.1-8.2 [129-130]

<sup>57</sup> BCS10, “Development principles” AJM appx. 2.6 [31]

<sup>58</sup> Ibid.

<sup>59</sup> Appx 2 of the Site Allocations and Development Management Policies – AJM appx6.2 [36]

## SERVICING ARRANGEMENTS

104. There are three areas of concern with the proposed servicing arrangements, as follows:
- a. The turning movements into and out of the site conflict with other movements, and give rise to highway safety concerns.
  - b. The internal site layout is such that there is very little room for error in the movements of delivery vehicles. Again, there are implications and knock on effects for other users of the car park or drive-thru lane, and the highway.
  - c. Almost half of the parking spaces are required to perform the servicing manoeuvre, however the Appellant does not have control over the parked cars. It is not accepted that all of the arrangements proposed by the Appellant can be secured by condition, but even if they could, they will be ineffective if cars cannot be cleared on time.

### **Turning movements in and out of the site**

105. AJM appendix 25<sup>60</sup> shows the possible movements in and out of the site, utilising a 14.4m articulated vehicle, which is proposed here.
106. You have heard Mr Fallon's assessment of the highway conflicts which arise for each of the four possible movements in and out of the site. That is not repeated here, and I ask you to accept that evidence.
107. It is clear that the right-in and left-out movements perform the worst in highway safety terms,<sup>61</sup> but whichever direction the vehicle arrives from and departs to, all of the movements take up a large amount of road space. None of them can be completed without the servicing vehicle interfering with parts of carriageways which will be used for opposing and conflicting traffic movements. The implications differ depending on whether the servicing vehicle is interfering with other vehicles entering or exiting the site and using the access junction, vehicles occupying or attempting to occupy the right turn lanes, or through traffic.

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<sup>60</sup> [338-341]

<sup>61</sup> LGF XIC



108. In the prevailing highway conditions already described, and given the existence of multiple conflicting movements taking place in this location (including the potential for vehicles to be waiting to turn in or out of the site, discussed above), the safety concerns are obvious and cannot be dismissed as easily as the Appellant suggests.

### **Internal site layout and servicing movements**

109. Once inside the site boundary, servicing vehicles would need to perform a banjo turn at the north end of the site and then adopt a forward-facing position along the front of the store to carry out the delivery and servicing process. The movement shown in AJM appx 1 [8-9] is no longer proposed in light of other changes to the site layout and landscaping.<sup>62</sup>

110. Vehicle tracking presented by the Appellant shows that, whilst the banjo turn movement can physically be performed by a 14.4m long articulated vehicle, the movement takes up the entire width of the turning circle.<sup>63</sup> There is almost no room for error. It may be the case that the vehicle could perform better than the tracks suggest, but Mr Mendelsohn only said that it would be “slightly” better.<sup>64</sup>

111. If the servicing vehicle does not complete the internal manoeuvre correctly on the first attempt, there will be a need for the vehicle to reverse, re-adjust and re-attempt. While doing so, it will be blocking the internal roadway leading to the drive-thru lane and potentially blocking parking movements in and out of the parts of the car park which remain useable. This presents a risk that the vehicle may lead to customers arriving at the site being forced to wait and queue back on to the highway, with attendant knock-on effects in terms of conflicting movements and driver risk-taking. The movements associated with the internal layout of the site are not included in S-Paramics and therefore no analysis is presented on the effects of this situation on the highway. Mr Mendelsohn acknowledged this potential, and said that it was why the Appellant wanted to agree a condition dealing with deliveries and servicing.<sup>65</sup>

### **Practicality of arrangements requiring parking spaces to be cleared and the possibility of imposing a condition**

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<sup>62</sup> XX of AJM

<sup>63</sup> AJM appx 25 [338-341]

