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30 June 2011

JUDICIAL REVIEW
PREACTION PROTOCOL LETTER
REQUIRES YOUR URGENT ACTION

IT IS ESSENTIAL THAT YOU TAKE ACTION ON THIS PRIOR TO THE INTENDED COMMITTEE MEETING ON 9 JULY (RESPONSE REQUESTED BY 5 JULY)

Dear Sirs

Proposed extension to Camgrain Site comprising additional grain storage facilities and ancillary works including drainage proposals, landscaping and highway improvements – land adjacent to Wilbraham Chalk Pit, West Wratting

Screening opinion dated 10 June 2011

Introduction

1. This is a pre-action letter under the Judicial Review Pre-Action Protocol in relation to the above. Please note that due to the committee meeting on 9 July there is only a very short time for response, unless you agree to defer that meeting pending reconsideration of the matter (see further the end of this letter). We are grateful to you for drawing our attention to the agenda for that meeting.

Our clients

2. The prospective claimants are Dr Alex and Mrs Jayne Bateman of Valley Farm Cottage, London Road, Balsham, Cambridge CB21 4HH.

The decision in question

3. The decision by South Cambridgeshire District Council of 10 June 2011 opining that the proposed development is not EIA development ("the screening opinion"). The claimants contend that the screening opinion was unlawful for the reasons identified below.

Orders sought

4. The following orders will be sought from the Court:

   a. an order quashing the screening opinion
   b. costs.

Grounds

5. The Claimants' underlying concern is that the proposed development quite clearly fulfills the criteria of nature scale and location for requiring EIA pursuant to directive 85/337/EEC (as amended) and implementing regulations, and that the Council's screening opinion dated 10 June 2011 is unlawful. As set out below, as a matter of conventional domestic jurisprudence there has been a failure to take into account required and material considerations.

6. If the matter needs to proceed to Court, we may in addition invite the Court to reach its own views on the Council's decision having regard to ECJ jurisprudence, although the Council's failings at a domestic level are such that this may not be necessary (as to the former see Buglife [2011] EWHC [746] (Admin) at §86-87; also Case C-2/07 Abrahams and Case C-435/97 Bozen). The latter were referred to in our email of 24 February 2011. The former was supplied on 30 March 2011.

7. You are fully familiar with the background of this matter. It is set out in the judgment of the Court of Appeal dated 22 February 2011 which quashed the planning permission granted on 9 July 2009 in relation to failure to give proper reasons for the original screening opinion made on 17 April 2009. Following that judgment we made further representations as to the need for EIA and refer in particular to our letters of 18 March and (in response to the developers) 30 March, which we attach for reference.

8. We have reviewed the Council's latest decision carefully and note recognition that "likely" environmental effect in context means (or the Council properly treat it as meaning) "possible". On the other hand it has applied a test to the effect that "significant" environmental effects means "major" ones. It states that it does this on the basis of one statement in the [first] recital of the original directive, a "general understanding" of the appropriate approach, and the UK government's approach in Circular 02/99.

9. The Council nevertheless recognises recent case law and EC guidance is to the effect that a lower threshold may apply; and even if it does the Council's opinion remains the same as if applying the significance test as summarised above, ie. "major" effects on the environment.

10. As you are aware the June 2001 EC screening guidance is that a "significant effect" is usefully regarded as "one that ought to have an effect on the development consent decision".

11. Thus in the circumstances the Council's decision is unlawful on at least the following grounds:

    a. It is perverse for the Council to conclude that even if it does apply the lower threshold of significance, there are unlikely to be significant environmental effects. The environmental effects are plainly of significance in the lower threshold sense. For example, it is recognised that there will be effects on landscape, but that these would be "ameliorated" by various measures.

