Appendix 2

IN THE MATTER OF STAFFORD PARK, LISTON

OPINION

Introduction and Summary of Conclusions

1. I am instructed on behalf of Mr. Allan Binks and the Liston Residents Association and asked to advise in relation to a planning application for development at Stafford Park, Liston ("the Site") of 100 new build dwellings, and conversion of an existing building to 22 flats. The local planning authority is Braintree District Council ("the Council").

2. In summary, I conclude as follows:

   (1) The polluter pays principle is capable in law of being a material planning consideration;

   (2) Whether the principle applies to this particular planning application depends largely on (a) whether the Site falls within the contaminated land regime in Part IIA of the Environmental Protection Act 1990 ("the 1990 Act") and (b) whether, if planning permission is not granted, the cost of remediation is likely to be borne by the public purse;

   (3) Applying those criteria here, it is highly likely that (a) the Site is a "contaminated site" as defined in the 1990 Act and (b) absent the grant of planning permission for enabling development, the cost of remediation is unlikely to be borne by the public purse. Therefore, in my opinion, the polluter pays principle is a material consideration to be taken into account by the Council in determining the planning application.

   (4) The weight to be attached to the principle is a matter for the Council. However, I conclude that, applying the principle here, it would be open to the Council to

limited weight to the benefits of remediation when deciding whether the Development should be justified as enabling development;

(5) The answer to whether the remediation costs should be excluded from the viability appraisal turns on the question of whether the polluter pays principle applies at all, and how much weight should be attached to it. If the polluter pays principle does apply, and is given significant weight, then it follows that those costs should be excluded.

Factual Background

The use of the Site

3. The Site is a 23 hectare industrial complex with adjacent associated landfill site and agricultural land. The former factory area comprises a mixture of traditional and modern industrial units totalling in excess of 17,770sq m (191,285sq ft). The Site is located approximately 1.5km west of Long Melford. It is split into two halves by the River Stour. To the North of the river is the landfill site, and to the south is the former factory area.

4. Industrial development at the Site commenced in the 1800s with a Flax Mill for the production of textile fibres.

5. In or around 1899, Stafford Allen and Sons ("Stafford Allen") purchased the Site and it was used for the extraction of fragrances. In the early part of the 20th century further development took place and an essential oil distillery was created for the extraction and refining of fragrances; a process which involved the use of organic solvents. By the 1920s, production included pharmaceutical products, textile dyes and controlled drugs. During the Second World War, the manufacture of DDT was undertaken.

6. In 1966, Bush Boake Allen Ltd ("Bush") was formed through the merger of Stafford Allen, WJ Bush & Co and A Boake, Roberts and Co. I understand that Bush still trades and has net assets of £42.5m. Manufacturing activities, focussing primarily on food colorants and flavourings, were carried out since the 1980s.

7. In 2002, Bush was acquired by International Flavours & Fragrances I. F. F. (Great Britain) Ltd ("IFF"). IFF acquired the Site at the same time and carried out manufacturing

at Stafford Park until 2004. At that point, manufacturing at the Site ceased and the buildings have since in part been let for various employment uses. IFF has a net value of £250m.

8. The current owner, Redding Park Development Company Ltd ("Redding Park") purchased the site on 2nd May 2007 from IFF for £2.9m. The Site was purchased following extensive site survey work, and with knowledge of site contamination. A deposit was made into a joint account of £250,000 which would act as an indemnity to IFF, which is registered at HM Land Registry. The indemnity is in respect of *"all matters"*, and in my opinion this is likely to include matters relating to contamination. A mandate was also given to IFF that Redding Park would assume liability for all environmental, or other, responsibilities for the Site.

Planning History

9. On 6th May 2015, an outline planning application (ref: 15/00565) was submitted to the Council for the following development ("the Development"):

"Outline planning application (with all matters reserved except for access) for the proposed development of up to 100 dwellings and the change of use of existing buildings to create up to 22 apartments and a community centre, to enable the remediation of the adjoining licensed landfill site to the north. Proposals to also include the demolition of the other existing buildings, associated works to remediate the land on the application site, flood attenuation measures, reinstatement of the River Stour to include the removal of the sluice gate and the creation of a series of rock riffle weirs and associated infrastructure improvements, landscaping and provision of public open space."

