PLANNING COMMITTEE MEETING – 19th September 2024
Amendment/De-brief Sheet

MAJOR PLANNING APPLICATIONS

Circulation: First Item: 4

Reference Number: 23/04590/OUT

Address: Land South of Coldham's Lane, Cambridge

Attached at appendices A and B are separate legal opinions provided by Richard Turney KC for the applicants and Martin Edwards KC for the Council concerning the use of conditions in respect of land contamination.

The opinions are released following a Freedom of Information Request made to the Environment Agency (EA), the deadline for a response to which falls a day later than the 19th Sept Planning Committee. The FOI request relates to the removal of the EA's objection on the grounds of land contamination and the context around this decision which includes the Counsels' opinions. In the interests of transparency, both the Council and the applicants have agreed to the release of the legal opinions, both of which are consistent in terms of the advice given and which should provide confidence for members in understanding the EA's position and the robustness of the officer recommendation.

Background summary

To Note:

The EA's decision to remove its holding objection was a unilateral action. Officers from the Local Planning Authority (LPA) and City Environmental Health Team have been working closely with the EA for some months since the application was submitted to ensure that:

a) the proposed foundation design options and their associated risks to groundwater has been adequately understood by all parties; and
b) appropriate risk prevention and monitoring measures are available and can be implemented at all stages of the development (pilot/test stage, construction and operational stages).

The basis for the EA's original objection mainly related to its view that planning conditions would not provide sufficient control in dealing with the potential risks of development on the groundwater environment. To satisfy its concern in this respect it recommended that the Applicant/Developer should carry out a separate stage of onsite test trials which would identify the efficacy of their proposed

approach to pollution risk management. In practical terms, the EA's recommended approach for test trials to take place first (in advance of consideration of the current planning application) was considered by the Council (and Applicant) to be unreasonable and unjustified in that it would constitute a separate development operation for which a separate planning application and permission would be needed. The Council requested its own independent legal advice from Kings Counsel following the Applicant/Developer's own Barristers Advice, and both clearly confirm that the use of planning conditions in these circumstances would represent a robust and acceptable approach to take.

Therefore, a number of planning conditions are being recommended by officers to control the risks of groundwater and air pollution at every stage of development (including test stage and future operational stages). These include: Nos. 41, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58. The scope and wording of these planning conditions have been developed in consultation with technical input from the City Environmental Health Team and EA.

Amendments to Text:

<u>Additional update to the lab/office demand/supply evidence position:</u>

Paragraphs 13.47and 13.48 of the committee report refer to the applicant's evidence of November 2023 regarding an undersupply in lab and office development in the period to 2041, and concludes at 13.51 "that the current proposals should be supported in order to close the current gap between growing demand and undersupply".

The Greater Cambridge Growth Sectors Study: Life science and ICT locational, land and accommodation needs (Final Report, September 2024) updates the lab and office demand/supply evidence position, noting that, given permissions in the last couple of years, the supply for wet lab space through 2025-2030 is now substantial, but that there may remain a shortfall in smaller scale-up space provision; and that there is likely to remain a shortfall in wet lab commitments overall to 2041, which can be met through the emerging Local Plan (paragraph 9.2).

As a result, officers note that there is no longer an undersupply in the total amount of lab space in the short term, but that this proposal will help meet the shorter-term shortfall for smaller scale-up provision, as well as helping provide a flexible supply overall.

<u>Cambridge Past, Present and Future – Additional representation received 17/09/24</u>

Comments made have been covered in paragraphs 11.6-11.8 (pages 42 and 43) of the committee report.

Pre-Committee

None

Amendments to
Recommendation:

Decision:

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PROJECT NEWTON

ADVICE

1. I am instructed to advise BGO Newton PropCo Ltd ("Mission Street") in respect of the proposed development of Land South of Coldham's Lane, Cambridge ("the Site"). On 17 June 2024 I gave advice in consultation on issues arising from the Environment Agency's ("the EA") objection to the proposed development, including whether the contamination issues identified by the EA could properly be dealt with by planning conditions imposed on the proposed "hybrid" permission. I have been asked to provide a written summary of my answer to that question. In summary, my answer is "yes".