Mitigation of such an impact does not detract from its significance as to deciding the need for EIA (except arguably in certain cases, as discussed eg. in Gillespie [2003] EWCA Civ 400 and Catt [2009] EWCA Civ 1417, though the European Commission have expressed doubt as to the correctness of that approach ie. to the effect that EIA should be required is significant effects are likely without EIA in all circumstances). In any event, here ameliorative landscape measures, even if they worked long term, would be bound while establishing themselves eg. trees growing, to have short and medium term unameliorated effects.

b. In relation to landscape, the Council fails to recognise that it is obliged to judge the effect on this by reference to the whole development and not simply the proposed addition. We believe this is uncontroversial; see also the top half of p.3 of our letter of 30 March.

c. The Council further entirely fails to consider the impact of the development, existing and extended, when viewed from the south, whether from closeby (eg. the road to Valley Farm Cottage) or from further away (eg. the end of the scheduled ancient monument Fleam Dyke on the A11 or from the A11 itself). Even as to existing landscaping measures, the Council acknowledges merely that these "have helped to minimise" visual intrusion. It is precisely this sort of mitigation measure which should be subject to the possibility of public comment via the EIA process. That relevant information may be found in other documents is irrelevant.

d. In relation to the significance of traffic the requirement to construct slip roads and other concerns raised to the Highways Agency in relation to a major trunk route are strongly indicative of the significance of environmental effects if such measures (which might be described as mitigation measures) were not carried out. The Council unlawfully considers the significance of the environmental impact after these measures have been carried out, rather than the position as it should have been when considering the application originally. Alternatively the changes effected are significant positive environmental effects of the development, an issue which the Council has not considered.

e. In relation to cumulation with other development, the screening opinion rightly considers (albeit, as above, in an incorrect way) the cumulation with the existing Camgrain storage facilities. However, and unlawfully, the opinion fails to deal with the cumulation with other development, namely the wind farm at Wadloes Farm, or the waste transfer development at the immediately adjacent chalk pit. This is despite the Council being reminded clearly in the correspondence referred to above that these matters must be considered as part of consideration of cumulative impact.

f. In relation to noise, the Council has been clearly advised as to the position at Valley Farm Cottage and makes no reference to this. This is an important consideration. At least so far as our clients the Batemans are concerned, this is a major impact on their environment. We remind you of the remarks of the Advocate General in Case C-321/95 Greenpeace Stichting v. Commission (supplied to you on 30 March) at §51-60 as to the importance of EIA for the protection of individuals. We note in your response to supplying that material you said (31 March) it would be taken "under consideration": well, we see precious little evidence of that in the impugned screening opinion.

g. The Council entirely fails to consider the alleged positive environmental impacts of the development as submitted by the developers, which must in context have

been intended to be significant. Again this was a matter plainly brought to your attention by us iun our letter of 18 March but seemingly completely ignored.

What the Council is asked to do

12. The Claimants therefore request that the Council agrees to reconsider the screening opinion of 10 June 2011 and pay the claimants' costs.

Further information required

13. Please provide copies of any and all correspondence, notes, meeting minutes, reports and other documents of a like nature internal to the Council or with any other party (of course other than ourselves) which are in any way connected with the making of the screening decision (other than, of course, privileged material).

14. We note with concern that the Council has still not responded to the question raised in pre-action protocol correspondence of October 2009 and re-raised in our letter of 18 March concerning the unlawful screening of the original installation and what it considered appropriate to do about that in the light of ECJ jurisprudence in particular Case C-201/02 Wells and C-508/03 Commission v UK. We require a statement of the Council's position as to this.

Interested Parties

15. Camgrain Storage Limited
    c/o , Solicitors: Kester Cunningham John, Beacon House, Kempson Way , Suffolk Business Park, Bury St. Edmunds IP32 7AR,
    Attn: Bob McGeady, ref BMG/CLA/084866-0011,
    Tel: 01284 732118, Email: Bob.McGeady@kcj.co.uk

Legal Advisers dealing with this claim

16. Richard Buxton Environmental & Public Law, contact details as at the head of this letter. All communications should be sent to us there.