10. Through a Screening Opinion dated 3rd July 2014 it was concluded that the development would require an EIA.

11. On 22nd February 2017, a planning application (ref: B/15/00671/FUL) was submitted to Babergh District Council, the local planning authority in respect of the landfill component of the Site, for the following development ("the Remediation Development"): *"Remediation works to licensed landfill site north of the River Stour (to enable the surrender of the landfill license), in conjunction with the residential development of land to the south of the River Stour (Stafford Works)"*

12. I am instructed that the Development does not comply with the Local Plan, as the Site is in an unallocated location in the countryside, outside of any settlement boundary, and is in an unsustainable location. This is confirmed by the Inspector's report into the Examination of the Council's Core Strategy, where he stated (at paras. 40.3.2 – 40.3.3):

"…The Site, in fact, is not in a sustainable location for large scale housing such as that proposed. Though the proposed allocation would partly contribute to the government's commitment to the re-use of previously developed land it would be unsatisfactory in relation to the government's desire to concentrate housing provision mainly within or adjacent to urban areas…it is remotely located in the countryside and, though the re-use of existing buildings for employment purposes would be encouraged by the Council, large-scale development such as that proposed would be inappropriate."

13. The applicant seeks to justify the grant of planning permission on the basis that the Council does not have a five year housing land supply ("5YHLS") and that the Development can be justified on the basis that it is "enabling development" in order to fund the proposed Remediation Development. I have seen two estimates for the cost of this remediation which puts the cost at either £6,167,367.50 or £7,218,335.00.

14. It is this latter justification that I will consider in this Opinion: in particular, the weight that should be attached to the benefits of remediation (which, in turn, is relevant to the question of whether these benefits outweighs the Development's non-compliance with the development plan).

15. In this respect, there can be no doubt that the Site is currently contaminated. This is confirmed by numerous surveys that have been carried out: see the Environmental Statement ("ES") at Chapter 10. The Environment Agency ("the EA") has categorised the Site as "high risk" in relation to potential groundwater contamination, a ranking based on a lack of technical precautions to prevent/limit groundwater pollution: see letter from the EA to James Cartlidge MP dated 3rd August 2015. As it is put in the "Contaminated Land and Remediation" section of the ES at para. 10.9.8:

"In general terms, it is concluded that if the site is not remediated contamination in the soils and groundwater have the potential to impact adversely upon the River Stour (particularly during flood events) and potentially upon potable water supplies in the vicinity. Remedial works will be required at the site in order to mitigate the potential

effects of contaminants on the health of current and future site users and upon the water environment."

16. Notwithstanding this, it does not appear that the Site has ever been formally identified as "contaminated land" as it is defined in Part IIA of the 1990 Act: see letter from the EA dated 3rd August 2015.

Analysis

17. I will first consider whether the "polluter pays principle" is a material planning consideration which the Council should take account of when determining the planning application.

18. In determining an application for planning permission, a local planning authority is required, by virtue of section 70(2) of the Town and Country Planning Act 1990 ("the TCPA 1990"), to have regard to:

"(a) the provisions of the development plan, so far as material to the application,
(b) any local finance considerations, so far as material to the application, and
(c) any other material considerations."

19. In deciding whether a particular consideration is "material" for the purposes of section 70(2) of the TCPA 1990, two questions must be considered. The first is whether the consideration in question is one *capable* of being a material consideration for planning purposes. The second is whether it is *in fact* material for the purposes of the determination of the particular application in question: see R (on the application of WE Black Limited) v St. Albans City and District Council [2015] EWHC 2059 (Admin) at para. 33.

20. Turning first to the question of whether the polluter pays principle is capable of being a material consideration. This is a question of law, and is not a matter for the Council's own discretion: see Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 per Lord Hoffmann at page 780F.

