

IN THE MATTER OF
THE TOWN & COUNTRY PLANNING ACT 1990
AND
IN THE MATTER OF PLANNING CONDITIONS &
CONTAMINATED LAND AT ISLES QUARRY WEST

ADVICE

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Reference: Instructing Solicitor Kevin Toogood

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Instructions

1. I am asked to advise on issues relating to the contaminated land regime and in particular the use of planning conditions, the requirement for continuous monitoring of any implemented scheme, condition 25 attached to a planning permission dated 20 June 2013 and the importance of the cancellation of the model conditions contained in the Chief Planning Officers letter dated 30 May 2008.

2. I am grateful for the helpful way in which my instructions have been collated.

3. My advice is as follows.

Factual matrix

4. Those instructing me are familiar with the relevant guidance documents and the background to the grant of planning permission for the erection of 171 dwellings subject to a number of planning conditions. I note that the scheme was also varied on 8 August 2013 as a result of further site investigations and delivery of a remediation strategy.

5. Before attaching the planning conditions to the planning permission a committee report had regard to the issue of contamination at paragraphs 6.60-6.69. The planning permission was granted shortly after the NPPF was published. The Framework cancelled the advice given on contaminated land issues and planning conditions in PPS 23. The model contamination conditions had been cancelled by the Chief Planning Officer's letter on 30 May 2008.

6. On 6 March 2014 the Planning Practice Guidance was published and includes guidance on planning conditions relating to contamination issues. This is the current up to date guidance from the government and in particular the advice of paragraph 003 is to ensure a site is suitable for its new use and to prevent unacceptable risk from pollution. The implications of contamination for a new development should be considered by the local planning authority to the extent that it is not addressed by other regimes.

7. Paragraph 010 has a flowchart. The flowchart is for current applications and reflects advice that has been given in the past notably in PPS 23, that a planning authority may grant planning permission when it is demonstrated by the developer that the remediation proposed will make the risks acceptable. On that basis, planning permission may be granted subject to appropriate conditions.

Analysis

8. In a planning context, the Borough Council as a planning authority has powers to enforce breaches of planning control including the breach of planning conditions. There are various powers ranging from enforcement notices to breach of planning condition notices and/or injunctions pursuant to section 187B. In this case, we are dealing with a site which has been identified as contaminated land pursuant to Part 2A Environmental Protection Act 1990.

9. Planning Condition 25 (a)-(d) contains the requirements set out in the cancelled PPS 23 Appendix 2B. I note in particular that the conditions follow Example J among others to the Appendix.

10. The conditions as drafted in June 2013 reflected the constructive advice in cancelled PPS 23 and follow the general approach set out in the NPPF. As a matter of law, the Borough Council was entitled to have regard to the cancelled draft conditions in the absence of any other guidance. In addition, they meet the statutory requirements for planning conditions set out in paragraph 203 of the Framework. The Planning Practice Guidance does not currently address planning conditions in the same detail.

11. I have seen a report to committee dated 5 March 2014. At 1.2.1 I note that concern had been expressed about decontamination of the site. The Borough Council's specialist contamination scientific officer has reviewed the position and sought clarification from the specialist team acting on behalf of the developer. Arrangements were made to make further visual assessments of material stored on site, procedures were analysed, a response elicited from the developer and my instructions inform me that the site has been inspected from time to time by Council Officers and on one occasion by an officer from the Environment Agency. The Borough Council's scientific officer has also attended with the Environment Agency

officer. The Environment Agency has not reported any matters of concern nor has it exercised any of its own powers.

12. For the purposes of my instructions it has been highlighted that a Member has a specific concern regarding the approach to remediation of hydrocarbon contaminated soils and whether such remediation should be on site or off site. This is linked to a further concern that the Borough Council should be taking a greater role in monitoring compliance rather than relying upon the developer's validation reports. There is also a suggestion that monitoring should be continuous. I note that specific advice and guidance has been issued in the context of site monitoring. Planning authorities should be mindful of the clear advice given in the NPPF at paragraph 120 that "Where a site is affected by contamination.....responsibility for securing a safe development rests with the developer/landowner."

Conclusions

13. My overall conclusion is that the planning conditions in this case were drafted on the basis of the extensive extant guidance in PPS 23. The planning conditions are not defective and are comprehensive in the way in which they seek to control the remediation plan for the land. The Borough Council has specific planning powers and can exercise in circumstances where there has been a breach.

14. The effect of the cancellation of the Chief Planning Officer's letter 30 May 2008 is that it no longer remains extant guidance and regard has to be had to the guidance set out in the NPPF and the more recent Planning Practice Guidance. However, in the absence of anything more detailed in terms of the drafting of conditions, it may still be a material consideration and something to which planning officers are entitled to have regard.

15. It is proposed by the Government that further planning conditions will come forward under the Planning Practice Guidance with a Suite of conditions.

16. On the issue of hydrocarbons, it has been investigated by officers in detail as appears from the committee report at paragraph 1.2.4. If the matter has been investigated and no action is necessary, there is no breach. There is nothing to prevent officers from carrying out any checks and/or inspections in circumstances where a breach is suspected. A planning authority may exercise its powers of investigation under section 196A to enter on land where it has reasonable grounds for doing so. It may also take action where it has reasonable grounds to suspect there are breaches of planning control taking place and serve a section 171C notice. In all cases the statutory powers must be properly exercised under the 1990 Act. However, the advised regime implemented through the appropriate use of planning conditions, does not require continuous monitoring of the site which would potentially be wasteful of Borough Council resources. I am also concerned that as a public authority the Borough Council must act reasonably, rationally and proportionally. A valid planning permission has been secured and as the guidance points out, monitoring is principally the responsibility of the developer. Constant and continuous on site monitoring in the circumstances can be oppressive.

17. The objective of development control is on the basis the planning permission has been granted on land use grounds taking full account of environmental impacts. The relevant pollution control authority, the Environment Agency and any other authorities are satisfied the potential releases can be adequately regulated under the pollution control framework and that the effects of existing sources of pollution in and around the site are not such that the cumulative effects of pollution, when the proposed development is added would make the development unacceptable. The use of those planning conditions secures the removal of unacceptable risk and makes the site suitable for its new use. As the previous guidance in PPS 23 pointed out as a minimum, after carrying out the development and commencement of its use, the land should not be capable of being determined as contaminated land under Part 2A Environmental Protection Act 1990. I also note that the planning conditions in this case follow the advice in the NPPF and secure an effective monitoring regime

prior to the development commencing and throughout the development as well as providing details of risk assessment including unforeseen contamination. Under planning condition 25(c) those measures must be completed fully in accordance with the approved details. The process is seen to completion by an environmental specialist and there is also a certification process. In my opinion the draft conditions attached to the planning permission in 2013 provide such protection and in the absence of any breach of those conditions being identified there is no need for continuous monitoring other than the monitoring which is set out the planning conditions themselves.

18. I consider the action of officers is commensurate and in accordance with the Borough Council's powers and duties as a planning authority.

19. I shall be pleased to advise further as is necessary and those instructing me should not hesitate to contact me on any point arising out of this Advice.

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IAN ALBUTT

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