<sup>64</sup> AJM XIC

<sup>65</sup> XX of AJM

### ***Practical issues***

112. The Appellant proposes to provide 32 parking spaces (including the two ‘grill bays’ and two accessible parking spaces). The vehicle tracking shows that the entire servicing process requires the vehicle to cut across all or part of 16 of these (50%), including – critically – the two spaces which are provided in the middle of the turning circle at the north end of the site and the four or six spaces on the left hand side, all of which are needed for the servicing vehicle to enter the banjo turning movement.<sup>66</sup>
113. Those 16 spaces will need to be cleared in good time for the servicing vehicle to arrive, leaving 12 ‘normal’ parking spaces available for customer use. The 8 spaces immediately in front of the restaurant will need to remain clear for the entire duration of the delivery, which is anticipated to take between 15 mins and 1 hour.<sup>67</sup>
114. It is clear from the site layout plans that this situation is, in large part, due to the Appellant’s desire to accommodate a drive-thru lane within the site. If it were not for this, the site could be laid out differently and there would be more space in which to incorporate a dedicated loading and unloading area. That would accord with the requirement in DM23 that proposals for servicing and loading should be “integral to the design of the development”.<sup>68</sup> Although the LPA does not suggest that the proposal should be treated as breaching DM23 on this basis, the consequences of the Appellant’s chosen layout and strategy cannot be ignored.
115. On the Appellant’s own evidence, based on the use of the car park at the Sheene Road store, up to 4% of the parking spaces are likely to be occupied by vehicles whose drivers are not on site, because the drivers have parked but left the site either before or after using the restaurant.<sup>69</sup> However in the LPA’s assessment this behaviour is likely to occur more frequently at the appeal site than at Sheene Road, because there are a greater number of free Council-owned car parks in the vicinity of the Sheene Road store which would provide alternative parking opportunities for drivers wanting to use other local facilities and amenities.<sup>70</sup>

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<sup>66</sup> AJM appx 25

<sup>67</sup> AJM appx 16 [218] para 3.1.2

<sup>68</sup> AJM appx 2.6 [33]

<sup>69</sup> AJM appx 13 [199], tables 13F and 13G.

<sup>70</sup> XX of AJM – AJM was not aware of these car parks at Diamond Street, Hereford Street and Sheene Road itself.

116. Even if all of the vehicle occupants are on site at the point where parking spaces need to be cleared, they are still outside the Appellant' control. The question whether a matter is within an applicant's control is relevant to the issue of enforceability – see the 'key questions' document incorporated by reference into para 4 of the PPG chapter on "use of planning conditions".<sup>71</sup> According to the draft delivery management plan, notification of the exact arrival time is received 30 minutes in advance, and at this point the required spaces would be cordoned off.<sup>72</sup> The Appellant will be reliant on its customers to leave within the average dwell time referred to by Mr Mendelsohn<sup>73</sup> (and again, this is an average figure, meaning that some customers will stay for less time and some will stay for longer). If that does not happen then the Appellant will need to be able to (i) identify the owners of the vehicles which are occupying the spaces needed for the servicing manoeuvre, and (ii) ask those drivers to move their cars. It will be reliant on customers to cooperate, or on staff forcing them to leave if they refuse to cooperate. It is not hard to imagine that members of staff would be unwilling to ask customers to leave the restaurant mid-way through a visit in order to clear spaces for a delivery vehicle.

117. If the spaces which are required for the servicing vehicle to manoeuvre are not cleared in time, then the sophisticated arrangements for advanced notification which are proposed by the Appellant in the draft delivery management plan are irrelevant. The servicing vehicle will not be able to perform the necessary turning movements.

118. The Appellant's position is that, in the unlikely event that all of the parking spaces needed for the servicing vehicle cannot be cleared, restaurant staff would probably email Martin Brower to advise them to abandon the delivery, which would prevent any possibility of knock-on effects on the highway.<sup>74</sup> This possibility was raised for the first time in cross examination, and does not appear to form part of the company's standard procedure.