21. A broad range of considerations are capable of being a material planning consideration. The test is that set out by Lord Scarman in Westminster City Council v Great Portland Estates Plc [1985] AC 661 (at p.669H to p.670C-E) i.e. whether the consideration *"serves*

a planning purpose", which is one that *"relates to the character and use of land"*. As Cooke J also put it in Stringer v Minister for Housing and Local Government [1971] 1 WLR 1281 at page 1294G to H, *"in principle … any consideration which relate to the use and development of land is capable of being a material consideration"*

22. In this respect, it is well established that material planning considerations include general planning principles including those deriving from European Union law. This includes the precautionary principle (see, for example, R (on the application of) Trevone Objectors Group v Cornwall Council [2013] EWHC 4091 (Admin)), the proximity principle (see, for example, North Lanarkshire Council v Scottish Ministers [2012] CSOH 150), and the principle of self-sufficiency (see, for example, R (on the application of Blewett) v Derbyshire County Council [2004] EWCA Civ 1508). This is because these are general planning principles which relate to the use and development of land, and also because they derive from EU law and so are capable of amounting to material considerations in determining domestic planning applications.

23. In my opinion, the polluter pays principle is clearly capable in law of being a material planning consideration. The "polluter pays principle" is a principle of EU law which states that since polluters are responsible for the pollution they have caused, and have derived a profit from doing so, they should therefore bear the cost of measures aimed at preventing and reducing pollution.

24. The principle has been recognised in EU law. Article 191(2) of the Treaty of the Functioning of the EU ("TFEU") states that:

> *"Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*

25. In domestic law, the polluter pays principle is given effect in the contaminated land regime contained in Part IIA of the 1990 Act. This deals with the identification of *"contaminated land"* (see section 78A(2)), with its *"remediation"* (see section 78A(7)) and, in section 78F, with the *"determination of the appropriate person to bear*

responsibility for remediation". The 1990 Act therefore deals with the question of where liability should lie for the cost of cleaning up land. Underpinning the regime is the polluter pays principle. Put simply, the 1990 Act provides that the *"appropriate person"* to clean up land will be the person who *"caused or knowingly permitted"* the contaminating substances to be in, on or under the land (known as a "Class A" appropriate person: see section 78F(2) and (3) of the 1990 Act). It is only if no Class A person is found after reasonable enquiry that liability will fall to the current owner or occupier (a Class B person) (section 78F(4), 1990 Act).

26. In my opinion, in the same way that the other principles of EU law referred to above are seen as being capable as amounting to a material consideration, so too is the polluter pays principle.

27. I have been unable to find any case-law which directly addresses the question of whether the polluter pays principle is capable of amounting to a material planning consideration (which may be because the point is trite and not capable of dispute). However, in a number of appeal decisions, Inspectors have treated the principle as being capable of being material, with the only dispute being whether it was material on the facts of each appeal and, if so, how much weight should be attached to it. For example, in appeal decision ref: APP/C4615/A/08/2066072 (considered further below) the Inspector proceeded on the basis that the polluter pays principle was capable of being a material planning consideration: see paras. 13-17.

28. Therefore, I am firmly of the view that the polluter pays principle of capable of being a material planning consideration.

29. Next, I will turn to the question of whether the principle is in fact material for the purposes of determining this particular planning application. This turns on two considerations: first, whether the Site is, or is likely to be, land that falls within the contaminated land regime in Part IIA of the 1990 Act, and second, whether there are any "appropriate persons" on whom liability will fall for remediating the contamination on the site.

30. Taking these in turn, and applying them to the facts of this case:

31. The first key consideration in determining whether the polluter pays principle is material in determining the current planning application is whether the Site is, or is likely to be, land that falls within the contaminated land regime in Part IIA of the 1990 Act. That is because the polluter pays principle is given effect in domestic law through Part IIA of the 1990 Act (see above). Unless contaminated land falls within Part IIA, there is no domestic liability on polluters and/or owners to remediate the land, and to bear the costs of doing so. It follows that if the Site does not fall within the Part IIA regime, the principle is of less relevance.