Background

2. For ease of reference I will briefly summarise the factual background. A planning application (reference 23/04590/OUT) was submitted to Cambridge City Council ("the LPA") in November 2023 for:

> "Outline proposal for 'Parcel A' for Offices (Use Class E(g)(i)), Research and Development (Use Class E(g)(ii)), ancillary retail & facilities (Use Classes E(a) and E(b)); car and cycle parking, landscape and public realm, infrastructure and associated works; all other matters reserved except for access;
> Detailed proposal for 'Parcel A' Building 3 (Use Classes E(g)(i) (Offices), E(g)(ii) (Research and Development)), the Hub Building with associated car and cycle parking, employment space, and leisure uses (sui generis), and the Pavilion Building for community uses (Use Class E); and,
> Detailed proposal for landscape works and access to 'Parcel C'."

3. The application is supported by a number of ground contamination assessments. Mission Street recognises that it will need to carry out further testing prior to the commencement of development, so that (amongst other things) the most appropriate method for foundation works can be identified.

4. The EA has objected to the application. In its consultation response dated 24 May 2024, the EA stated that "insufficient technical detail has been provided to demonstrate that

development as proposed on this site can be undertaken whilst providing adequate mitigation of existing pollution risks to controlled waters and without causing additional pollution of controlled waters." In essence, the EA's position is that further testing should be carried out (which, I am instructed, would require work "so extensive that [it] would amount to engineering operations… requiring planning permission") before the application is determined. The EA considers that it would be "inappropriate at this stage to proceed under planning conditions". It also "strongly recommend[s]" that the planning application be "parallel track[ed]" with applications to the EA for abstraction licences and environmental permits.

5. In response, Mission Street's planning consultants, Stantec, provided the LPA with a "Remediation Route Map", which illustrates how "the works that need to be undertaken to provide the "technical detail" the EA require" will be undertaken. They explained that this process could be secured by a "set of robust conditions", which they will seek to agree before the application goes to committee. Draft conditions have been prepared (which I have seen) and subsequently shared with the LPA. These would ensure that appropriate methodologies are developed following the more intrusive series of works required to identify those methodologies.

Advice

6. Local planning authorities are required to consider whether development which would otherwise be unacceptable could be made acceptable through the use of conditions: NPPF, para 55. If an authority refuses an application on a planning ground capable of being dealt with by condition, a substantive award of costs may be made against them on appeal: Planning Practice Guidance ("PPG") on 'Appeals', para 049.

7. I am asked whether the contamination issues identified in the EA's consultation response are capable of being dealt with by condition. On the basis of the material provided to me, I consider that they are.

8. I note that the EA routinely requires a suite of standard "stepped" land contamination conditions in "normal" land contamination scenarios, recognising that the detailed understanding of contamination risk can be achieved after the grant of planning permission, so long as provision is made for the approval of appropriate remediation

schemes thereafter. Although the Site is more challenging than the norm, the conditions proposed by Mission Street's consultants contain similar protections to the conditions the EA regularly requires on schemes across the country, in that detailed remediation proposals will be established after the grant of consent and based upon the evidence available following intrusive survey work. The EA has not justified why it considers that such conditions would not be appropriate in this case, other than to suggest such conditions may be challenging to discharge.

9. The only reason why a Grampian condition of this sort could not lawfully be imposed is if "there are no prospects at all of the action in question being performed within the time-limit imposed by the permission": see PPG on 'Use of Planning Conditions', para 009. The case law on this is clear, although the principles are often misunderstood. The test is not whether it might be difficult for the developer to achieve what is required under the condition; indeed, even if a condition would create "insuperable" difficulty for the developer, it can still lawfully be imposed: *British Railways Board v Secretary of State for the Environment* [1994] J.P.L. 32 at 38. Accordingly, in order to justify its position that a Grampian condition should not be used in this case, the EA (and ultimately the LPA) would have to show that there is no prospect of the condition being satisfied. That presents a high hurdle for the EA, which it has not as yet overcome.

10. More broadly, on the merits of the EA's position, I note the following:

    (a) The logical conclusion of the EA's position – that testing should proceed now under a freestanding grant of planning permission – does not seem tenable. The EA cannot sensibly argue that it is necessary to require Mission Street to make a new application for a freestanding permission to carry out testing, if this is capable of being dealt with by condition through the application which already been made.

    (b) The EA's recommended "parallel track[ed]" approach is likely to run into difficulty in practice. The reality is that construction/remediation methods will need to be known before any environmental permit is applied for – i.e. the planning permission will need to come first, so that relevant conditions can be discharged before an environmental permit is sought. The planning system can operate on the assumption that the appropriate regulatory controls, including environmental permitting, will

operate as intended. Paragraph 194 of the NPPF emphasises that the "*focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively.*"

(c) The EA should be considering the issue of contamination and remediation in the round, rather than focusing on this issue in isolation, and be looking for opportunities to remediate the land through development where risks can be appropriately addressed. If (as I am instructed) there are contamination betterments which would be achieved through the delivery of this scheme, then the risks associated which individual trials (which are presumably capable of being dealt with on a case-by-case basis) should not weigh against the grant of consent, provided appropriate conditions are imposed. This approach is supported by national policy: see e.g. para 180(f) of the NPPF.

