The Planning Inspectorate

Appeal Decision

Site visit made on 9 August 2016

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 19 September 2016

Appeal Ref: APP/P4415/W/16/3148762
Hine Labels Ltd, Hope Street, Rotherham, South Yorkshire, S60 1LH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
- The appeal is made by Mr William Hine o/b Hine Labels Ltd against the decision of Rotherham Metropolitan Borough Council.
- The application ref: RB2015/1079, dated 6 August 2015, was approved on 28 October 2015 and planning permission was granted subject to conditions.
- The development permitted is an 'extension to side'.
- The condition in dispute is no. 5 which states: *Prior to commencement of development a Phase II Intrusive Site Investigation and subsequent risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing by the Local Planning Authority. The above should be conducted in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11' and Contaminated Land Science Reports (SR 2-4)*.
- The reason given for the condition is: *To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors*.

Main Issue

1. The main issue is whether it is necessary and reasonable to require a site investigation and risk assessment – and, if so, what type of site investigation – with regard to evidence that the appeal site may be affected by contamination.

Planning Policy

Use of Conditions

2. The *National Planning Policy Framework* (the Framework) expects that planning conditions are only imposed where they are necessary, relevant to planning and the development permitted, enforceable, precise and reasonable in all other respects[1]. The Government's online Planning Practice Guidance (PPG) advises in paragraph 21a-004-20140306 that conditions which place unjustifiable and disproportionate burdens on an applicant will fail the test of reasonableness.

Contamination

3. The Framework states that where a site is affected by contamination, responsibility for securing a safe development rests with the developer and/or landowner. It seeks to ensure that a site is suitable for its new use, taking account of ground conditions including pollution arising from previous uses and any proposals for

[1] The Framework is a statement of Government planning policy; it is not 'legislation' as the Council stated.

mitigation. After remediation, land should not be capable of being determined as contaminated land under Part IIA of the Environmental Protection Act 1990 (EPA). Further guidance on dealing with contamination is set out in the PPG.

4. Policy ENV3.7 of the *Rotherham Unitary Development Plan* (UDP) states that planning permission will not be granted for development which is likely to give rise to pollution beyond acceptable standards or that is incapable of being avoided by preventative or mitigating measures. Policy CS28 of the *Rotherham Local Plan – Core Strategy 2013-2018* (CS) expects development to contribute to securing a healthy and safe environment, including by addressing any risks to health or safety from the environment. These policies are broadly consistent with the Framework.

5. The Publication Sites and Policies Local Plan (SPLP) was due for examination in summer 2016. SPLP Policy SP57 requires that where land is known or suspected of being contaminated, it should be demonstrated that there is no significant harm or risk of significant harm to human health or the environment. Any necessary remedial action should be undertaken to safeguard users or occupiers of the site or neighbouring land, and protect the environment, from contamination during development and in the future. I am not aware as to whether there are any outstanding objections to Policy SP57, but again the provisions cited are consistent with the Framework, such as to carry moderate weight.

Reasons

The Site and Approved Extension

6. The appeal site includes a building used for the manufacture of printed labelling. The unit is some 30m across and 24m deep; the approved side extension would widen the building by an additional 12m. I saw that the extension would stand close to the existing car park on the site – and an area used for the storage of refuse, possibly including hazardous waste. The appeal building lies within a well-established industrial estate, but I saw that land to the north of the site – again close to the approved extension – is neglected and used for the storage of vehicles.

Background to the Appeal

7. The planning permission subject to this appeal – the '2015 permission' – was granted subject to eight conditions, four of which concern land contamination. For the avoidance of doubt, no. 5 is the only 'disputed condition'[2].

8. The appellant objects that a 'Phase II Intrusive Site Investigation' and risk assessment would be costly and potentially unnecessary. Such an investigation would essentially involve obtaining samples and carrying out testing from exploratory holes to obtain information about ground conditions. The appellant argues that the disputed condition should be removed and – if there is a genuine risk of contamination – then another condition should be imposed which only requires a Phase I Site Investigation, involving a desk study and site walkover.

9. Planning permission (ref: RB2010/1401(FUL)) was granted for a side extension to the appeal building on 15 December 2010. Condition no. 3 imposed on the '2010 permission' required the submission and approval of an 'intrusive site investigation and risk assessment' in relation to contamination. Planning permission was granted in 2011 to develop the side extension without compliance with condition no. 3 (ref: RB2011/0267(VC)) but the 2010 and 2011 permissions lapsed unimplemented, meaning that approval had to be sought afresh for the extension.

[2] Condition no. 6 requires the submission of a Remediation Method Statement as discussed below; conditions nos. 7 and 8 set out requirements in the event that unexpected significant contamination is encountered when the 'development works' are taking place.