The Committee process

17. We are concerned to note from a review of the committee report for 6 July (site visit) and 9 July (determination) that there has been very limited consultation on the matter, with consultation responses apparently being supposed to be dealt with by way of verbal or written update at the committee meeting. We have serious doubts as to the lawfulness of this (though will not comment further yet as we do not know the dates of consultation) but in any event it is hardly fair to have a major application consulted upon and responses dealt with in this way ie. expect responses to be dealt with by way of verbal update etc.

18. We are also concerned to note no reference at all to the representations made by us and the developers (and there may be others) on the re-screening process.

19. Overall we believe that if the committee were to consider the matter on 9 July other than for informational purposes that would of itself raise grounds of illegality.

20. As to whether it is possible for the committee to determine, contrary to the officer's opinion, that the matter is in fact EIA development, and direct the officers to proceed accordingly, that will be a matter for you. We believe it would be the right outcome so as finally to resolve this matter and having regard to all the circumstances is the only outcome that the Council will in fact be able lawfully to reach, though we appreciate that members may require fuller briefing on the screening issues than in the present report, even if this letter and the attached correspondence and input from the developer goes some way towards that.

Period for reply

21. Normally we would seek a response within 14 days of the date of this letter. Having regard to the presently-planned committee meeting on 9 July we believe the right approach for the Council will be either to agree to defer the meeting in order to re-screen the matter in a lawful way, or to invite a decision/direction from the committee on the question of screening.

22. If however the Council intends to proceed to determine the matter as indicated in the current committee report then we believe that would be so obviously unlawful having regard to the points above that we are likely at least to issue judicial review proceedings in advance of the committee meeting. The Council should be in no doubt as to what we believe are its unlawful conduct in relation to this matter.

23. If however you do see the sense of what we say in this letter we invite you to confirm by closing on 5 July that the matter will be deferred from 9 July pending further consideration and/or at most on 9 July the committee will be informed about the screening issue and invited to make observations/directions on that.

24. So in the first instance we await hearing from you by 5 July, and subject to what you say within the normal period thereafter.

Yours faithfully

Richard Buxton

cc: Camgrain Storage Ltd c/o Kester Cunningham John
(attn: Bob McGeady, Ref. BMG/CLA/084866-0011)

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18 March 2011

Dear Sirs

Camgrain – EIA issues

We refer to recent correspondence following the quashing of the planning permission under your reference S/0506/09/F by the Court of Appeal on 22 February 2011.

Re-screening

You have sought views as to whether the proposals are likely to have significant environmental effects for the purposes of the EIA rules, as your authority is about to re-screen the matter.

We have made enquiries of our clients and, in order to ensure some balance, have also informally enquired of the principal parish councils concerned (West Wratting and Great Wilbraham) as to the significance of likely or indeed actually experienced environmental effects.

The responses are unequivocally and unhesitatingly to the effect that significant effects are likely (and currently occurring). Points made include the following:

Noise: noise from the existing facility is such as to make it difficult for our clients to get to sleep at night, from the fans and "clinking and clanking" of conveyor belts, particularly during the harvest season and when it is still or there is an easterly wind – and when of course they would rather have windows open – yet the noise can still be heard through the double glazing. The concern with the proposed expanded plant is that this would not only increase with the size of the extended facility, but also the machinery may be in a worse position from our clients' perspective than presently.

We understand that there has also been at least one incident of grain being dumped near the entrance to the facility and then scraped up very noisily (he had to get out of bed and come out to remonstrate) with a digger which scraped on the concrete.

We understand that the noise of the facility can be heard as far away as Lark Hall Farm.

Highways/A11 junction: this was already the subject of an objection from the Highways Agency which speaks for itself as to significant effects. We are unsure as to the accident position: we understand there have been at least two in the vicinity of the junction in the past year or so, though are unaware of the background to them. In any event there remains grave concern about the safety of the junction. The basic point is that the junction there was simply not designed for the sort of facility now being put in (and quite apart from the waste facility and wind farm which we mention further below). We refer in particular to information supplied by Michael Hampton for West Wratting PC during the consultation in 2009 (see CB/183).

