Stuart Jessop
6 Pump Court Chambers

ADVICE IN RESPECT OF THE SOUTHALL WATERSIDE DEVELOPMENT AND THE F.M. CONWAY LIMITED SITE (NORTH HYDE GARDENS)

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1. I am asked to advise the London Borough of Ealing (LBE) in respect of its duties and obligations in relation to complaints of odour nuisance and escape of gasses from two sites. The first is known as the Southall Waterside development also known as the former Southall gas works. The second is known as North Hyde Gardens which is currently operated as a roadstone coating plant by F.M. Conway Limited. It is located close to the border with the LBE but is wholly within the London Borough of Hillingdon (LBH).

2. I am asked to advise on the duties and obligations of LBE generally and specifically answer questions posed within my written instructions dated 29th June 2021. I have been provided with extensive instructions both within this brief, previously sent written briefs, various letters between the Leader of the Council and others, reports from Public Health England (PHE), reports and letters from CASH, material in respect of complaints and the investigation, and emails and with material relevant to these instructions. The relevant material is voluminous, and I have not been provided with nearly all of what is available. I also rely on the written instructions provided when I was first asked to advise on this issue in 2019 and 2020, as well as two substantial conferences held in both years. I rely further on my advice sent to the Council in June 2020. At that time, I advised that a further report from PHE should be obtained. A report was obtained in July 2020 and that report has since been made available to me.

3. I am asked to set out my experience of dealing with environmental issues. I am ranked as a leading practitioner in Environmental Law by the Legal 500 and praised in that publication for my knowledge and experience of the law of nuisance. I am co-author of the book, 'A practical Guide to Environmental Enforcement' published earlier this year. I am regularly instructed by companies, individuals and local authorities in nuisance and other environmental cases. In addition, I am on the specialist regulatory list of counsel (A list), as a prosecutor for the Environment Agency and I am often instructed against the Agency in various matters. My connected planning work invariably involves environmental issues. I have advised and acted in numerous cases involving odour and other nuisance arising from commercial premises.

Southall Waterside

4. Southall Waterside development is a large 88-acre brownfield site which has now been remediated for the purposes of a mixed use of housing, commercial and open green space. The extensive contamination of the soil arising from the former gasworks and chemical works at the site required treatment to make the land safe and suitable for the new proposed uses. A "soil treatment hospital" was established to enable remediation of the soil to take place on site, enabling soil to be reused in situ, thereby removing the need to have clean soil imported from elsewhere. The treatment process involved the turning over of stockpiles of material and mixing with additives. As a consequence of the remediation works, there was an apparent release of odours from the site.

5. Planning permission was granted in 2010 for a large mix use development across the site and Berkeley Group was appointed as the developer. The outline planning permission for the current

development included several conditions to ensure that contamination is comprehensively identified, that an approved remediation scheme is carried out and that the completion of remediation is properly verified. Responsibility for the implementation of these requirements and the discharge of the relevant planning conditions rest with the London Borough of Ealing (LBE) as the local planning authority (LPA). In consultation with the Environment Agency's (EA) groundwater specialist, the council's contaminated land officer has maintained close oversight of all operations undertaken to deal with contaminated material and groundwater, however the soil remediation activities themselves, since they involve the handling and treatment of soil deemed to be contaminated waste material, have been subject to regulation by the Environment Agency under the Environmental Permitting (England and Wales) Regulations 2016.

6. Berkeley Group appointed C. A. Blackwell Contracts limited to carry out the necessary remediation of the site. Blackwell holds an environmental permit covering their mobile soil treatment work and the Environment Agency issued an approval document in 2017 to allow the company to proceed with their proposed remediation of the former Southall gas works. I understand that the remediation work is completed and therefore there are no operations being conducted under the permit. However, I am also told that there has been recent activity on the land consisting of the pumping of dense non aqueous phase liquids (DNAPL) detected in a depression of the London clay at depth. The Council should monitor such works in respect of any nuisance which might be caused by them. A decision will also need to be made about whether the works need to be otherwise regulated and if so by whom.

7. Complaints of a chemical odour emanating from the remediation works at Southall Waterside were first received by the LBE in June 2017. Complaints were especially numerous during the hot summer of 2017 when a persistent northerly wind brought odour to residential areas to the South of the site. On the advice of the EA's officer responsible for the enforcement of the Blackwell environmental permit, LBE's regulatory services officers have referred complaints to the EA's pollution incident hotline. I am told that the EA's position is that the permit holder did not breach its permit during the period of operations at the site and that any issues raised were managed and dealt with although I have not see any written documentation to this effect.