10. I have taken account of documents relating to the 2010 and 2011 permissions, but I am not bound to allow this appeal because the Council deleted a similar condition in the past. The 2011 permission pre-dates the NPPF, PPG and CS, and this decision must be based on current planning policy and the evidence before me.

The Evidence of Risk of Land Contamination

11. The appellant has submitted a Desk Top Ground Assessment (DTGA) dated 1 November 2010. This report describes that the site and wider area were initially developed as rows of terraced houses – which were built prior to 1889, demolished after 1968, and replaced by factories and warehouses around 1980.

12. The DTGA notes that 'there may well be backfilled cellars over [a] large section of the site, but the likelihood is that below this there will be competent soil'. A Land Contamination Officer (LCO) at the Council was consulted on the 2015 application; she advised that there is potential for made ground and backfilled cellars from the former housing area. The DTGA does not specify what materials were or could have been used for the backfilling, and the Council's appeal statement suggests that these are unknown. Made ground *could* be in excess of 3m – and it *could* include asbestos and/or degradable materials.

13. The LCO noted that coal could be at or close to the surface, although there are no records of any workings at shallow depths. The DTGA described pre-1911 mining activity, but found that this took place more than 20m from the site boundary and posed no current or future risk to the extension. However, the Coal Authority commented on the application that the site falls within a Development High Risk Area, where there are coal mining features and hazards. The appellant's Coal Mining Risk Assessment Report (October 2015) identifies a 'moderate to high' risk from historic mining legacy features, albeit in relation to land stability[3].

14. The LCO stated that there is a landfill site within 171m of the site, but this was not mentioned in the DTGA, which concluded that other than backfilled cellars, no 'abnormal' hazards are anticipated in relation to the development. In my view, the DTGA does not contain sufficient information or analysis to support that finding.

15. The LCO advised that, given the past uses in the area, it is likely that some land contamination has occurred, and potential sources may include naturally occurring metals in made ground and surface soils; made ground associated with the former houses and backfilled cellars; asbestos associated with the former structures; and/or ground gas associated with made ground, potential shallow coal seams and the landfill site. I see no reason to dispute that assessment – and also note that the past demolition and construction works in the area pre-dated the EPA. There is no information before me as to what measures, if any, were taken to investigate or remediate potential contamination prior to the development of the appeal building.

16. The approved extension would be built with shallow foundations but nevertheless some excavation of the site would be required. In my view, the appellant has not substantiated his assertion that operations would be 'unlikely' to 'involve increased risk of exposing contamination receptors to sources of significant contamination'. The Yorkshire and Humberside Pollution Advisory Council (YAHPAC) Technical Guidance may not include industrial units in its list of vulnerable uses but there is a realistic risk that, in particular, workers contracted to build the extension could be exposed to contamination as described by the LCO.

[3] Doubtless for this reason, there is no appeal against condition no. 4 on the 2015 permission, which requires further investigations and remediation if necessary to ensure the stability of the land.

17. Thus, and in accordance with UDP Policy ENV3.7, CS Policy CS28, SPLP Policy SP57 and the Framework, I find that it is necessary to impose a condition requiring the carrying out of a site investigation and risk assessment before development begins.

The Disputed Condition

18. The LCO recommended that the disputed condition be imposed on any planning permission granted, but she was not obliged to consider whether the condition would comply with the tests set out in the Framework. The Planning Officer's report on the 2015 application stated that the recommended conditions would be 'acceptable and relevant' – but did not refer to necessity or reasonableness.

19. While I have found that a site investigation would be necessary, there is nothing in the Framework, UDP, CS or SPLP to indicate that a Phase II Site Investigation and risk assessment should be required in the first instance. PPG paragraph 33-007-20140612 gives guidance on the approach to be taken (<u>with my emphases</u>):

    …If there is a reason to believe contamination could be an issue, developers should provide <u>proportionate but sufficient</u> site investigation information (a risk assessment) to determine the existence or otherwise of contamination, its nature and extent, the risks it may pose and to whom/what (the 'receptors') so that these risks can be assessed and satisfactorily reduced to an acceptable level…

    The risk assessment should also identify the potential sources, pathways and receptors ('pollutant linkages') and evaluate the risks. This information will enable the local planning authority to determine whether further more detailed investigation is required, or whether any proposed remediation is satisfactory.

    <u>At this stage, an applicant may be required to provide at least the report of a desk study and site walk-over.</u> This may be sufficient to develop a conceptual model of the source of contamination, the pathways by which it might reach vulnerable receptors and options to show how the identified pollutant linkages can be broken.

    <u>Unless this initial assessment clearly demonstrates that the risk from contamination can be satisfactorily reduced to an acceptable level, further site investigations and risk assessment will be needed…</u>

20. I consider that the DTGA is possibly out of date and does not address all of the matters raised by the LCO. It was prepared by structural engineers rather than environmental consultants. In my view, it would be reasonable and consistent with the advice in the PPG – and from the YAHPAC – to require that the appellant submits another desk-top study, or Phase I Site Investigation, in the first instance.