Access road: this is in the course of being widened. The effect will be to permit more lorries moving faster, potentially with safety implications. So far as environmental effects are concerned, one can see that they can be regarded in some senses as positive, and in others as negative – but in any event as significant.

Traffic: we understand that Camgrain is already exceeding the permitted number of movements. As such level must be there to counteract undesirable environmental effects, the significance of exceedance speaks for itself. And this is without the huge increase expected as a result of the proposed extension to the facility.

There is also serious concern that the number of silos proposed (an additional 48) will in practice add far more significantly than had been envisaged to the throughput of traffic. Put simply: if permitted movements are being exceeded with 12 silos, and even if the future permitted number of movements is approximately three times that, it is hard to see how that can accommodate for five times the number of existing silos.

We also understand that there is concern about Camgrain traffic passing though the village of Great Wilbraham.

Light pollution: we are advised that lighting is already highly visible, even with the 12 silos. With 60 it is likely to get very significantly worse. Our clients advise that they already find it intrusive, they are well aware of the facility when in their garden. They and others are of the view that the lighting on site is in need of "serious improvement". Dr Bateman is a keen amateur astronomer and lighting in this sort of rural environment, where "good dark" is to be expected, frustrates that.

Landscape: it is hard to overstate what a massive effect this development has on the landscape, including views both from the A11 and the surrounding countryside. Even if screening were possible, it is going to take a long time to establish. Thus even if there were no significant environmental effects in this sense in the long term (which we consider highly unlikely in any event) they are there in the short to medium term. It is considered that the facility is a gross overdevelopment for the location, particularly in combination with other projects (as to which see below) and one in relation to which it would, frankly, be irrational not to consider has significant effects in this respect.

"Positive" effects: these of course "count" for the purpose of determination of significance of effects just as negative ones do. This is understandable if only because claims in relation to positive effects can be controversial and therefore require as a matter of EU law consultation in the prescribed manner. In any event in this regard we refer inter alia to Camgrain's (Mr Darke's) witness statement at the appeal stage (5.1.11) from which it can only be inferred that it is their own case that the (positive) environmental effects of the proposed development will be significant.

The existing permission (ref: S/2494/04/F)

We referred to this in our pre-action protocol letter – see CB/11. In effect the point is that the Council should be considering revocation of that permission so that it may consider the requirement for EIA in relation to it. Indeed in relation to that we can see no materials (and we reviewed your files very carefully at the time) supporting the letter of 20.12.04 containing the negative screening opinion.

Therefore in relation to that permission the Council must consider revocation in order to consider EIA for that planning permission. This is trite law: see Case C-201/02 Wells, Case C-508/03 Commission v UK. Given that most of the observed environmental effects relate in fact to the facility without the extension, it must follow that this one (ie. without consideration of the now-quashed extension) is likely to have significant effects.

Secondly, and in any event, re-screening of the extension application must also take into account its accumulation with the earlier development. Again, this is trite law: see the terms of the EIA directive and regulations and eg. R (Baker) v. BANES [2009] EWHC Admin 595.

Other developments

Very significantly, the screening must take into account the accumulation of other relevant developments. These include in particular that for the Wadlow Farm Wind Farm and the Chalk Pit waste disposal facility. These presumably were not considered in the original screening as they had not reached the stage that they have now (granted and – we understand – nearly granted respectively), although had we appreciated the current state of gestation of those projects at the time of commencing the proceedings in relation to the Camgrain facility the point might well have been made. Anyway, they have to be taken into account now.