8. To press for more rapid implementation of odour suppression measures in the light of ongoing public concern and complaints, LBE's director of planning and regeneration wrote to the environment agency's area director in June 2018 and was advised that measures were being implemented to improve odour suppression following his officers most recent visit in May 2018. The leader of the council, at that time, also wrote to the EA's director in similar terms to request an increased frequency of inspection by the agency's officers so they might witness the extent of the odour problems that residents were reporting.

9. Alongside the response that the Environment Agency has given to the complainants, LBE has pursued direct contact with representatives of Berkley Group and their environmental consultants, Atkins. Their response to the complaints has generally been prompt, with additional odour suppression units being deployed at the boundary around the soil hospital and new methods being sought and trialled to reduce odour emissions from the remediation activities, such as the covering of stockpiles with an odour suppressant foam. On occasions, works have been suspended while further odour suppression equipment was deployed.

10. Public concern was raised as to the health hazards associated with the odours, particularly those arising from emissions of benzene and other volatile organic compounds. LBE asked Public Health England (PHE) to carry out an independent public health risk assessment using the air quality monitoring data collected from 25 monitoring stations at the development site. The results provided in July 2019 showed that there is unlikely to be a risk to long term health of the nearby population from the chemicals detected. Ongoing assessments of the results of monitoring carried out by PHE received to date, have shown that levels are very low at the soil hospital boundary.

11. The main remediation work was completed in March 2019 and the soil treatment hospital was decommissioned subsequently. As of June 2020, some smaller areas of contaminated soil remained to be dealt with by excavation removal from the site and not expected to give rise to significant odour emissions. There was some work on the land requiring remediation which began in the third week of Jan 2021. The excavation and backfill was completed by mid-February 21. There is currently some pumping of dense liquids which is stored in a sealed plastic tank for offsite disposal. There are no other parts of the site requiring land or soil treatment. I am instructed that the frequency of complaints has reduced substantially since the closure of the soil hospital and that received complaints have continued to be at a very low level all the way through to July 2021, reducing to two recorded complaints this year.

12. Members of the public, including those associated with the residents' campaign group known as 'Clean Air for Southall and Hayes' or CASH, alleged that a statutory odour nuisance has existed and continues to exist arising from the works in progress to redevelop the former Southall gas works site and that therefore the council should serve an abatement notice on those responsible, under section 80 of the Environmental Protection Act 1990. I am told that the same campaign group has previously been active in alleging odour nuisance from the roadstone coating plant operated by FM Conway limited. LBE officers believe that a large proportion of recent complaints since summer 2019 are attributable to the industrial site in Hayes in the vicinity of the Conway plant, with that plant, in the absence of evidence that other plants are implicated, being the likely source of the odour. However, I am instructed that those who have attended in response to the complaints and in compliance with the local authority's duty to inspect the area and investigate allegations of statutory nuisance, have found it extremely difficult to ascertain the source of any odour experienced, and have not themselves experienced a statutory nuisance.

13. This difficulty is created due to various reasons. Attribution of the odour complained of to a specific source is not always possible for a variety of reasons, including that the odour was faint and indistinct, that the odour was not present at the time the officer visited, that the officer was unable to contact the complainant to obtain further details, and that the odour had ceased on contacting the complainant. Further, because there has sometimes been a similarity in the character of the odour complained of in relation to the Southall Waterside site and the FM Conway site, it is possible that a proportion of complaints attributed to one site should correctly have been attributed to the other site. This degree of uncertainty renders the potential service of a notice, assuming a statutory nuisance exists, particularly difficult as the person responsible is often not possible to identify with any adequate level of confidence. Furthermore, there are other industrial sources in and around these two sites which could possibly be responsible even in part to any odours witnessed. I am instructed that the small number of complaints that have persisted since the summer of 2019 until the present time are possibly arising from the F.M. Conway site rather than Southall Waterside.

North Hyde Gardens

14. In 2012 The London Borough of Hillingdon (LBH) received a planning application for the development of a new industrial facility at the former Powergen site in North Hyde Gardens, Hayes, located close to the boundary with the LBE in Southall. The development included the construction of a new roadstone coating plant for the manufacture of road surfacing products. The plant comprises equipment for heating asphalt and mixing it with stone and other additives to produce a range of road surfacing materials.

15. The LBE was consulted on the planning application for the plant and raised an objection on the ground of likely adverse impact of emissions from the plant on air quality in Southall, increased traffic flow and detriment to the visual amenity. However, the application was granted in August 2013 and the plant was constructed and started operations in 2014. Roadstone coating plants are subject to regulation by the relevant local authority under the Environmental Permitting (England and Wales) Regulations 2016. FM Conway Limited's permit was granted by the LBH in September 2014.