11. In the event that the EA does not decide to lift its objection, and the LPA does not therefore grant consent, an appeal against non-determination may need to be considered. The merits of such an appeal (and the prospects of any associated application for costs) would need to be judged at the time, on the facts as they then stand. My view at this stage is that the LPA's case for defending a non-determination appeal would not be a strong one if based on an EA objection on the use of conditions in circumstances where reasonable conditions had been proposed and no cogent case had been put forward as to why they were not legally appropriate in the circumstances.

Richard Turney KC
Landmark Chambers

16 July 2024

IN THE MATTER OF CAMBRIDGE CITY COUNCIL

AND PROJECT NEWTON – LAND AT COLDHAM'S LANE, CAMBRIDGE

ADVICE

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1. I am asked to advise Cambridge City Council, as local planning authority, regarding a hybrid planning application for a mixed-use development on land at Coldham's Lane, Cambridge (23/04590/OUT). I do not propose to repeat the facts as set out in my instructions and in the planning application (which I have studied online on the Council's planning portal). The issue on which I am asked to advise is the continuing objection of the Environment Agency as set out in the Agency's letters to the Council of 9 February and 24 May 2024. In its first letter, the Agency had objected on two grounds. The first related to water resources and the second related to groundwater and contaminated land. However, in the subsequent letter of 24 May 2024 the Agency had effectively abandoned its first ground. The letter notes that the proposed water efficiency measures are welcome and supported and that the Agency recognises "that the water efficiency measures and commitments could be of benefit to the LPA in its consideration of the planning balance." Thus, it clearly recognised that the acceptability of the proposed measures in relation to water resources is a matter for the planning judgment of the Council. It must follow, however, that the same approach applies to the issues regarding land contamination. Thus the ultimate judgment on these issues is for the Council to make and its judgment can only be challenged on usual judicial review grounds.

2. The Agency's remaining objection is based on two issues. These are stated to be:

> "1. This site is already causing pollution of controlled waters due to the migration of contaminants from historically deposited waste on Parcel A. The technical information submitted to date does not demonstrate that the remediation strategies considered feasible will adequately manage this pollution. We do not have confidence that there is a viable remediation strategy to manage the existing pollution risks to controlled waters.
> 2. The construction methods that are proposed pose a risk of causing pollution of

> controlled waters. The technical information submitted to date does not demonstrate that the risks are fully understood and can be adequately managed.
> We do not have confidence that the development as proposed can be undertaken without causing additional pollution of controlled waters.
> We consider that insufficient technical detail has been provided to demonstrate that development as proposed on this site can be undertaken whilst providing adequate mitigation of existing pollution risks to controlled waters and without causing additional pollution of controlled waters.
> We consider it inappropriate at this stage to proceed under planning conditions. We consider there is insufficient detail submitted to enable us to recommend appropriate conditions. If you are minded to approve this application contrary to our advice, we would nevertheless ask to be re-consulted to allow for further discussions and/or representations from us in respect of conditions for controlled waters."

3. Of relevance to these issues is the fact that on 9 July 2024 the developer provided a presentation slides pack, prepared by its planning consultants Stantec, demonstrating its response to the Environment Agency's issues in terms of remediation measures and advancing draft planning conditions. Further, it has provided a written Advice from Richard Turney KC dated 16 July 2024.

4. In the closing sentence of paragraph 3 of my instructions, my instructing solicitor has commented that the Agency's approach appears to necessitate the submission of a secondary planning application for the engineering works required by its suggested approach to the investigation of land contamination and that this approach appears to be unreasonable. I agree with my instructing solicitor without reservation or qualification. The Agency's approach appears to fly in the face of (and undermine the purpose behind) the long-established national planning policy regarding the investigation and remediation of contaminated land bearing in mind that the modern contaminated land regime was introduced along with the Environment Act 1995 (following an earlier aborted attempt in section 143 of the Environmental Protection Act 1990).

