APPEAL REF: APP/L6940/A/20/3265358 &
APP/L6940/A/21/3282880
Land at Craig yr Hesg Quarry, Berw Road, Pontypridd, CF37 3BG

NOTE ON MATTERS OF LEGAL PRINCIPLE RAISED IN LPA EVIDENCE

INTRODUCTION

1. This Note is designed to assist the Inspector and the Local Planning Authority ("the LPA") with matters which appear in the evidence before the inquiry.[1] It is provided in advance of the opening of the Inquiry so that the LPA has an opportunity to consider it before the Inquiry opens.

2. It covers two substantive areas: (1) the law on the relevance of alternatives; (2) the treatment of 'fear' as a material consideration in planning decision-taking.

THE LAW ON ALTERNATIVES

3. The law on alternatives has been considered in several cases before the High Court. The current legal position is helpfully summarised in *Derbyshire Dales v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 where Carnwath LJ (sitting as a Judge of the High Court) was required to determine whether, as a matter of law or policy, there was a requirement to consider alternative sites for the proposed development, and if so, whether that process had been adequately pursued and alternatives had been convincingly discounted.

4. In that case, the Inspector had rejected the argument that it was necessary to consider possible alternative sites. On the evidence, he

[1] Specifically, the evidence of Mr Phil Williams, in his Written Statement of Evidence

was not persuaded that the appeal proposal was one of a 'narrow range of cases' where alternatives had to be considered as a matter of law; nor that there was any requirement in planning policy to do so. He found that the nature of the adverse impacts that the proposal would have was such that a decision could properly be made on the merits of the case, balancing any such impacts against other considerations.

5. The Court held that it was one thing to say that consideration of a possible alternative sites was a *potentially relevant* issue, so that a decision-maker did not err in law if he had regard to it. However, it was quite another to say that it was *necessarily relevant* so that the decision maker erred in law if he failed to have regard to it.

6. Whilst it must be borne in mind that each High Court decision must be read with regard to the particular facts of that case, at [15]-[16], the Court helpfully summarises the applicable legal principles:

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> 15. It is not surprising that such challenges have generally failed. Common sense suggests that alternatives may or may not be relevant depending on the nature and circumstances of the project, including its public importance and the degree of the planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgment for the decision-maker, involving no issue of law.
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> 16. A useful starting-point is the judgment of Simon Brown J. (as he then was) in Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD, where he sought to summarise the effect of the cases:
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> > "There has been a growing body of case law upon the question when it is necessary or at least permissible to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site … These authorities in my judgment establish the following principles:
> > (1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes

would not justify the refusal of planning permission upon the application site.

(2) Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

(3) Instances of this type of case are developments, whether of national or regional importance, such as airports … coal mining, petro-chemical plants, nuclear power stations and gypsy encampments … Oliver LJ's judgment in Greater London Council v Secretary of State for the Environment [52 P&CR 158] suggests a helpful though expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material …'comparability is appropriate generally to cases having the following characteristics: first of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development or at least only a very limited number of permissions.'

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices… and superstores …

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong …."

7. In due course, the Inspector will be invited to conclude that the assessment of alternatives is not necessary in this case. This is

because the land may be developed in any way which is acceptable for planning purposes. It does not fall within the defined classes at §16(3), and even if it does have the characteristics referred to above, it is unnecessary to go into questions of comparability (§16(5)).

'FEAR' AS A MATERIAL CONSIDERATION

8. At §4.22, Mr Williams refers to two Court of Appeal judgments which rehearse the legal principles on when a perception of harm by the local community, arising from the development, can be a material consideration (where it meets qualifications). He relies upon *Newport Borough Council v Secretary of State for Wales* [1998] Env L.R 174.[2] and *West Midlands Probation Committee v Secretary of State for the Environment* (1998) 76 P.& C.R 589.[3]

9. Mr Williams explains that 'fear' is capable of being a material consideration where (a) it relates to the land use matters such as physical emanations from the development that are part of the character of the use; (b) the objections are genuine; and (c) the objections are justified or warranted. He then goes on to explain that the objections can be justified where they are not supported by objective or scientific evidence, for example, where they are based on empirical evidence of past events associated with the use.