32. I note that in two appeal decisions it was found that the polluter pays principle was not material in those particular appeals because the land in question did not fall within Part IIA of the 1990 Act:

    (1) In appeal decision ref: APP/Q1825/A/02/1102705, relating to a contaminated site in Redditch, the Secretary of State did not apply the principle because the site did not fall within Part IIA of the 1990 Act (see paragraph 56 of the Inspector's Report which was endorsed by the Secretary of State at paragraph 13).

    (2) Similarly, in appeal decision ref: APP/C4615/A/08/2066072 relating to a site at Dudley, an Inspector did not consider that the polluter pays principle applied because, inter alia, there was no indication that the Part IIA regime would apply: see paragraphs 14 and 16.

33. Therefore, in deciding whether the polluter pays principle is a material consideration, it will be necessary to consider whether the land is likely to fall within the Part IIA regime. Not all contaminated land does. As it is put in the Government's statutory guidance on Contaminated Land (April 2012) ("the Guidance") at paragraph 1.3 and 3.21-3.22:

    "1.3 *Under Part 2A the starting point should be that land is not contaminated land unless there is reason to consider otherwise. Only land where unacceptable risks are clearly identified, after a risk assessment has been undertaken in accordance with this Guidance, should be considered as meeting the Part 2A definition of contaminated land."*

    3.21 The Part 2A regime was introduced to help identify and deal with land which poses unacceptable levels of risk. It is not intended to apply to land with levels of contaminants

in soil that are commonplace and widespread throughout England or parts of it, and for which in the very large majority of cases there is no reason to consider that there is an unacceptable risk.

3.22 Normal levels of contaminants in soil should not be considered to cause land to qualify as contaminated land, unless there is a particular reason to consider otherwise. Therefore, if it is established that land is at or close to normal levels of particular contaminants, it should usually not be considered further in relation to the Part 2A regime and the local authority should have regard to paragraphs 5.2 to 5.4 of this Guidance."

34. Part 2A of the 1990 Act defines "contaminated land" in section 78A(2) as being any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land that: (a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) significant pollution of controlled waters is being caused, or there is a significant possibility of such pollution being caused. In order for land to fall within the contaminated land regime in Part IIA, there must be at least one significant contaminant linkage (contaminant, pathway and receptor), resulting from the presence of at least one contaminant.

35. In this respect, whilst the Site has not been formally identified by the Council as contaminated land falling with Part IIA, the applicant's own assessment in the Contaminated Land chapter of the ES concludes that without remediation the existing contaminants on the Site are likely to result in harm to designated receptors, including groundwater and future site users (see Table at 10.5.1 read together with Table at 10.2.8). The EA classes the Site as "High Risk": see above. Given this, it is highly likely that the Site would be classed as "contaminated land" under section 78A(2) of the 1990 Act. Certainly, in the absence of any evidence to the contrary, it would be unsafe for the Council to conclude otherwise.

36. The second factor that will determine whether the polluter pays principle is material on the facts of this case is whether there are any "appropriate persons" on whom liability will fall for remediating the contamination on the site. That is because if there are no such persons, liability for remediating the land will fall on the enforcing authority (either the Council, or occasionally the EA). In that situation, the cost of remediation will be borne by the public purse (and not by the polluter) and therefore the principle is of limited relevance.

37. For the purposes of determining whether there are any "appropriate persons" on whom liability will fall for remediating the contamination on the site, I will assume for present purposes that (as above) there is a realistic prospect of the Site being identified as contaminated land under Part IIA of the 1990 Act. In that event, an "appropriate person" will be required to pay for any remediation action relevant to the contaminant that forms part of the significant contaminant linkage.

38. The identification of appropriate persons is set out in section 78F of the Act. This provides as follows:

"(2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.

(3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.

(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.

(5) If, in consequence of subsection (3) above, there are things which are to be done by way of remediation in relation to which no person has, after reasonable inquiry, been found who is an appropriate person by virtue of subsection (2) above, the owner or occupier for the time being of the contaminated land in question is an appropriate person in relation to those things."