119. It is submitted that Mr Mendelsohn's prediction about what would happen in this scenario is unrealistic. Mr Hemstock explains that stock is ordered with the assistance of a computer system which monitors the amount of food being served, in

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<sup>71</sup> ID: 21a-004-20140306

<sup>72</sup> AJM appx. 16 [221] para 4.1.14

<sup>73</sup> AJM XIC

<sup>74</sup> XX of AJM

order to minimise excess ordering and therefore wastage.<sup>75</sup> If that is correct, it must follow that the restaurants do not carry substantial amounts of excess stock, and would therefore be reliant on the regular deliveries to replenish their supplies to meet expected demand, which would be compromised if the delivery was abandoned. The vehicles are on a scheduled route involving a number of different stores. It appears far more likely that, in the event the parking spaces could not be cleared, the servicing vehicle would wait somewhere on the highway near the site until the spaces could all be cleared, or the delivery would take place in any event, from the highway (as Mr Fallon has seen at other sites, albeit not owned by the Appellant). In either case the vehicle would cause an obstruction to traffic and encourage risk taking behaviour. Alternatively, the vehicle may still enter the site and carry out the delivery and servicing procedure from the internal site road, in which case it would inevitably block one side of the internal carriageway and obstruct other manoeuvres in the car park, with the attendant risk of vehicles queuing back out of the site as they wait to enter or park. If the turning movement could not be completed, the vehicle would have to reverse either in or out of the site, creating further conflicts with other movements occurring outside the site access.

***Would a planning condition resolve the practical issues?***

120. The planning SoCG<sup>76</sup> contains a proposed delivery condition which would include restriction on the timing of servicing activities (to only take place between 08:00 – 20:00) and require the submission and approval of (and subsequent compliance with) a refuse, servicing and delivery strategy.
121. It is accepted that in principle conditions of this nature can be, and are, imposed by decision makers. However, the effect of such a condition is that the approved strategy becomes part and parcel of the condition itself, and a failure to comply will amount to a breach of the condition. A condition of this nature should not be imposed unless you are satisfied that the practical problems that have been identified above are capable of being adequately addressed within an approved strategy and that any such strategy would be effective and workable. Furthermore, it is necessary to be satisfied that the likely content a refuse, servicing and delivery strategy would be necessary, reasonable and enforceable. It is therefore necessary to investigate the likely parameters of such a strategy.

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<sup>75</sup> NH PoE para 4.7

<sup>76</sup> Inquiry document 6

122. In this regard, the Appellant has produced a draft delivery management plan which it suggests “could be secured as a condition of the permission”.<sup>77</sup> This is the crucial piece of evidence before the inquiry detailing how the delivery and servicing process would take place.

123. It is clear from the draft delivery management plan that the proposed servicing arrangements are heavily dependent on the detailed practices which have developed between McDonald’s and its sole distributor, Martin Brower. These arrangements include the use of a specific computer system (‘Paragon’) linked with GPS, to manage and give advanced notification of the timing of deliveries, including the sending of an email 30 minutes before the delivery is due to arrive to allow staff to implement procedures to clear necessary parking spaces.<sup>78</sup> This is critical in terms of avoiding the highway conflicts discussed above. The arrangements also rely heavily on McDonald’s internal training and procedures, to ensure that parking spaces are kept free/cleared at the right times.

124. The LPA’s position remains that arrangements of sort proposed here are not appropriate for use as part of an enforceable planning condition. They are specific to McDonald’s as an occupier, rather than to the development which is proposed. A condition which imposes requirements, via a plan, which depend on the specific business practices followed by McDonalds’s for the time being is unreasonable (even if, as stated by Mr Mendelsohn, the computer system is in principle available for use by other companies). It has the practical effect of making the permission personal to McDonald’s, because no other end user will be able to comply with the conditions, or would only be able to do so with potentially considerable changes to their own business practices and costs, which would impose an unreasonable burden.

125. It has also been suggested in evidence that the proposed delivery management plan could specify the direction from which servicing vehicles approach, to address the concerns raised by Mr Fallon regarding the in/out movements. Such a stipulation would not in the LPA’s view be practically enforceable. Any breach would be extremely short lived, occurring only at the moment a vehicle arrived at the site entrance and performed a turning movement from the wrong direction. Even if the breach were observed, it

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<sup>77</sup> AJM appx 16 [214] para 1.1.3

<sup>78</sup> AJM appx 16 [218] section 3.2 and para 4.1.14

would almost certainly be over before any evidence could be recorded and before any enforcement action could be taken.