16. Complaints alleging a strong bitumen odour from the plant were received from July 2014 onwards. Where complaints were thought to have their origins in this plant, officers from the LBE have liaised with the LBH for them to consider as the regulator of that site. I am told that officers from LBE have attended the site whenever such complaints have been made in order to witness any odour occurring within the LBE area and deal accordingly.

17. In 2015 FM Conway Limited agreed to undertake improvements to their plant to reduce odorous emissions. The works approved by the LBH as the regulator included an increase in the height of the chimney serving the plant to the maximum permitted by the Civil Aviation Authority and the provision of an extraction and filtration system to the loading bay to prevent the escape of odorous emissions during the loading of lorries. These improvement works were completed in April 2016, but the works did not bring about a cessation of complaints from the affected areas in Southall. However, I am informed that the frequency of complaints reduced in 2019. I am also instructed that a major difficulty for officers has been their lack of ability to accurately determine the source of any odour witnessed particularly bearing in mind the operation of these two sites in close proximity to each other.

18. I am informed that the LBH's latest assessment of the site is that it is in compliance with the permit conditions with one minor non-compliance unconnected to odour.

Statutory Nuisance

19. Section 80(1) of the Environmental Protection Act 1990 provides the power to serve an abatement notice.

> *"Where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority shall serve a notice, "an abatement notice" imposing all or any of the following requirements—*
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> *(a)requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;*

(b)requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes,

and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

20. Section 79(1) of the Environmental Protection Act 1990 (EPA 1990), as amended, establishes categories of statutory nuisance they are; (a) state of premises; (b) smoke emissions; (c) fumes or gases from dwellings; (d) effluvia from industrial, trade or business premises;(e) accumulations or deposits; (f) animals; (fa) Insects; (fb) light; (g) Noise from premises; (ga) noise from vehicles or equipment in the street; (h) other matters declared by other Acts to be statutory nuisances.

21. Each one of these categories requires the existence of something either 'prejudicial to health' or 'a nuisance'. These concepts are explained below.

22. If a statutory nuisance exists or is likely to occur or recur at either of the two sites, it is likely to fall either under section 79(1) (d) or (e).

23. Category (d) is defined as any dust, steam, smell or other effluvia on industrial, trade or business premises and being prejudicial to health or a nuisance. It is likely that fumes or gasses given off and which are offensive to the senses are covered under the term effluvia. However, if gases given off from the sites do not cause a smell which is offensive to the senses they may not be caught by this category. Instead, it is likely that parliament envisaged that such emissions would be dealt with under the permitting regime created by the Pollution Prevention and Control Act 1999. These would be regulated by the EA in respect of Southall Waterside and the LBH in respect of the Conway site.

24. Complaints are made both based on odour caused by the escape of gasses and also on gasses being emitted which are being prejudicial to health. It is unclear whether the gases alleged to be prejudicial to health are also the same gasses causing complaints of odour nuisance or whether these two complaints relate to entirely separate sources.

25. Category (e) might apply to the Southall Waterside site, but it is unlikely it would be relevant to the North Hyde Garden site. In respect of the Southall site, it might apply to the deposit of substances on the land. However, it appears that it is not the deposits which are alleged to cause the nuisance but rather it is the processing of them which is thought to be the cause of odours or the emission of gasses.

26. However, in respect of both categories, proceedings may not be initiated by local authorities without the consent of the Government in respect of premises subject to the regime of the Pollution Prevention and Control Act 1990, if proceedings might be taken under that legislation. Both sites were regulated under these provisions and the Environmental Permitting Regulations, the Conway site still is, and if there was a breach of the permits in either case, such proceedings could have been commenced.

27. Therefore, there are two initial hurdles in respect of potential proceedings, assuming that there exists a statutory nuisance or one is likely to occur or recur . First, is identifying which category of nuisance to apply and second is in obtaining consent to initiate proceedings. I am instructed that

both regulators are of the view that both sites were or are fully compliant with their permits and although this does not remove the duty placed on the local authority to investigate complaints of statutory nuisance and bring proceedings by serving a notice if such a nuisance exists, it is nonetheless an import consideration and is relevant to any appeal against the service of any notice.

28. A third difficulty is a more fundamental problem. I am told that on each occasion that there was a visit from LBE officers it was difficult to ascertain the source of the odour. If the source of the odour cannot be established, then it is difficult to see how the correct person can be served with an abatement notice and easy to see how proceedings may be successfully defended by a recipient of an abatement notice in such a case.