39. Clearly, at this stage, determining with any certainty whether there are any appropriate persons is a difficult exercise. There has been no formal contaminated land assessment, and the information I have as to the activities that were carried out at the Site (and the contaminant linkages that may have been introduced) is understandably "high level". However, at this stage, for the purposes of deciding whether the polluter pays principle is material, I consider that the Council need only consider whether it is likely that appropriate persons will exist and, if so, who they are. It is not necessary for a detailed

examination to be carried out. I note that a similar approach was taken in appeal decision ref: APP/R3650/A/06/2028286, at para. 10.59 and 10.87.

40. In determining who is an "appropriate person", each significant contaminant linkage is treated separately (unless it is reasonable to treat more than one linkage together because the same parties are liable). For the purposes of what follows, for the sake of simplicity, I will assume that the all of the companies who have manufactured from the Site are liable for all of the contaminant linkages. It may well be the case, however, that some of the contaminant linkages are particular to one company. That will be a matter for detailed consideration as and when the Council identifies the Site as being contaminated land within the Part IIA regime.

41. To determine who the relevant "appropriate persons" are in respect of each linkage, the first stage is to identify all those who have *"caused or knowingly permitted"* the contaminant in question to be in, on or under the land: see s. 78F(2). Any such persons constitute a "Class A liability group" for the significant contaminant linkage.

42. In this case, it would appear that initially Stafford Allen *"caused or knowingly permitted"* contaminants to be on the Site. Stafford Allen however merged with two other companies to form Bush, and ceased to exist as a separate entity. Bush also appear to have *"caused or knowingly permitted"* contaminants to be on the Site, but it was in turn was acquired by IFF. As set out above, Bush still exists as a separate entity, with assets of £42.5m. Its parent company in the UK has assets of £250m and in the US of USD 1.6bn.

43. In a situation where one company has been acquired by another, the law is unclear on whether it can be found to be an appropriate person under s. 78F(2). In R(National Grid Gas plc) v Environment Agency [2007] 1 WLR 1780, the House of Lords considered this point, but did not reach a firm conclusion. Lord Neuberger stated (at para. 29) that *"there are no doubt arguments for extending the "polluter pays" principle to a company which has acquired the whole of the business (or at least the whole of the relevant part of the business) of the polluter, at least in some circumstances, perhaps particularly where the company concerned has taken a statutory transfer of the business."* However, he pointed out that there were also arguments against, and did not reach a concluded view (as it was unnecessary on the facts of that case). However, Stephen Tromans QC concludes in

Contaminated Land (2nd edn) at para. 5.70 that where a company is acquired by another company *"…the original polluting company still exists and can be found, albeit that the ownership of its shares have changed…"*

44. In light of the above, it is certainly very arguable (and probably the case) that Stafford Allen and Bush are capable of being identified as Class A "appropriate persons" under the 1990 Act for each contaminant linkage on the Site. Given that Stafford Allen has been acquired by Bush (which in turn still operates as a separate entity notwithstanding the fact that it has been acquired by IFF), in reality that means that Bush would be required to bear the remediation costs for which Stafford Allen is liable.

45. Further, IFF would also appear to be an appropriate person on the basis of its activities carried out at the Site between 2002 and 2004, which means that it may have caused or knowingly permitted contaminants to be on the Site. On this basis it too would be a Class A appropriate person. Therefore, albeit on limited information, it appears likely that there is a Class A liability group for the contamination on the Site consisting of two or more Class A persons. Both Bush and IFF have considerable assets.

46. In a situation where there are two or more Class A persons, it is necessary then to decide whether any of the Class A persons should be excluded from liability. As it is put in section 78F(6) of the 1990 Act:

"Where two or more persons would, apart from this sub-section, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing."

The guidance referred to is the statutory Guidance referenced above. If all of the members of any liability group benefit from an exemption, the authority should treat the significant contaminant linkage in question as an orphan linkage, which means that the enforcing authority (the Council, or in some cases the EA) bears liability.