126. In the Ewell decision<sup>79</sup>, an Inspector considered a proposal for a fast food restaurant (A3/A5 use) requiring “cordoning-off of a significant number of parking spaces to accommodate delivery/refuse vehicles some 6-7 times per week”.<sup>80</sup> It was said that “the level of site management required to manage the parking at the anticipated times of service delivery would be significant” and that there was “the potential for a lack of positive control so that there could be circumstances whereby car parking spaces may not be free of parked cars at the time the service vehicles arrived”.<sup>81</sup>

127. In that case also it was proposed that the developer (KFC) would use a specific supplier, and control the size of the vehicle, and control the time of service delivery through conditions – all of which are proposed here. Nevertheless the Inspector found that “such a condition would be ineffective if there was an inability to restrict parked cars at the time of service delivery or the collection of refuse due to lack of control of existing parked cars”.<sup>82</sup> Her concerns around servicing and delivery were among the reasons for finding that there would be severe highway impacts and that the proposal was contrary to development plan policy and the NPPF.<sup>83</sup>

128. The Appellant has provided an appeal decision for a McDonald’s drive-thru at Broomwood Road, Orpington.<sup>84</sup> In that case the Inspector referred to the company’s arrangements with its sole distributor and the computer scheduling system.<sup>85</sup> He granted planning permission and imposed a condition requiring a servicing and delivery plan to be submitted and approved.<sup>86</sup> We have also been provided with vehicle tracking to show the movement that a servicing vehicle would perform.<sup>87</sup> It appears that this would involve clearing 12 out of 27 parking spaces (including disabled and grill bays).

129. You therefore have one decision (Ewell) where an Inspector found that there was the potential for a lack of control over parked cars and that a condition would be

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<sup>79</sup> Inquiry document 2

<sup>80</sup> Ibid. para 44

<sup>81</sup> Ibid.

<sup>82</sup> Ibid. para 46

<sup>83</sup> Ibid. para 58

<sup>84</sup> MC appx I

<sup>85</sup> Ibid. para 24

<sup>86</sup> Ibid. para 39 and condition 3

<sup>87</sup> Plan H

ineffective in those circumstances, and a second decision (Orpington) where an Inspector appears to have concluded that the loss of parking spaces could be adequately addressed with a delivery management plan.

130. It is unclear whether the problems discussed above, and in the Ewell decision, regarding the ability to clear parked cars were raised within the Broomwood Road inquiry, and whether the proposed servicing arrangements were challenged along similar lines to the objections advanced in this case. The decision itself does not contain any discussion about that issue, and we have not seen the delivery and servicing arrangements which were proposed in that case. For those reasons, and because the Inspector's conclusions were clearly correct, I invite you to follow the approach adopted in the Ewell decision in this case. Although it is true that it concerned a different operator, the proposed use was similar and the arrangements which were being put forward by the applicant to address concerns about deliveries were similar to those proposed by the Appellant. There is no sufficient basis for distinguishing the decision reached in the Ewell case.

***Conclusion on deliveries and servicing***

131. The potential problems are evident and cannot be overcome by a delivery and servicing strategy. Critical elements of the arrangements are outside the Appellant's control, the detailed arrangements relied on are too personal to form part of a planning condition. In the absence of a practical solution to this problem, the servicing and refuse arrangements are highly likely to give rise to highway safety impacts.

132. Policy DM23 specifically requires developments to "provide appropriate servicing and loading facilities" and requires that "proposals for parking, servicing and loading should make effective and efficient use of land and be integral to the design of the development". Those requirements are not met here. The Appellant has not provided any dedicated routes or bays for deliveries and loading or unloading within the design, preferring instead to use the space around the restaurant to provide customer parking and drive-thru lanes. As a result, deliveries and servicing will have to take place in the areas which are otherwise reserved for customer parking. For the reasons already given, this cannot be considered 'appropriate', and is certainly not 'effective' or 'efficient'.

