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For the attention of Ms Claire Tomalin

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Our ref
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Your ref
ESS/34/15/BTE/66/01
Date
22 February 2022

By email

Dear Sirs

**ESS/34/15/BTE/66/01 - Request for deferral of determination
Rivenhall Airfield, Coggeshall Road (A120), Braintree**

- 1.1 We write on behalf of our client Indaver Rivenhall Limited in relation to the application made on 2 September 2021 to discharge Condition 66 of planning permission ESS/34/15/BTE (the "**Application**").
- 1.2 We have reviewed your report published on 17 February 2022 providing your advice and recommendation to Essex County Council's Department and Regulation Committee (the "**Council**") in determining the Application (the "**Report**"). The analysis and the recommended approach in this Report contain fundamental flaws such that it would not be appropriate or lawful for the Council to determine the Application in reliance upon the Report in its current form. These are described below, but it should be understood that the list which follows does not purport to be comprehensive.
- 1.3 **Misunderstanding of submitted Plan of Action:**
 - 1.3.1 The Report advises the Council on the basis of a clear misunderstanding of fact, namely as to the nature and content of the plan of action that has been submitted (the "**Plan of Action**" or "**Plan**"), and thus the issue that the Council must determine pursuant to Condition 66.
 - 1.3.2 Condition 66 requires the operator to submit a plan of action for an alternative use for approval by the Council as Waste Planning Authority. The scope of the Council's lawful decision-making is therefore defined by the application that is made. It may either approve the plan that has been submitted, refuse to approve that plan, or approve it subject to lawful conditions.

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- 1.3.3 The Plan of Action submitted in the Application is clearly described as a "*staged plan of action*". It further describes itself as setting out three stages to be followed "*in sequence*". The necessity for this staged approach is explained within the Application. Hence the Plan of Action that has been submitted to the Council is an integral whole, consisting of a series of stages to be worked through by the operator in sequence. It is plain that the submitted Plan of Action does not present individual options from which the Council may select at its discretion.
- 1.3.4 Therefore, the statement on Page 86 of the Report that "*3 separate options are proposed, each of which are proposed by the applicant to be acceptable*" (emphasis added) and that Essex County Council "*may approve only one or more than one of the options*" is demonstrably factually incorrect and misleading.
- 1.3.5 This fundamental misunderstanding of the Application underpins the entire approach within the Report and, as a result, the Report recommends the approval of a 'plan of action' which is substantially different from that for which approval was sought.
- 1.3.6 In addition, the proposed unlawful approach would generate an obvious unfairness. Condition 66 requires the approved plan to be implemented by the operator within 6 months. A decision to 'approve' a plan which is substantially different from that submitted as part of the Application purports to impose a legal obligation on the operator to implement a plan that he has not and would not have proposed, and to do so within six months or be in breach of condition. Such an outcome would be fundamentally and patently unfair.
- 1.3.7 Any decision made by the Council purporting to approve only part of the submitted staged Plan of Action on the basis of this misunderstanding of the Application before it would fall outside of the scope of the Council's decision-making powers under Condition 66 and would be ultra vires.
- 1.4 **Refusal of "Option 2":**
- 1.4.1 The refusal of Option 2 proceeds from a misinterpretation of the existing planning permission in that it assumes that partial implementation would be a breach of development control.
- 1.4.2 The Report suggests that the existing permission was granted on the basis that complete implementation was required. In fact, the Inspector expressly rejected this through his refusal of the proposed condition that "*No element of the development may be implemented in isolation of others*" (see condition 23 at Page 239 of the Report). The Inspector was concerned to enable the development permitted the necessary "*flexibility to accommodate future changes in waste arisings and in waste management techniques and practices*" (see paragraph 13.61 at Page 200).
- 1.4.3 Thus the Report assesses Option 2 on the basis of an error of law as to the scope and effect of the existing permission. In so doing, it also fails to take account of a material consideration, namely a correct understanding of the scope and effect of the existing permission. Any decision made in reliance on that analysis would be both unlawful and unreasonable.
- 1.4.4 Even if the Council's analysis of the lawfulness of partial implementation under the existing permission were correct, and a further planning application were required, this would not necessarily form an appropriate basis for the refusal of



the submitted Plan of Action. Properly understood, it is a concern as to whether the submitted Plan is sufficiently clear in setting out the potential procedural requirements associated with this part of the staged approach, and not a concern as to the substance of the Plan itself. Rather than recommend refusal without further engagement with Indaver, the Council should therefore instead:

- (A) engage with Indaver to discuss what it considers would be necessary by way of further procedural details within the submitted Plan of Action; or
- (B) impose a condition upon an approval requiring the submission of further details.

1.4.5 The Report fails to give any consideration to addressing the identified concerns in this way. The NPPF advises planning authorities to approach decisions on proposed development in a positive and creative way (paragraph 38), and to consider whether otherwise unacceptable development could be made acceptable through the use of conditions or obligations (paragraph 55).

1.4.6 For those reasons the approach taken by the Report in recommending the rejection of "Option 2" is both unlawful (because it is based on an erroneous understanding of the scope and effect of the existing permission), and manifestly unreasonable (because the identified concerns are capable of being addressed through engagement with Indaver and/or condition) even if the Council's understanding of the existing permission was correct

1.5 Refusal of "Option 3":

1.5.1 At Page 95 of the Report, the refusal of Option 3 is justified on the basis that "*it is only appropriate to approve one "Plan of Action" under Condition 66. As set out in paragraph 1.3, this is based on a misunderstanding of the Application.*

1.5.2 In approving "Option 3", the Council would not be approving more than one "plan of action" because this is an integral element of the staged Plan of Action that has been submitted. Hence, the suggested reasons given for rejecting this part of the Plan is underpinned by the same basic error as identified above.

1.5.3 Furthermore, neither:

- (A) the recognised need for a further application, whether for planning permission or a development consent order, to allow this alternative development at the site; nor
- (B) the ability of Indaver to submit such an application without its approval through the Plan of Action

forms a valid reason for refusal of this element of the proposed Plan. This is recognised at Page 81 of the Report which states "*where a plan of action for alternative use proposes any development that requires express planning permission [...] the plan of action to achieve that "alternative use" might be considered acceptable (such as the timescale for submission of an application)*".

1.5.4 For the same reasons as described in paragraphs 1.4.4 and 1.4.5 above, the Council is entitled to request further details from Indaver or to impose a condition upon an approval requiring submission of appropriate details if it considers this to be necessary and appropriate to make the submitted Plan acceptable. Failure to



consider and explore these options before proposing to reject this element of the Plan is contrary to national planning policy and unreasonable.

- 1.6 For the reasons set out above, we consider that any decision made on the basis of the Report would be both unlawful and unreasonable. Were a decision to be made by the Council in accordance with the Report, we would expect to be instructed to bring an appeal under section 78 of the Town and Country Planning Act 1990 and to seek full costs from the Council.
- 1.7 In order to avoid the necessity of such an appeal, we therefore request that the determination of the Application is deferred until after structured discussions have been held between the Council and Indaver in order to:
 - 1.7.1 address the misunderstandings in the Report;
 - 1.7.2 discuss what, if any, further information is required by the Council in respect of the Plan of Action (and where appropriate to enable such information to be provided by Indaver); and
 - 1.7.3 enable Indaver to respond in full to the legal analysis set out for the first time in the Report.
- 1.8 Following this, we would expect that an updated Report would be prepared for the Council in order to enable the lawful determination of the Application.
- 1.9 In the circumstances, it would clearly be in the public interest for the decision to be deferred to enable those steps to be taken in advance of any decision.
- 1.10 We therefore look forward to receiving confirmation that the Council will not proceed to determination of the Application at the meeting on 25 February 2022.

Yours faithfully

Herbert Smith Freehills LLP

Herbert Smith Freehills LLP

on behalf of Indaver Rivenhall Limited