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**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 6<sup>th</sup> November 2019. I have been provided with extensive instructions both within this brief, subsequent written briefs, 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 am not asked to review the material that exists. For the purposes of my instructions I do not consider it necessary to do so. Instead I rely on the written instructions mentioned above as well as oral instructions provided in two lengthy conferences, one in November 2019 and one in June 2020.

**Southall Waterside**

3. Southall Waterside development is a large 88-acre brownfield site which has 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.
4. 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.

5. Barkley 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.
6. 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.
7. 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 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.
8. 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 in an attempt 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.
9. 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.
10. The main remediation work was completed in March 2019 and the soil treatment hospital was decommissioned subsequently. Some much more smaller areas of contaminated soil remain to be dealt with by excavation removal from the site and not expected to give rise to significant odour emissions. I am instructed that the frequency of complaints has reduced substantially since the closure of the soil hospital.
11. 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.

12. 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 particularly difficult as the person responsible is often not possible to identify to an adequate level of confidence. Furthermore, there are other industrial sources in an around these two sites which could possibly be responsible even in part to any odours witnessed. I am instructed that the very 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**

13. 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.
14. 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.
15. Complaints alleging a strong bitumen human 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.

16. 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 one of the main challenges for officers has been their lack of ability to accurately determine with confidence the source of any odour witnessed particularly bearing in mind the operation of these two sites in close proximity to each other, their propensity to emit odours combined with variable wind direction and speed.
17. I am informed that the LBH's latest assessment of the site is that it is in full compliance with the permit conditions although they accept that such plants can cause odour from time to time.
18. in fact, the position in respect to both sites is that their respective regulators confirm but there is currently full compliance with their permits under the regulations.

#### **Statutory Nuisance**

19. Section 79(1) of the Environmental Protection Act 1990 (EPA 1990), as amended, establishes nine 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.
20. If there was a statutory nuisance caused by either of the two sites it is likely to fall either under section 70(1) (d) or (e ). 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.
21. 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 causing complaints of odour nuisance or whether these two complaints are entirely separate.
22. 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. However, the exemption only applies if the condition of the land is such that it causes Part II harm. It does not apply if the use of the land causes such harm. 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. Therefore, the exemption would appear not to apply.

23. 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.
24. 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 are regulated under these provisions and the Environmental Permitting Regulations and if there was a breach of the permits in either case, such proceedings could have been commenced.
25. Therefore, there are two difficulties in respect of potential proceedings. First, lies is identifying which category of nuisance to apply which is not straightforward and second there is no guarantee that consent to initiate proceedings would be given. I am instructed that both regulators are of the view that both sites 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.
26. 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 in such a case.

### **Prejudicial to Health**

27. The definition of nuisance has two limbs. What is required is the existence of something either prejudicial to health or a nuisance.
28. 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.
29. 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.
30. 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.

31. I have been given a copy and have read a report from Centric Lab which appears to have been produced relatively recently 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.
32. I make a few observations which should be followed up by an appropriate expert in this field. 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. An expert opinion should be sought to deal with this claim, but I would not be prepared to readily accept that. 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.
33. However, having made these observations my considered view is that a report from an expert dealing with these and other points raised in the Centric Lab report is required. The PHE report is almost one year old and much has happened with operations at the site and with the frequency of complaints that a fresh report is necessary in my view. Further, we are amid a pandemic and these are all factors which should be considered, in assessing whether there now exists a statutory nuisance, in particular whether there is any risk of injury to health. In my opinion, this can adequately be dealt with in a report from PHE. I understand that such a report is expected in any event and I would advise those instructing me that they should ask the authors of that report to consider the matters raised in the Centric Lab report as well as the observations I make above and any other relevant questions.
34. As to whether there has been a statutory nuisance based on likelihood of injury to health already, the PHE report 2019 says otherwise. Based on this report it cannot be said that it was likely that any gases emanating 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 no statutory nuisance in 2019. 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. I cannot criticise the LBE for its position on this based upon the PHE report of 2019. However, as I suggest above, a fresh report should be sought dealing with matters as they are now.