**ASSESSMENT UNDER S. 38(6)**

## **Approach**

133. The correct approach when determine this appeal is well-known and requires the following two questions to be answered:
- a. Does the proposal accord with the development plan, taken as a whole?
  - b. If not, are there other material considerations which indicate that planning permission should be granted notwithstanding the conflict?
134. This is the approach which has been applied by Ms Tyrer in her proof of evidence.
135. Mr Carpenter has not followed the above approach. Instead, he has adopted a novel approach in his proof of evidence in which he starts not with the development plan, but with the concept of sustainable development within the NPPF. This back-to-front approach can be seen in section 5 of his proof, where he summarises relevant parts of the NPPF, including those relating to sustainable development first, before turning to the relevant policies of the development plan. Then in section 6, which contains Mr Carpenter’s assessment of the application, there is first an assessment of the extent to which the appeal proposal can be said to advance the three ‘dimensions’ of sustainable development. Some of the development plan policies are mentioned and considered, but only where relevant to, and through the prism of, the dimensions of sustainable development.<sup>88</sup> Mr Carpenter concludes in para 6.25 of his proof that “the proposed restaurant adheres to the three principle threads of sustainable development” and “complies with ... paragraph 14 of the Framework, and is thus sustainable development”. He confirmed in cross examination that this is on the basis that, in the Appellant’s view, the proposal is development plan compliant (and therefore accords with the first bullet point of ‘decision taking’ under para 14).
136. Some further development plan policies are referred to under the headings ‘principle of development’ and ‘amenity’. The overall conclusion of section 6 is first that the development accords with the principle of sustainable development, and secondly that it accords with national and local planning policy, with reference to the loss of the B8 use and the principle and location of development.

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<sup>88</sup> See MC PoE paras 6.13 (BCS20), 6.18 (BCS13-16, DM32), 6.21 (BCS15 and DM32) and 6.22 (BCS14).



137. Mr Carpenter's approach tends to subvert the primacy of the development plan, and implies that consistency with the aims of the NPPF is more important. However, the NPPF is a material consideration and it cannot be treated as if it had the same status as adopted development plan policy. Nothing in the NPPF changes – or is capable of changing – the statutory duty under s. 38(6).

138. Para 14 NPPF applies not only to decision taking but also to plan making, and a plan which is up to date in terms of the NPPF will deliver sustainable development if it is followed.<sup>89</sup> Therefore, if a proposal is not in accordance with an up-to-date plan, it follows that it is not sustainable development and should normally be refused on that basis.<sup>90</sup> Conversely, if the development accords with an up-to-date plan, it is sustainable development and it also benefits from the presumption in favour of sustainable development in the first bullet point of para 14 NPPF. It is not necessary to conduct a free-standing assessment of the sustainability credentials of a proposal in order to determine how it should be approached, as Mr Carpenter appears to have done. Section 38(6) provides the answer.

139. Quite remarkably, Mr Carpenter does not anywhere set out and apply the test contained in s. 38(6). He does not explain what 'material considerations' the Appellant would rely on in the event that the development is considered not to accord with the development plan. His evidence is therefore of no assistance in terms of how the balance should be struck in the event that you accept the LPA's position on highway safety matters.

### **Accordance with development plan**

140. It is trite that, in assessing whether or not a proposal is in accordance with the development plan, the decision maker should not mechanically add up how many policies are complied with and how many are breached. Policies in plans often pull in different directions. It is necessary to consider the plan as a whole and form a judgement.

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<sup>89</sup> *Trustees of the Barker Mill Estate v SSCLG* [2016] EWHC 3028, paras 118-120.

<sup>90</sup> *East Staffordshire BC v SSCLG* [2016] EWHC 2973, para 22. See also para 12 NPPF.

141. One important factor to consider in reaching that judgement will be the relative importance of the policy or policies which are breached within the context of the plan. For example, some policies are concerned with matters of principle whilst others deal with matters of detail. Some policies apply to any development proposal in the area of the plan, whereas others are specific to particular types or locations of development. In this case, the highway safety policies apply generally to any type of development in the LPA's area and they address important matters which are fundamental to the in-principle acceptability of any proposal, for the protection of the public.
142. It is also necessary to consider the extent of any breach. A minor or technical breach, or a 'near miss' will be less weighty in the overall balance than substantial non-compliance. In this case, there would be substantial non-compliance with key elements of the BCS10 and DM23.
143. If the LPA is correct that the proposal breaches the highway safety policies, the proposal will not be in accordance with the development plan – regardless of whether it is appropriate for the town centre location, compliant with policy on food and drink uses and so on. That is accepted by Mr Carpenter.<sup>91</sup>