5. I am asked to advise on Mr Turney's view that the conditions proposed by the developer to deal with the issue of contaminated land "contain similar protections to the conditions the EA regularly requires on schemes across the country, in that detailed remediation proposals will be stablished after the grant of consent and based upon evidence available following intrusive survey work". I agree with Mr Turney. As a preliminary point, I agree with his assessment on the use of a Grampian condition. The case law referred to (the House of Lords'

decision in *British Railways Board v Secretary of State for the Environment* [1994] JPL 32 at 38) is wholly appropriate and relevant. In paragraph 38 Lord Keith of Kinkel held:

> "The function of the planning authority was to decide whether or not the proposed development was desirable in the public interest. The answer to that question was not to be affected by the consideration that the owner of the land was determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That did not mean that the planning authority, if it decided that the proposed development was in the public interest, was absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. For example, if there were a competition between two alternative sites for a desirable development, difficulties of bringing about implementation on one site which were not present in relation to the other might very properly lead to the refusal of planning permission for the site affected by the difficulties and the grant of it for the other. But **there was no absolute rule that the existence of difficulties, even if apparently insuperable, had to necessarily lead to refusal of planning permission for a desirable development. A would-be developer might be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considered that it was in his interests to secure planning permission notwithstanding the existence of such difficulties, it was not for the planning authority to refuse it simply on their view of how serious the difficulties were**." (*My emphasis*)

6. In my opinion, Mr Turney has correctly addressed all the relevant case law and national planning practice guidance. A recent example of the courts applying the approach to the use of a Grampian condition can be seen in the judgment of the High Court (Sir Duncan Ouseley) in *Satnam Millenium Ltd v Secretary of State for Housing, Local Communities and Local Government* [2019] EWHC 2631 (Admin). It follows that I agree with Mr Turney's advice that: "in order to justify its position that a Grampian condition should not be used in this case, the EA (and ultimately the LPA) would have to show that there is <u>no prospect</u> of the condition being satisfied. That presents a high hurdle for the EA, which it has not yet overcome." I would also add that I have represented parties at planning inquiries where bodies such as the Environment Agency or Natural England have maintained objections to a development and, consequently, the local planning authority has relied on those objections as one of the reasons for refusal only to find that the relevant body, despite its objection being maintained, declined to appear or provide evidence to the inquiry thereby exposing the local planning authority to an adverse costs award. It follows that I would agree with Mr Turney's warning in paragraph 6 of his Advice regarding paragraph 049 of the PPG on "Appeals".

7. I also agree with Mr Turney's observations in paragraph 8 of his Advice. If the Agency has any technical justification for its approach, it is not to be found in either of its letters. Vague comments such as "the information provided to date is insufficient to demonstrate that these risks are fully understood and can be adequately managed" are vague and unhelpful. It also follows that the observations of Mr Turney in paragraph 10 of his Advice (and especially that regarding paragraph 194 of the NPPF) are appropriate.

8. I note that in its letter of 24 May 2024 the Environment Agency suggests that planning permission should be refused "in line with paragraph 180 of the National Planning Policy Framework". In my opinion, the Agency has misinterpreted this paragraph. Its approach sits uncomfortably with, if not undermines, the guidance in that paragraph that "Planning policies and decisions should contribute to and enhance the natural and local environment by…..(f) remediating and mitigating despoiled, degraded, derelict, contaminated and unstable land, where appropriate." The Agency's current approach appears to place obstacles in the way of securing remediation of the site. In short, I agree with Mr Turney's view regarding paragraph 180(f) of the NPPF in his paragraph 10c.

9. Finally, Stantec has proposed 8 draft conditions to be attached to the planning permission. The principle behind the imposition of these conditions cannot be in dispute – they accord with the advice in the PPG on the use of conditions and follow the Model Conditions 56-59 in Annex A to circular 11/95. It is important to note that, despite the remaining advice in circular 11/95 being replaced, the MCHLG PPG makes clear that Annex A to that circular remains in force – see paragraph 10 of the PPG "Land affected by contamination". In my view the draft conditions proposed by Stantec closely follow (but are more extensive and site specific) the Model Conditions and meet the statutory tests. They also cause an additional difficulty for the Environment Agency if it continues with its objection to the development. It will have to demonstrate, with clear evidence, why these 8 conditions are unacceptable and any grant of planning permission with those

conditions imposed would be unlawful, why the advice in the PPG should not apply to this development and why Grampian conditions cannot be imposed in this case.

10. In the circumstances, it may be considered appropriate to put to the Environment Agency (and to request an urgent written response to) the points raised by Mr Turney and in my advice above so that the matter then can be reported in the round to the members determining this application so as to ensure that there can be no doubt that the members took into account ,as a material consideration, all the known contamination issues when determining this application.

MARTIN EDWARDS

Cornerstone Barristers

30 July 2024

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