## **Nuisance**

35. 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.
36. Relevant considerations to which the test of altering decent people will be applied include the following: location, time, duration, frequency, convention, importance, and value to the community of difficulty in avoiding external effects of activity.
37. 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 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 emanating 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 suggests are essential for the operator to reduce risk associated with the operations appear to have been already implemented to a large degree.
38. 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. 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.

#### **Best Practicable Means Defence**

39. It is the view of the LBE that the operators of the Southall Waterside site and the operators of the FM Conway site has employed best practicable means and that in the event of proceedings being initiated each would have a very good chance of success in defending an allegation that there has been a breach of an abatement notice.
40. I am of the opinion that it is arguable that there is a discretion not to serve a notice even if there is a judgment that there is a statutory nuisance where the local authority believes that BPM has been deployed and that such a defence would be successful. However, the authorities do not support this and guidance from DEFRA is contrary to this.
41. Therefore my advice is that the existence of a potential BPM defence does not mean that it is advisable for the LBE to decline to issue a notice if it is of the view that a statutory nuisance exists at any given time.

#### **The Duty to Inspect the Area**

42. 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 a number of visits by officers to the vicinity of both sites over a prolonged period of time.

43. 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 taking into account the prevailing activities at each of the sites. Based on what I am told the local authority have complied with their duty to inspect the area in respect of statutory nuisances.

#### **The Duty to Investigate Complaints**

44. Section 79(1) of the Environmental Protection Act 1990 further 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.
45. 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.

#### **Planning Conditions**

46. 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.
47. 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.
48. 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.

#### **Specific Questions Posed**

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

*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 site?*



50. Since the information provided to me both in writing and in oral instructions, I'm of the opinion that LBE has fully and reasonably explored all enforcement or management options available. Officers were entitled to come to the view on visiting the sites and surrounding areas, there was no statutory nuisance. The LBE was entitled to rely on the 2019 Public Health England report in its conclusion that it was not likely that emissions of gases from the Southall waterside site were likely to be injurious to health. Going forward, I would advise LBE revealing to obtain an up to date report from Public Health England on the risk of injury to public health from any gases emanating from the site and for that report to consider the report which has been published by Centric Lab.

*Is the council correct in its view that where a potential challenge would be likely to succeed on the basis that there was best practicable means deployed, that it would not be reasonable or appropriate for the council to serve an abatement notice?*

51. It is arguable that where it is likely that the recipient of an abatement notice would be able to successfully challenge that notice on the basis that it employed best practicable means, the local authority would have a discretion not to serve it. However, this is by no means certain and I would advise not relying on this potential argument. Government advice is to the contrary. Therefore, if the council are of the view that a statutory nuisance exists or that if it did exist would recur, then it must serve a notice. However the view of the local authority is that there has not been a statutory nuisance and subject to a further report by Public Health England that there is not a statutory nuisance on the basis that gasses emitted from the Southall Waterside site are injurious to health or likely to be injurious to health.

*Is the council correct to consider its duties and options on the basis of the current extent and severity of the odour or could account reasonably and properly be taken of the likelihood that historic occurrences of odour came much closer to the threshold of nuisance than at present?*

52. It is correct to consider whether a statutory nuisance exists now. It is also correct to consider whether a statutory nuisance existed in the past and if so whether that situation could recur. However, on what I am told, it was not considered at any stage that there was a statutory nuisance on either limb of the test at any stage in the past. Therefore, the question going forward and one which must be kept under review, is whether at any given time now or in the future there exists a statutory nuisance.

*Has the council taken the correct approach by relying on third parties for example the London Borough of Hillingdon and the Environment Agency to enforce the permits or consents that they have issued?*

53. It is for these two bodies to regulate each of the sites according to the regulations under which the permits have been issued. Of course, this does not absolve The LBE of its duties to deal with statutory nuisance or those duties and obligations which arise under the Town and Country Planning Act 1990 in its capacity as the local planning authority.

*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?*

54. In my opinion, the local authority needs to carry on with its commitment to inspect the area , properly investigate complaints, and ensure that there is no risk to public health through its instruction to Public Health England to compile a further report which would also deal with the issues raised in the report drafted by Centric Lab. It must also continue to liaise with each regulator in respect of any effect the operation of these two sites might have on the Council's own area.

**19<sup>th</sup> June 2020**

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