29. A fourth difficulty lies in the potential for a defence being available to each of these sites. This is dealt with below under the defence of 'best practicable means'.

Prejudicial to Health

30. The definition of nuisance has two limbs. What is required is the existence of something either prejudicial to health or a nuisance.

31. The term prejudicial to health is defined, by section 79 (7) of the Environmental Protection Act 1990, as injurious or likely to cause injury to health. It applies to making existing health conditions worse. However, ultimately, the issue is a matter of judgement. Expert evidence as well as guidance from the World Health Organisation and the experience of relevant professionals will contribute to that judgement.

32. Injury to the health of a person must be likely although actual injury is not required. Interference with a person's comfort is not sufficient to amount to prejudice to health although it may amount to a nuisance. However, the effects on health do not have to be direct. For example, sleeplessness has been held to be injurious to health.

33. The test is an objective one, so it does not depend on the personal circumstances of the individual affected but is concerned with the effects on health generally. In Cunningham v Birmingham City Council (DC) [1998] Env LR 1, a kitchen was harmful to an autistic child but was otherwise acceptable so that the relevant test was not met.

34. I have been given a copy and have read a report from Centric Lab which appears to have been produced in 2020 and I am told was commissioned by the resident's group CASH. The report criticises alleged weaknesses in the PHE report published in the summer of 2019 in that it based its assessment on WHO guidelines which did not consider the biological make-up and individual susceptibility of the Southall community. The report appears to focus entirely on alleged complaints relating to gases emitted from the Southall Waterside development site only.

35. I will make a few observations on this report. First, the sample size of 10 persons appears very small. Second, the report alleges that the WHO guideline thresholds for risk to health do not consider external stressors which might affect the impact of such gasses on an individual's health. However, the WHO are likely to have considered other generally applicable factors which might increase the impact on health when setting thresholds for risk, in my opinion. Third, the report concludes that those responsible for the site should do all they can to "de-risk" it and makes a ten-

point recommendation. I am instructed that each of these recommendations is either being fully met or is no longer applicable, because for example the soil hospital operations have now stopped.

36. I have now also considered the PHE report dated July 2020. As to whether there has been a statutory nuisance based on likelihood of injury to health, both PHE reports of 2019 and 2020 say there is a low risk or none at all. The 2020 report concludes as follows:

> *"The results obtained from the air quality monitoring indicate there is unlikely to be a direct toxicological risk to the health of the nearby population from the levels of VOCs detected."*

37. Based on these reports it cannot be said that it was likely that any gases escaping from the Southall Waterside site were likely to cause injury to health. On that basis I do not accept that the LBE can be criticised in concluding that there was and is no statutory nuisance, which was prejudicial to health. The soil hospital has finished, and complaints have substantially reduced. I am told that officers from LBE therefore do not believe that if a nuisance did exist before, that it would recur. In my opinion, the evidence from Public Health England does not support the contention that there has been a statutory nuisance so as to be prejudicial to health or that such a nuisance is likely to occur or reoccur. Of course, the local authority must keep this under review and consider any contrary evidence which is brought to their attention.

38. One option would be to commission a further independent report from an expert other than one from PHE. I do not say this is essential but it might assist in dealing with the concerns of CASH and the community who appear not to accept the validity of the PHE reports.

Nuisance

39. Nuisance is the unacceptable interference with the personal comfort or amenity of neighbours or the nearby community. What is unacceptable is that which ordinary, decent people would consider unreasonable.

40. Relevant considerations to which the test of ordinary decent people will be applied include the following: location, time, duration, frequency, convention, importance, impact, value to the community and the difficulty in avoiding external effects of activity.

41. Government guidance provides, *"To work out whether smells are a statutory nuisance, councils can consider one or more of the following: where the smell is coming from; the character of the area; the number of people affected nearby; if the smell interferes with the quality of life of people nearby (for example, if they avoid using their gardens); how often the smell is present; the characteristics of the smell."*

42. Councils usually use at least 2 human 'sniffers' to work out: the strength of the smell; how often it's detectable and for how long; when it's recognisable; its offensiveness; its character; the emission rate; wind direction and weather conditions should be taken into account as this can cause variations in smells; Councils can also ask people to keep smell diaries, recording their perception of the smell and the effect it has on them.