47. The basis for determining whether members of a Class A liability group can be excluded from liability are set out in section 7(c) of the Guidance. In light of the information I

have, I have considered whether any of the exceptions apply. My opinion as matters currently stand is that none of the exceptions set out in the Guidance applies so as to exclude Stafford Allen, Bush or IFF.

48. In particular, I do not consider that the exclusions in relation to sale with information (see paras. 7.49-7.50 of the Guidance) or agreements as to liabilities (see paras. 7.29-7.30 of the Guidance) applies so as to exclude any of these companies (and in particular, IFF). Taking each in turn:

    (1) Under the Guidance, the exclusion on sale with information does not apply to "related companies" (as defined in para. 7.37). This means that neither Stafford Allen nor Bush (who both appear to have sold to related companies) can avoid liability on the grounds that the purchaser was aware of the contamination. In particular, I note that when Bush was sold to IFF, there was a transfer of assets. The annual report of IFF stated (at page 23) that *"Goodwill arose upon the transfer of the trade, assets and liabilities from Bush Boake Allen Limited to the Company on 28 April 2001. The goodwill arising was amortised over a two year period."* Further, the exception does not apply to exclude liability where the land is sold to a non-polluter (meaning that IFF are not excluded from liability simply on the grounds that Redding Park was aware of the contamination when it purchased the Site).

    (2) Similarly, the exclusion of liability where parties have reached an agreement between themselves on liability only applies where this agreement is made between two "appropriate persons", i.e. in this case, two members of the same Class A liability group. As the indemnity and mandate made between IFF and Redding Park was not made between two members of the same Class A liability group, it does not apply so as to exclude IFF from liability under the contaminated land regime in Part IIA.

49. Given this, I consider it likely that there is at least one Class A appropriate person in respect of the Site, who will be found to be liable for the cost of remediating the contamination at the Site. It will be for the Council to apportion the costs of remediation between Bush and IFF.

50. In that case, there would be no liability on the Redding Park under the Part IIA regime. That is because it is only if *"after reasonable enquiry"* no Class A person has been found for any significant contaminant, then the current owner or occupier of the land is the appropriate person (known as a "Class B person"): see s.78F(4).[1] That said, the indemnity and mandate means that, whilst Redding Park does not bear statutory liability under the Part IIA regime (because it is not a Class A person), because of the indemnity and mandate it will in reality have to pay any sum which IFF is found to be liable for under the regime as a consequence of IFF being a Class A person.

51. Ultimately, therefore, one way or another, either Bush, IFF or Redding Park is likely to be required to pay to remediate the Site. This is the effect of the polluter pays principle. Bush and IFF are "polluters" and are therefore required to pay for the cost of remediation. Redding Park is not a direct polluter. However, that does not mean that the principle does not apply. It can be fairly assumed that Redding Park acquired the Site at a reduced price on the basis that it would indemnify IFF for its liabilities in respect of remediation. Given that the estimated cost of remediation is in the region of £7m, this reduction in price is likely to be substantial. In this way, if Redding Park is able to avoid the cost of remediation, it will have (albeit indirectly) benefitted from the pollution that has been carried out. Therefore, applying the polluter pays principle, it too should be required to pay for the cost of remediation.

52. Therefore, in light of the above:

    (1) The polluter pays principle is capable in law of being a material planning consideration;

    (2) Whether the principle in fact applies depends on whether (a) the Site falls within the contaminated land regime in Part IIA and (b) whether or not the cost of remediation is likely to be borne by the public purse;

[1] There is an exception where the significant contaminant linkage relates solely to the significant pollution of controlled waters, in which case the Council – as enforcing authority – bears the cost of any remediation to be carried out – but it does not appear that that is likely to be the case here.

(3) Applying those criteria here, it is highly likely that (a) the Site is a "contaminated site" as defined in the 1990 Act and (b) absent the grant of planning permission for enabling development, the cost of remediation would not be borne by the public purse.

(4) Therefore, the principle is a material consideration to be taken into account by the Council in determining the planning application.