### **Other material considerations**

144. Considerations have to be "material" in order to be lawfully weighed in the planning balance. Considerations are material if they are relevant to planning and to the use and development of land.<sup>92</sup> Considerations which do not relate to the use of land are not material and should be disregarded in the planning balance.
145. A substantial amount of evidence has been presented by the Appellant about various benefits which would be generated by the appeal proposal, which in the LPA's view are not capable of amounting to material considerations in favour of the scheme.
146. Benefits which fall into this category include the following:
- a. Recycling of waste oil and using it to fuel servicing vehicles;<sup>93</sup>
  - b. Excellent training programmes;<sup>94</sup>

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<sup>91</sup> XX of MC

<sup>92</sup> *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65, at 77

<sup>93</sup> MC PoE para 6.22

- c. Investment of £43m annually on staff training and education;<sup>95</sup>
- d. Local sports sponsorship;<sup>96</sup>
- e. Open farms programme,<sup>97</sup> love where you live programme;<sup>98</sup>
- f. Support of Ronald McDonald House Charities;<sup>99</sup>
- g. Community initiatives by franchisees including commitments to local and national football; support for employees and free wi-fi;<sup>100</sup>
- h. Use of recycled materials in packaging;<sup>101</sup>
- i. High levels of waste recycling (e.g. corrugated cardboard).<sup>102</sup>

147. These are matters which are specific to McDonalds as the end user of the site. They are not related to the development proposed, which is the “demolition of existing warehouse and erection of a freestanding two storey restaurant with associated drive-thru, car parking and landscaping. Installation of 2 no. customer order display and canopy”.<sup>103</sup> It is important to focus on considerations which relate to the development which is proposed rather than the occupier of the land from time to time. As Mr Carpenter agreed, aside from the specific situation where a personal planning condition is imposed, the planning system is concerned with the regulation of development and use of land and not with the identity of the occupier from time to time.<sup>104</sup>

148. It was put to Catherine Tyrer that the kind of benefits referred to in para 146 above add to the merit of the application, but if they are not material planning considerations – which they are not – then there is no scope for weighing them in the balance. It would be an error of law to take them into account.

149. If the above benefits could be secured by condition so that they secured so that they would run with the land in perpetuity, it would be right to have regard to them. However, conditions requiring the above benefits to be provided would plainly not meet the six tests in para 206 NPPF, again because they would not be relevant to planning and planning objectives, or to the development permitted. Nor would they be necessary to

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<sup>94</sup> Ibid. para 6.12

<sup>95</sup> Ibid. para 6.12

<sup>96</sup> Ibid para 6.14

<sup>97</sup> Ibid.

<sup>98</sup> Ibid

<sup>99</sup> Ibid.

<sup>100</sup> Ibid. para 6.15

<sup>101</sup> Ibid. para 6.21

<sup>102</sup> Ibid. para 6.21

<sup>103</sup> Planning SoCG, Inquiry document 6, para 1.2

<sup>104</sup> XX of MC

make the development acceptable in planning terms by minimising or removing an impact which would otherwise justify refusing permission.

150. The possibility of a personal planning permission was suggested for the very first time during cross examination of Catherine Tyrer and was raised again in Mr Carpenter's evidence. This would be another mechanism by which benefits which are associated with McDonalds as an occupier, and not with the use of land, might be secured in the future – although of course, company policy on any of the matters relied on could change at any time, and so even a personal planning permission could not guarantee the future delivery of the benefits in question.

151. The original application was not made or determined on the basis that a personal planning condition was sought, nor was it the basis on which the appeal was made. It is not mentioned anywhere in the Appellant's written evidence.

152. Planning Practice Guidance on the "Use of planning conditions" states at para 15 that "unless the permission otherwise provides, planning permission runs with the land and it is rarely appropriate to provide otherwise. There may be exceptional occasions where granting planning permission for development that would not normally be permitted on the site could be justified on planning grounds because of who would benefit from the permission."