43. It is a common misconception that only subjective non-technical assessments exist for the monitoring of odour. This is not correct. The EA have produced guidance in the form of a document entitled H4 Odour Management dated 2011. In this document guidance is given on a

range of techniques which can be used effectively to monitor smell. The Council should have regard to this and in my opinion must review its investigative and evidence gathering approach to these sites ensuring that it considers and has considered a wide range of measures to accurately assess the odour at each site. One part of this guidance suggests that people can become hypersensitive to a smell if experienced over a long period of time. This can mean that even if the area in question has levels of odour which ordinarily would not be seen as a statutory nuisance, may be unacceptable to the residents in that area. This is a factor which might explain why the residents are adamant that they are experiencing a nuisance whereas the officers, who understandably are not hypersensitive to the odour, do not witness any nuisance. It would be useful to know what techniques, both qualitative and quantitative, officers have used so far.

44. It has already been noted that the frequency of complaints received has reduced since the cessation of the soil hospital and that is a factor relevant in the assessment of whether any odour experienced now amounts to a statutory nuisance. So too, the importance and value of the site to the community. It is a mixed-use site providing housing and other commercial opportunities for development on a disused brownfield site so the benefits to the community are arguably considerable. The difficulty in avoiding the escape of gasses causing odour nuisance is also a relevant factor when one considers what the operators of the site have done to reduce or eliminate the problem. There have been no breaches of the permit and I am told that LBE's regular liaison with the operator has shown that they have robust measures in place. Indeed, the very measures which the Centric Lab report suggests are essential for the operator to reduce risk associated with the operations appear to have been already implemented to a large degree.

45. Essentially, the assessment of whether there was, and is, a statutory nuisance at either site is a matter of judgment as has already been said. It is for the Environmental Health Officers to make that judgment taking into account the experiences and evidence of those affected. I am told that the officer' firm view is that there has not been a statutory nuisance witnessed by them, either from the Waterside or the Conway site. Officers attended after each complaint and assessed the situation. On each occasion they concluded that there was not a statutory nuisance. I am told that they continue to visit the site when there are complaints and that there has not been a statutory nuisance witnessed. Based on that judgment it would have been incorrect to serve an abatement notice.

46. In my view, it is important to ensure that several officers make this assessment rather than confine it to the same officer. I understand that the investigation has been conducted by more than one officer.

47. However, despite the reduction in recorded complaints (only two this year) I am told that residents and those representing them take a different view to the officers. There may therefore be some discrepancy between the complaints received by the council and the effect of any nuisance felt by residents. I do not think this should be ignored. The Council should critically analyse why this might be occurring. For example, it might be that any delay in attending the site after a complaint reduces the opportunities for officer to witness the nuisance, being a smell, which may naturally come and go.

48. I note a range of initiatives are being proposed or are already established, for example the permanent presence of an officer on site. The assessment of any smell also needs to be examined and considered inside the homes of those experiencing it to establish whether the locality of the

person experiencing the nuisance has any material effect on that person's judgment as to whether a nuisance is witnessed. The Council must also ensure that complaints are not being missed, either because residents have lost confidence in complaints being responded to or for some other reason. I note the recent use of an App in this regard. This and other initiatives should be reviewed so that the Council are getting the most up to date and accurate picture of what the residents are experiencing so that there can be confidence that officer's assessments of the alleged nuisance are based upon all available information and that the Council are continuing to fulfil their duty to investigate.

49. It is worth noting that the law does not insist on the evidence of the nuisance being provided by the Council's officers. In theory it is possible for a case to be built on the evidence of the residents alone, particularly if it has proven difficult for officers to witness the odour. In my view, a case is likely to be considerably weaker without officer's evidence and, in any proceedings, it is highly likely that the officers' views would need to be disclosed. This would obviously weaken the Council's case further. Much would depend on the level and quality of evidence from the residents. Therefore, it would in my view be essential to have some objective assessment of the odour.

50. The Conway site warrants a particular focus. Officers believe that when they have witnessed odour in the area it appears to be a smell of tarmac and to have emanated from the area around the Conway site. This warrants further investigation. Section 81(2) provides that where the act, default or sufferance which resulted in the statutory nuisance took place outside the area of the local authority where its effects were experienced, the duties of the local authority are as if that act, default or sufferance had taken place within that local authority's area. So, if it could be established that a statutory nuisance occurred in the area of the LBE due to the Conway site (which is located within the London Borough of Hillingdon) then the duty on the LBE would be to serve a notice.

51. At the time of writing though, officers from the LBE are of the view that there has been no statutory nuisance from either site or indeed from any other site in the area concerned.

Contaminated Land

52. The land at Southall Waterside is contaminated land. Section 79 (1A) EPA 1990 provides an exemption to what may constitute a statutory nuisance:

> *"no matter shall constitute a statutory nuisance to the extent that it consists of, or is caused by, any land being in a contaminated state."*

53. However, the following should be noted: First, the exemption does not apply where the offence to the senses is caused, or amenity is harmed without harm to health, ecosystems or man's property. Second, the exception applies only if the state or condition of the land, rather than its use, is such that it causes harm to health, ecosystems or property. Third, the exemption only applies where substances cause harm as defined by that part of the Act.