53. The question of how much weight to be attached to the principle is ultimately a matter for the decision maker (see Tesco Stores). However, in my opinion, it would be open to the Council to give limited weight to the benefits of remediation. This is for three main reasons:

(1) First, if planning permission is not granted, the cost of remediating the Site is likely to fall on either or both of Bush and IFF (with IFF's costs being underwritten by Redding Park). There is no suggestion that these companies would be unable to afford to carry out the works. In this respect, I note that in called-in decision (ref: APP/R3650/A/06/2028286), reduced weight was attached to the benefits of remediation on the basis that the contamination authority (in that case the Environment Agency) would be under a duty to remediate the site, and would receive government funding to do so: see para. 10.80 and 10.87. A similar conclusion can be reached here (and in fact, even less weight given to the benefits of remediation on the basis that the cost will not be borne at all by the public purse).

(2) Second, I have seen no consideration in the application of whether the applicant's scheme is the only viable option to prevent the continued contamination of the Site. It may well be the case that there are alternative development schemes that would fund the remediation and which are not contrary to the development plan. As I understand it, no such analysis has been carried out. At the very least, the Council should require this to be satisfactorily demonstrated. Should there in fact be such scheme, this would further reduce the weight that can be attached to the remediation benefits: see appeal decision ref: APP/R3650/A/06/2028286 at para. 10.88.

(3) Third, there does not appear to be any consideration in the application of whether there are any temporary measures that can be employed which would avoid the short-term risk of environmental damage or harm to human health. If there are, this would again reduce the weight that can be attached to the benefit of remediation: see appeal decision ref: APP/R3650/A/06/2028286 at para. 10.61.

54. It is of course correct that the Guidance recognises that the grant of planning permission for development which includes remediation should be preferred to use of the contaminated land regime in Part IIA. As it is put in the Guidance at para. 1.5:

"Enforcing authorities should seek to use Part 2A only where no appropriate alternative solution exists. The Part 2A regime is one of several ways in which land contamination can be addressed. For example, land contamination can be addressed when land is developed (or redeveloped) under the planning system, during the building control process, or where action is taken independently by landowners. Other legislative regimes may also provide a means of dealing with land contamination issues, such as building regulations; the regimes for waste, water, and environmental permitting; and the Environmental Damage (Prevention and Remediation) Regulations 2009."

55. However, this Guidance does not consider the particular issue of enabling development where (as here) the Development in question is in principle unacceptable, and is being justified on the basis of the remediation benefits. In such a situation, it would (in my opinion) be reasonable for the Council to conclude that remediation through Part IIA is preferable to granting planning permission for an unsustainable development. It is for this reason that this guidance was given limited weight in appeal decision ref: APP/R3650/A/06/2028286.

56. Overall, therefore, I conclude that it would be open to the Council to give limited weight to the benefits of remediation.

57. Finally, I have considered whether the expenditure involved in remediating the site should be deducted from the potential value of the completed development in assessing the residual land value, and therefore the economic viability of the alternative development under consideration.

58. I can deal with this issue briefly.

59. As I understand it, the purpose of the viability appraisal is to determine what level of affordable housing and section 106 contributions can be reasonably provided on the Site without it becoming unviable: see section 1.1 of the appraisal. Therefore, this particular issue is only likely to be considered if the Council concludes that the development is acceptable in principle as enabling development, and then turns to consider the level of affordable housing/contributions required.

60. The answer to whether the remediation costs should be excluded turns on the question of whether the polluter pays principle applies at all, and how much weight should be attached to it (see above). If contrary to the above, the Council concludes that the polluter pays principle does not apply, or should only be given limited weight, then it follows that these abnormal costs can be taken into account in deciding the level of affordable housing that can be reasonably provided on the Site. This was the approach taken in appeal decision ref: APP/C4615/A/08/2066072 at para. 17. Conversely, if the polluter pays principle does apply, and is given significant weight (for the reasons set out above), then it follows in turn that those costs should be excluded.

Conclusion

61. My conclusions are set out above at paragraph 2.

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