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