54. In my opinion, it is the use of the land here which is said to cause a nuisance, namely, the operation of remediation works on the land. Further, as will be considered below it appears that there is no evidence of a significant possibility of the relevant harm being caused to human health. In my opinion, if a statutory nuisance exists, and is one which is offensive to man's senses and amenity

and as such a nuisance rather than being prejudicial to health, the exemption will not apply. The contaminated land exemption would not apply and the gasses escaping and offending the senses of residents would fall to be dealt with as a statutory nuisance. Furthermore, in my view, even if the gasses were also harmful to ecosystems, health and property, they would still be subject to control as a statutory nuisance in respect of them being offensive to man's senses or harmful to amenity.

55. In summary, if there exists a statutory nuisance here, or if one is likely to occur or recur, then it would fall to be dealt with as a statutory nuisance and the contaminated land exception would not apply.

Best Practicable Means Defence

56. It is the view of the LBE that the operators of the Waterside site and the operators of the Conway site have employed best practicable means and that in the event of proceedings being initiated each would have a particularly good chance of success in defending an allegation that there has been a breach of an abatement notice. I have not considered whether there is good evidence of such a defence (I have not been provided with the detailed history of what measures each site has undertaken nor their regulatory history) but I suspect that given both regulators have repeatedly said that the sites operate in accordance with the permit, I anticipate that such a defence would be available to each prospective defendant. The contaminated land officer has confirmed that he is satisfied that the operators of the site have acted in compliance with CLR11 (now replaced by LCRM since October 20). He has reviewed various documents including the Journal Hazard Materials 286 (2015) with respect of the use of stabilised/solidified (s/s) fill, and firmly believes that the site is well documented and that any challenge based on best practicable means would likely fail given the proven suitability of the s/s fill.

57. In my opinion, it is arguable that there is a discretion not to serve a notice, despite there being a statutory nuisance, where the local authority believes that BPM has been deployed and that such a defence would be successful. However, the law is not clear on this and guidance from DEFRA is to the contrary. However, it would be open for the Council to argue this in any proceedings.

58. The likely existence of this defence is a substantial hurdle for the Council in my view. If it was satisfied that a statutory nuisance existed or was likely to occur or recur and it served a notice that notice is highly likely to be appealed. Such an appeal might have at least a good prospect of success on the basis of the BPM defence alone. Even if the appeal could be defeated, the recipients of the notice would still be able to raise the defence in any subsequent criminal proceedings for breach of the notice. Again, with seemingly good prospects for success.

The Duty to Inspect the Area

59. Section 79(1) of the Environmental Protection Act 1990 requires a local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80. There is no fixed period to indicate when a local authority should conduct its inspection. I am instructed that in addition to investigating individual complaints there have been several visits by officers to the vicinity of both sites over a prolonged period of time. In addition, there should be continued engagement with LBH as the regulator of the Conway site.

60. In my opinion, the appropriate course of action here is for the local authority to have a programme of inspection covering both sites and the surrounding areas. This should be in addition to prompt

investigation of any new complaints. Such a programme of inspection would need to be at reasonable intervals considering the prevailing activities at each of the sites. Based on what I am told, the local authority has complied with their duty to inspect the area in respect of statutory nuisances. However, the introduction of a permanent office based on site or near to site would be a positive step in the pursuit of effectively monitoring complaints and assessing any nuisance complained of.

The Duty to Investigate Complaints

61. Section 79(1) of the Environmental Protection Act 1990 requires local authorities, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps, as are reasonably practicable, to investigate the complaint.

62. In my opinion, the council have responded properly to the making of complaints. They should continue to investigate each complaint as they are made to keep the situation in and around the two sites under review. However, a more proactive approach could be taken through the use of a permanent presence and rapid responses to complaints, assessments inside homes and by ensuring that there is confidence in the complaints process so that the information officers have reflects the reality of resident's experiences. There is an apparent mis-match between the strength of feeling expressed by residents about odour being experienced by them and the number of complaints that are now being received. The Council must investigate this.

63. Further, the Council should review its investigative approach taken so far. It should consider whether its approach to the assessment of any nuisance and its response to any complaints can be improved and whether it is utilising all reliable forms of assessment to examine any odour present.

Planning Conditions

64. I have been asked to consider whether there is a requirement for the LBE, as the local planning authority, to consider taking enforcement action in respect of any breach of planning conditions.