153. The Appellant has not identified any exceptional circumstances which would justify the imposition of a condition limiting the permission to McDonald's and it is obvious that there are none.

154. Furthermore the PPG says that "a condition limiting the benefit of the permission to a company is inappropriate because its shares can be transferred to other persons without affecting the legal personality of the company." That is further guidance which tells against the grant of a personal planning permission in this case.

155. It has also been suggested<sup>105</sup> that in reality the site can and will be operated only by McDonalds. The implication is that the various benefits which the company is said to bring can be weighed in the balance because they will, in effect, be guaranteed.

156. It is important to appreciate that there is no planning reason why the site can only be operated as a McDonalds.

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<sup>105</sup> NH XIC

157. The matters referred to by Mr Hemstock are concerned only with current company policy, practice and intentions. He confirmed that, although McDonalds would own the freehold of the appeal site, there was nothing practically or legally to prevent them from disposing of it in due course and that this was a matter of company choice and policy.<sup>106</sup> Mr Carpenter did not seek to depart from that.<sup>107</sup> The company has disposed of sites previously, whether by subleasing (in the case of a leased drive-thru site in Northern Ireland) or selling.<sup>108</sup> Intellectual property rights in building design would not act as a legal impediment to any disposal.<sup>109</sup>
158. The fact that the Appellant says it is committed to the site and has invested heavily in it is scarcely relevant - company intentions and strategies can and do change. The company's intentions at this moment in time are not a sound basis on which to determine an application for planning permission which, if granted, will benefit the land indefinitely.
159. The LPA's position remains that this is a proposal is for a drive-thru restaurant, and not for a McDonalds. There is no legal impediment to the site being used by another occupier in future if permission is granted for the proposal and the appeal should be determined on that basis, which is the normal approach in planning law.
160. It follows that the various company-specific benefits relied on by the Appellant are not material planning considerations, and cannot be secured by condition. They have to be disregarded.
161. Catherine Tyrer has acknowledged that the extra jobs which would be generated by the appeal site are a material consideration; although of course this needs to be balanced against the fact that the proposal involves a loss of employment land (albeit this is assessed as being policy-compliant). It has been suggested by the Appellant that the provision of a place for people to meet and congregate and the provision of facilities for people travelling through the area are benefits of the proposal, and that limited benefit is also a material consideration.<sup>110</sup>

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<sup>106</sup> XX of NH

<sup>107</sup> XX of MC

<sup>108</sup> XX of NH

<sup>109</sup> XX of NH

<sup>110</sup> XX of MJ

162. As much as the Appellant would like to portray it otherwise, the reality is that this is not a proposal which will providing any significant social or community benefits. It is a commercial enterprise. The material considerations, such as they are, are not sufficient, either individually or in combination, to overcome the conflict with the development plan in terms of highway safety.

***Conclusion on s. 38(6)***

163. This is a development proposal which is not in accordance with the adopted development plan as a result of the conflict with highway policies BCS10 and DM23. Such a proposal falls to be refused unless there are other material considerations which are of sufficient weight to justify a different outcome. When the irrelevant considerations are left out of account, what is left is in no way sufficient to justify a departure from the plan.

**CONCLUSION**

164. For all of the above reasons, the LPA invites you to dismiss the appeal, and to uphold the decision of the Development Control Committee on 4 February 2015 to refuse planning permission on the basis of highway safety concerns and non-compliance with policies BCS10 and DM23. The Appellants have evidently spared no expense in their efforts to have the decision overturned, but in the final analysis, even with the mitigation proposed by Mr Mendelsohn and with possible conditions, the problems identified by Mr Fallon will remain and are sufficient to justify the refusal of permission.

165. That is not to suggest that the site cannot be developed in the future; it is entirely feasible that an application could come forward for a proposal with no or very limited traffic generation and therefore conflicting vehicle movements, which would not present the highway conflicts and safety concerns that are apparent here. Such a proposal would also be consistent with development plan policy which seeks to minimise the use of the private car and to prioritise other sustainable forms of transport such as walking and cycling; a policy which is entirely appropriate in a location which is within the designated town centre.

**Emma Dring**  
**Cornerstone Barristers**  
**2 May 2017**