ANSONS

Solicitors

Please Ask for: David Anderton
Our reference: DWA/MLM/GAI003/001/37977
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Commerce House
Ridings Park
Eastern Way
Cannock
Staffordshire
WS11 7FJ

DX: 16092 Cannock
T: 01543 466660
W: www.ansonssolicitors.com

Kevin O'Hanlon Esq
Department for Transport
Great Minster House
33 Horseferry Road,
London SW1P 4DR

By email only: WMInterchange@planninginspectorate.gov.uk

Dear Mr Hanlon,

Planning Act 2008 (as amended) – Four Ashes Limited
Application for an order granting development consent for the construction of rail freight interchange and associated development (West Midlands Interchange) Response to further representation by Applicant dated 13th December 2019.

We act for Stop the WMI Group ("The Group").

This Representation is made pursuant to your letter dated 24th January 2020 inviting comments on the Applicant's late representation dated 13th December 2019.

It is important to understand what the Applicant is actually proposing before addressing the legal issues set out in the late representation.

The Applicant seeks consent to build 25% of the total warehousing applied for without any rail connection being in place. This would involve building on an area in excess of 60 hectares which co-incidentally is the minimum for an SRFI. The area in question is not limited to the area in close proximity to the railway and could be built in isolated pockets.
Under the terms of the draft DCO it could be 6 years before any legal pressure could be applied for the rail connection to be provided.

The Group has already commented on the defective mechanism put forward to secure the commitment to provide the rail connection in its Deadline 8 submission which was published on the website on 22nd August 2019. In short the Applicant does not have the funds to build the rail connection and is attempting to use the building out of the 25% of the warehousing as a form of enabling development. The Applicant has declined to enter into any form of Planning Obligation to set aside any part of the receipts from the initial development to fund the rail connection and the prospects of enforcing any commitment to construct the same is founded on criminal sanctions in the Planning Act 2008 against parties who may be insolvent or no longer around in 6 years time. It is a speculative Application which runs a substantial risk of the loss of green belt land without a rail connection.

The Group has previously made the point that this Applicant is under an obligation to reinstate each zone of its Quarry at Four Ashes to Agricultural Green Belt in accordance with the County

Council's Planning Permission - but hasn't bothered to do so. The rhetorical question is - how could it be trusted to comply with an obligation to construct the rail connection which yields no additional rent for the warehousing already built?

It is clear from the Northampton Gateway Rail Freight Interchange Order that the decision in that case was based on an interpretation of the NPS for National Networks which required the provision of a rail terminal prior to the occupation of any warehousing, notwithstanding the Applicant in that case sought to allow up to 140,400 square metres of warehousing to be occupied before the rail connection was provided. That figure is less than the 186,600 square metres referred to in the WMI draft DCO.

There is the additional point that in the WMI case the proposal has to satisfy the green belt "very special circumstances" test. That distinguishes the case from other Freight Interchanges and whatever view is taken of the legal interpretation issues raised by the Applicant that test cannot be satisfied by allowing the building out of a warehouse development without the certainty of a rail connection.

There are three legal issues arising from the late representation:

1. Is there any distinction between the use of the verbs "must" and "should" in paragraphs 4.88 and 4.89 of the NPS for National Networks?

2. What do " initial take-up" and "initial stages" mean?

3. Does the proposal that Zones A1 and A2 are to be rail connected from the outset of their development meet the policy objective?

Dealing with these points in turn:

1. The verbs "must" and "should" are modal verbs (ie verbs used in front of other verbs to distinguish statements, commands, suppositions, questions and so on – Fowler's Dictionary of Modern English Usage Fourth Edition) which have to be construed in context. If one starts from the assumption that the draftsman uses the same verb consistently to mean the same thing, then "should" in paragraphs 4.88 and 4.89 is used to mean "needs to" i.e. synonymous with the verb "must". This is so because 4.89 states: "As a minimum, a SFRI should be capable...". One would not phrase something using this construction if it were merely desirable (it would be contradictory to say "as a minimum, ideally..."). Paragraph 4.88 states, "It is not essential for all buildings on the site to be rail connected from the outset, but a significant element should be", we can rule out "should" as indicating a merely desired outcome; it has to mean "must", otherwise it makes nonsense of the preceding clause about what is "not essential". Both "must" and "should" express obligations in the context of the NPS for National Networks and there is no distinction between their respective meanings in this context.

2. "initial take-up" and "initial stages" have to be construed in the context of the concluding sentence in paragraph 4.88 which refers to "a significant element."

3. Zones 1A and 1B are subject to the constraint relating to the pollution plume. Rail connection by the development of Zones B and C is required in any event before an

effective rail connection would exist. The references to Zones A1 and A2 do not on any basis constitute a "significant element".

The Group's position is that:

1. On any basis the green belt "very special circumstances" test has not been met.

2. The late representation is flawed in its reasoning about the interpretation of the guidance and the Application fails the policy tests in the NPS for National Networks by reason of the proposal to defer the provision of a significant element of the rail connection for up to 6 years.

Yours sincerely

David Anderton
Ansons Solicitors
Solicitor
Direct Dial: 01543 431927
Email: danderton@ansonssolicitors.com