65. I am instructed that the planning team meet regularly to discuss the permission granted and compliance with the conditions. I am told that there have been no complaints that any conditions have been breached. I am also informed that although there have been found to be instances of minor non-compliance, these have all been rectified and have not been considered to amount to it being expedient to take enforcement action.

66. The Council as the local planning authority should consider whether conditions have been or are being breached. A proper review should be conducted. There may have been no specific complaints of breaches of conditions but it might be that some of the complaints of nuisance received or otherwise made by residents through CASH, amount to concerns that conditions have been breached.

67. There is of course no corresponding duty to inspect or investigate complaints within the Town and Country Planning Act 1990. It would be advisable though for the LPA to maintain its current approach of regularly reviewing compliance with the conditions as well as investigating complaints if they are made.

The Permits

68. Southall Waterside was regulated by the EA under a permit. The Conway site is still regulated by the LBH under a permit. These permits set conditions on the control of odour from the sites, amongst other requirements. There is a strict regulatory enforcement regime that applies. In my view, given the difficulties associated with dealing with the case through the statutory nuisance provisions, the focus in respect of the Conway site should be on the effective regulation under the permit. I am instructed that save for a minor non-compliance with a condition not connected to odour, the Conway site is said to be compliant with its permit.

69. The Council needs to be actively engaged with the LBH and must ensure that it makes its own assessment of whether the site is causing a statutory nuisance rather than merely relying on the views of that regulator in respect of its regulation of the permit and the activities controlled under it. My understanding is that there has been active engagement and this should continue.

70. It would be useful to know details of any attempts by CASH and the residents to engage with these regulators and the response of the EA and the LBH to this. I am instructed that a series of site meetings were arranged by Berkeley and of the few people who attended reports are that they were content with what they saw. A public open meeting which Berkeley / Atkins / EA and LBE attended was also arranged. The contaminated land officer has had no correspondence from CASH and no evidence (scientific data or argument) submitted proving a viable linkage still exists between the site and receptors (humans living on or near the site).

Section 82 Environmental Protection Act 1990

71. It should be noted that the ability to enforce the statutory nuisance regime is not restricted to a local authority only. Private citizens may bring proceedings under section 82 of the Environmental Protection Act 1990 in respect of statutory nuisance. Any person aggrieved by a statutory nuisance may bring proceedings by making a complaint to the magistrates' court. This is separate to any civil action that might be taken. This would clearly cover the resident who could show that they were affected personally by a statutory nuisance and in my opinion is highly likely to include any association acting on behalf of such a resident if it can show that its associates are affected by it. Obviously any resident or other person seeking to bring such proceedings should obtain legal advice in the first instance.

Conclusion

72. The Council is not satisfied that a statutory nuisance exists. It cannot therefore serve an abatement notice. In my opinion there is no evidence before me that a statutory nuisance does exist or will likely occur or recur. However, despite the number of complaints falling to very low numbers, residents continue to assert that they are experiencing a odour nuisance. This discrepancy must be investigated. The Council should conduct a review of its methods used so far and consider other measures to accurately measure the odour experienced at or near the sites. If the level of perception of a nuisance existing is not matched by the level of complaints received, the Council should ask itself why that is so and where such evidence might be obtained. For example, have residents compiled smell diaries or do they have other evidence of nuisance existing currently which they have not brought to the Council's attention?

73. There is, at present, no evidence of prejudice to health. The PHE reports do not support such a finding in my view. The Council could consider an independent expert if the residents do not have faith in the reports commissioned so far, but I do not see this is essential.

74. If a statutory nuisance is found to exist or is likely to occur or recur, then the Council must serve a notice on the person responsible for the nuisance. There is an argument that this duty does not arise where a defence of BPM is likely to succeed, but this is uncertain. However, there are substantial difficulties is serving a notice. The first is that it has been extremely difficult to attribute the source of any odour experienced. Any failure here would mean that an appeal would succeed. Indeed, without being able to determine who is responsible for the nuisance, a notice cannot be served in the first place. The second difficulty is that a BPM defence is likely to be successful, given the compliance of each site with the permits.

75. A person aggrieved by the nuisance can bring proceedings themselves for an abatement order in the magistrates' court. So, CASH or the residents themselves could make a complaint to the magistrates' court in respect of a nuisance. The court can make an order abating the nuisance and impose a fine. Obviously, those contemplating such proceedings should seek legal advice first.

76. Given the difficulties as set out above, a better solution is likely to be achieved through tighter monitoring and regulation of the permit regulated by the LBH. It is the Conway site which is thought to be the source of any odour present. However, so far, each regulator has said that the site under their supervision has complied with the permits in respect of odour.

