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