21. However, the Phase I Site Investigation would need to include a recommendation as to whether a Phase II Site Investigation is needed. To be clear, the Phase I report would need to show that any risk from contamination can be satisfactorily reduced to an acceptable level – and if this cannot be demonstrated, a Phase II Site Investigation would be required before development commences.

Conclusion

22. I cannot comment as to whether the Council followed its own validation policy in dealing with the 2015 application, or denied the appellant an opportunity to submit evidence before permission was granted. For the reasons given and with regard to all other matters raised, I conclude that the appeal should be allowed. The disputed condition is not necessary or reasonable, but there is evidence that the site may be affected by contamination. I shall delete the disputed condition and

substitute another which requires the carrying out of a Phase I Site Investigation initially – and then a Phase II Site Investigation if required.

23. This new condition is necessary to ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors, in accordance with UDP Policy ENV3.7, CS Policy CS28 and SPLP Policy SP57, the Framework and the PPG. The condition is reasonable because the appellant will not be put to unjustifiable or disproportionate expense.

Other Matter – Condition no. 6

24. As noted above, the appellant has not appealed against condition no. 6 – but it is imprecisely worded. It requires the submission of a Remediation Method Statement 'subject to the findings of item 1 above'.

25. Planning conditions need to be read in the context of the permission as a whole, and in a common sense way. I interpret 'subject to the findings of item 1 above' as meaning 'subject to the findings of the site investigation and risk assessment undertaken in accordance with condition no. 5'. While that conclusion may be obvious, it would be preferable if condition no. 6 was explicit and precise.

26. In determining a s78 appeal against a grant of permission subject to conditions, the whole permission is before me; I may vary any part of the Council's decision. I shall delete condition no. 6 and substitute another condition as described. I am satisfied that I can make this amendment without prejudice to any party.

Decision

27. The appeal is allowed and the planning permission (ref: RB2015/1079) for extension to side at Hine Labels Ltd, Hope Street, Rotherham, South Yorkshire, S60 1LH, granted on 28 October 2015 by Rotherham Metropolitan Borough Council, is varied by deleting conditions nos. 5 and 6, and substituting for them the following conditions:

5) a) No development shall commence until a Phase I site investigation and assessment of the risks posed by any contamination shall have been submitted to and approved in writing by the local planning authority (LPA). This assessment must be undertaken by a suitably qualified contaminated land practitioner, in accordance with British Standard BS 10175: Investigation of potentially contaminated sites – Code of Practice; DEFRA and the Environment Agency's Model Procedures for the Management of Land Contamination (CLR 11) (or equivalent British Standard and Model Procedures if replaced); and Contaminated Land Science Reports (SR 2-4), and shall assess any contamination on the site, whether or not it originates on the site. The assessment shall include:

i) A desk study of the likely extent, scale and nature of contamination, with regard to the past uses of the site and surrounding area;

ii) Identification of the potential risks to:
- human health;
- property (existing or proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes;
- adjoining land;
- ground waters and surface waters;
- ecological systems; and
- archaeological sites and ancient monuments; and

iii) Recommendations as to whether any risk from contamination can be satisfactorily reduced to an acceptable level, or whether a Phase II intrusive site investigation and risk assessment are required.

b) Subject to the findings of item 5)a), no development shall commence until a Phase II intrusive site investigation and risk assessment has been submitted to and approved in writing by the LPA. This assessment must be undertaken by a suitably qualified contaminated land practitioner, in accordance with British Standard BS 10175: Investigation of potentially contaminated sites – Code of Practice; DEFRA and the Environment Agency's Model Procedures for the Management of Land Contamination (CLR 11) (or equivalent British Standard and Model Procedures if replaced); and Contaminated Land Science Reports (SR 2-4), and shall assess any contamination on the site, whether or not it originates on the site.

6) Subject to the findings of the site investigation and risk assessment(s) undertaken in accordance with condition no. 5, a Remediation Method Statement shall be submitted to and approved by the local planning authority prior to the commencement of any development or remediation works. Any works proposed in the Remediation Method Statement shall be of such a nature as to render harmless any identified contamination, given the proposed end use of the site and surrounding environment, including any controlled waters; and shall ensure that the site must not qualify as contaminated land under Part IIA of the Environment Protection Act 1990 in relation to the intended use of the land after remediation. Any approved remediation works shall be carried out in full on site under a quality assurance scheme to demonstrate compliance with the proposed methodology and best practice guidance. The local authority must be given two weeks written notice of the commencement of the remediation scheme works.

Jean Russell

INSPECTOR