Specific Questions Posed

77. I now address the specific questions posed by those instructing me.

    a. As plainly as possible, please explain the statutory framework which the management and enforcement of environmental nuisance, of the type alleged at the Southall Waterside site, is undertaken.

    I have set out the relevant statutory framework above.

    b. In answering the above, please identify what the Council should consider before taking enforcement action including any minimum evidential threshold necessary for identified action. Where there is Council discretion, please comment on how the Council is best advised to exercise this discretion.

    Once a local authority is satisfied that a statutory duty exists it has no discretion in respect of the service of an abatement notice. It must serve one. There is some merit in the contention that where a best practicable means defence is likely to succeed there is no such duty, but this is by no means clear cut. In any case, that situation has not arisen here because the local authority is of the view that no statutory nuisance exists or is likely to occur or recur. In those circumstances the local authority cannot serve an abatement notice.

    c. In your opinion and on the evidence provided to you, has the Council correctly interpreted the scope of its discretion to serve an abatement notice and/or any other identified enforcement steps?

Yes. The decision as to whether officers, acting on behalf of the local authority, are satisfied that there exists a statutory nuisance or that one is likely to occur or reoccur, is a matter of judgment for those officers. I have advised above that there appears to be a mismatch between the number of complaints received and the strength of feeling from residents about the presence of a statutory nuisance such that the Council should take steps to ensure it has placed itself in the best possible position to consider their assessment of the situation accurately. I note several proposals within the documents sent to me, such as a permanent officer presence at the site and better forums for conveying complaints and these should be supported. The Council must guard against there being a feeling that the residents' concerns are not being addressed as this will likely affect the accuracy of the picture the officers are being asked to assess because fewer complaints will be made. The Council should review its investigative methods used so far. It should ensure it has used all available assessment tools so that it is confident it is accurately measuring the odour at the sites and near to them. It should be alive to the possibility that residents may have become hypersensitive to the odour and may be experiencing a nuisance when others, not resident to the area may not. There have only been two complaints this year. If that is not reflective of the real situation then there must be evidence that the Council do not have. This should be acquired. One way of doing this is through smell diaries for example. However, subject to all the above, it is my opinion that the officers have acted properly. If a person aggrieved by any nuisance does not agree with the Council's assessment, then it can bring proceedings under section 82 of the Act.

d. Has the Council fully and reasonably explored all enforcement or management options available to remove or mitigate odour or other sources of nuisance complaint at the Southall Waterside and North Hyde Gardens sites?

Further to the investigative review and measures suggested above, the Council must continue to work with both the EA and the LB of Hillingdon as regulators of the sites in question. This does not absolve the Council of its duties under the Act but compliance with the permits which enable the use of the sites and regulate them is obviously an important factor. The Council should continue to monitor compliance with any planning conditions and consider enforcement if there are any breaches.

e. If not, then what further enforcement or management options could the Council reasonably pursue?

I have dealt with these above.

f. In the experience of Counsel, what is your opinion on the prospective financial cost of pursing an abatement notice which was challenged. Please also comment on any other associated risks of pursuing a challenge.

This is difficult to assess. However, such a case would be high profile, complex and would likely require the assistance of senior or Queen's Counsel on both sides. As an indication I have dealt with similar, although perhaps not as high profile, cases where Queen's Counsel has been on the opposing side. Costs in that case were more than £100,000. They

are likely to be significantly higher in this case and the Council's own legal costs would need to be considered, potentially doubling this figure or perhaps even higher than that. Other risks concern the evidential difficulties of bringing such proceedings, even if the Council was satisfied of a statutory nuisance existing. It will be difficult to determine the source of any odour and to correctly attribute any nuisance to a particular site. Further, the person served with a notice would have the right of appeal and would likely contend that they have employed best practicable means. This might be difficult to counter. In my view there would be a huge financial risk involved in any proceedings and, on the evidence supplied to me thus far, a high likelihood of failure. Instead the Council should work with all those affected and with the sites concerned to ensure any odour is reduced to acceptable levels.

g. Is there anything further the Council could reasonably do to fulfil its statutory and other responsibilities in relation to the Southall Waterside and North Hyde Gardens sites?

The Council needs to carry on complying with its duties as set out above in the main body of this advice. Both sites should be encouraged to limit further any odour being emitted from their sites. The Council must continue to work with the regulators in this regard. It should seek to continually monitor the air quality in and around the site and be receptive to any emerging evidence. It must continue to investigate complaints and proactively assess the odour at the sites.

20 July 2021

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