Conclusion

We trust that the above comments will be of assistance to the Council in re-screening the Camgrain application for likely significant environmental effects. In our view – as indeed has been the position from the start, but is now heavily reinforced by developments on site, and by the other nearby developments – this is a situation where the Council could not conceivably decide otherwise than that EIA is required. We also remind you of the EU Screening Guidance. However, in the first instance we await the Council's decision on the matter.

We are concerned to note that construction work appears to be continuing in relation to the extension. This is wholly unacceptable given that there is no planning permission for it. While well aware of the views expressed in the email correspondence we had about this, we consider that the Council would be in legal error if it did not act very promptly to sort the matter out particularly given that it is overwhelmingly likely that the development in question is likely to have significant environmental effects.

Yours faithfully

Richard Buxton

cc. Kester Cunningham John (attn: Bob McGeady, Ref. BMG/CLA/084866-0011)

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30 March 2011

Dear Sirs

Camgrain – EIA issues – response on re-screening

We refer to Bob McGeady's email of 23rd March.

We trust that the Council will appreciate that the arguments suggesting that effects will not be significant are incorrect, and/or simply do not address the points that we have put forward.

"Significant"

As to (4), it is true that there is (one) reference in the preamble to the original (1985) version of the EIA directive to "major effect on the environment". However all the obligations refer to "significant" effects and there is no suggestion that the effect has to be in some way "big" as opposed to "significant". Indeed, if the former, Schedule 2 (at least in dealing with smaller versions of certain Schedule 1 projects) might not exist – one would, for example, only need to deal with "big" roads, "big" intensive livestock installations, and so forth. In fact the directive requires looking at all such projects (over minimum threshold where applicable) and assessing likely significance.

And in turn, as reminded in our letter of 18th March, the EU guidance may represent the threshold of significance. We are anyway unaware of any contrary EU guidance. Logically there is every sense that there is a low threshold, or else the point of EIA – informing the public and decision makers so decisions that effect the environment can be better informed – would be avoided.

As for effects on a small number of people, we note the views of the Court of Appeal in Malster (which was in any event only a permission application). Those views however are now 10 years old during which time there have been huge strides in the understanding of the correct application of the directive. We note that in that case, either at the High Court or Court of Appeal levels, other than a brief reference to

Kraaijeveld, there was no consideration of ECJ level authority, for example the Opinion of the Advocate General in Case C-321/95P Stichting Greenpeace v. Commission §54-60 – observations which indicate that the EIA directive is indeed intended to protect individuals (like our clients here).

Indeed (and by contrast to remarks in Malster) only today the High Court has observed in R(Buglife) v. Medway BC and another [2011] EWHC [746] (Admin) at §87 that

> "...the trend in the law of the European Union, and of English courts when considering decisions arising from directives and other directly enforceable features of Community law, is to require the English courts to apply objective standards of proportionality and legal certainty instead of the subjectively-based Wednesbury tests".

In our view it is inconceivable that the environmental effects that we have referred to would not be regarded as "significant" to the decision making process on the latter basis. In fact the particular circumstances of this case are such that we do not believe a decision maker could rationally (ie. Wednesbury test) decide otherwise.

We note that even our opponents consider the size of 300,000 tonnes as "not harmful". Rightly, they cannot seriously say that such a size is not "significant". Similarly, of course traffic accidents are relevant: Schedule 4 refers to effects "including" those listed (even if "population" were not to include particular people affected by accidents, or accidents were not "creation of nuisances" on a wide reading of the directive).

And so forth. We rely on the SCDC to appreciate that the circumstances point one way as to whether this is a development that should attract EIA.

Positive effects

We note this issue is completely avoided by Camgrain. It is of course their own case that the facility will have significant positive effects. And, indeed, on a wide – not just local – basis (see Philip Darke witness statement and cf. their email now).

Cumulative effects

This issue is inexplicably not mentioned by Camgrain either.

Yours faithfully

Richard Buxton

cc. Kester Cunningham John (attn: Bob McGeady, Ref. BMG/CLA/084866-0011)