10. In *Newport Borough Council*, the case largely concerned the interpretation of an Inspector's decision awarding costs. In reviewing the Costs Decision, the Court also considered the substantive decision too. In that case, the Inspector was found to have erred because he had concluded that the public concern without substantial supporting evidence "*does not amount to demonstrable harm nor is it, on its own, a sound and clear cut reason sufficient to warrant refusal of planning permission*".

[2] See §4.22 of his evidence, and Appendix 1.
[3] See §4.22 of his evidence, and Appendix 2.

11. It is an accepted position that the public perception of risk, even where unsubstantiated, can be a valid consideration to take into account when determining whether to grant planning permission for a potentially hazardous operation.

12. *West Midlands Probation Committee* was a case where the Appellants were refused planning permission to extend a bail and probation hostel to accommodate a further 8 bailees, in a Green Belt location, adjacent to a suburban housing estate. The appeal was dismissed on the basis that the proposal would be likely to exacerbate the disturbance and accentuate the fears of local residents and would impair their living conditions. Whilst the decision was upheld in the High Court, the Court of Appeal, found that *where it is justified*, a fear of crime emanating from a proposed development is *capable* of being a material planning consideration.

13. The Appellant in this case considers that while public perceptions of risk can be a material consideration, the weight in the planning balance will be determined by the extent of the evidence advanced on that particular issue.[4] That is a matter of planning judgement. Accordingly, in due course, the Appellant will invite the Inspector to make findings about the evidence, and therefore, the weight that can be attributed in the planning balance.

14. The Appellant submits that the facts of *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1994] Env LR 11 are relevant in this case. In *Gateshead*, the Appellant challenged the Secretary of State's decision to grant outline planning permission for a clinical waste incinerator to Northumbrian Water plc. It is necessary to rehearse the factual background of this case so that it can be properly understood.

[4] The Appellant also agrees that *where it is justified,* fear of a crime is capable of being a material consideration, though the relevance of that issue to this case is doubted

15. The Northumbrian Water Group plc ("NWG") wanted to construct and operate an incinerator for the disposal of clinical waste on a disused sewage treatment works at Wardley in Gateshead. Planning permission was necessary for the construction and use of the incinerator. Incineration is a prescribed process within section 2 of the Environmental Protection Act 1990 ("the EPA") and Schedule 1 to the Environmental Protection (Prescribed Processes and Substances) Regulations 1991 as amended. An authorisation to carry on the process of incineration is required by section 6 of the EPA.

16. Two grounds of challenge were pursued:

(1) that the Secretary of State could not lawfully say that pollution was a matter which was to be left for the EPA and the regulator: that would amount to an abrogation of planning responsibilities. That there was no evidence that the EPA controls would be adequate; and

(2) that the Secretary of State could not properly be satisfied that these concerns could be dealt with under the EPA regime, it would follow that the proposal would not comply with the third criterion of policy EN16, which spoke of unacceptable consequences in terms of environmental impact and, hence, the proposal would be contrary to the development plan.

17. The Court of Appeal dismissed the appeal for the following reasons:

(1) It was clear that the environmental impact of emissions to the atmosphere *was* a material consideration at the planning stage. It follows that the Secretary of State could not lawfully adopt a policy of hiving-off all consideration of such environmental effects, in their entirety to the EPA regime.

(2) Where two statutory controls overlap, it is not helpful to try and to define where one control ends, and another begins. At one extreme there will be cases where the evidence at the planning

stage demonstrates that potential pollution problems have been substantially overcome, so that any reasonable person will accept that the remaining details can sensibly be left to the EPA authorisation process.

(3) At the other extreme, there may be cases where the evidence of environmental problems is so damning at the planning stage that any reasonable person would refuse planning permission, there being, in effect, no point in trying to resolve very grave problems through the EPA process. Between those two extremes there will be a whole spectrum of cases disclosing pollution problems of different types and differing degrees of complexity and gravity.

18. In *Gateshead*, the Inspector had concluded that there was insufficient information to conclude that the air quality impacts were acceptable. In due course, the Inspector will respectfully be invited to conclude that the air quality effects *are* acceptable in this case. There is no evidence to the contrary before the inquiry.

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