

## **APPENDIX 2**

**Opinion of Mr Gregory Jones K.C. in respect of Land Rear of The  
Hollies, Burghfield Common, dated 4<sup>th</sup> May 2022**

**IN THE MATTER OF LAND  
REAR OF THE HOLLIES**

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**OPINION**

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**Introduction**

1. I am instructed by ProVision, who are acting on behalf of T A Fisher & Sons Ltd, to advise on the implications arising from the fact that West Berkshire District Council (“the **Council**”) has indicated that planning permission would likely be refused for a proposed development of 32 residential dwellings (“the **Proposed Development**”) because the application site (“the **Site**”) is in the detailed emergency planning zone (“**DEPZ**”) that was adopted by the Council on 19 March 2020, pursuant to the Radiation (Emergency Preparedness and Public Information) Regulations 2019 (“the **Regulations**”).
2. In particular, I have been asked to advise on whether the AWE off-site emergency plan should be made public and whether the fact that the Site is in the DEPZ prevents development from coming forward.

**Summary of Advice**

3. In summary, and for the reasons set out in detail below, my Advice is:
  - i) There is nothing in the Regulations or the Health and Safety Executive Radiation (Emergency Preparedness and Public Information) Regulations

2019 Approved Code of Practice and Guidance (“the **Guidance**”) that prevents the Council from publishing the off-site emergency plan. The off-site emergency plan is also ‘environmental information’ under the Environmental Information Regulations 2004 (“**EIR**”), and there is a presumption in favour of its disclosure subject to applicable exceptions and the application of the public interest test in maintaining the exception. Given that the Council previously published a public version of the off-site emergency plan in 2017, there is no apparent reason why, at the very least, a public version of the off-site emergency plan should not be published.

- ii) The Regulations and the Guidance do not ban development within the DEPZ. On the contrary, they envisage that development will come forward within the DEPZ. The Council must therefore consider whether the Proposed Development can be accommodated within the off-site emergency plan rather than treating the DEPZ as a blanket ban on development.

### **Factual and Legal Background**

4. The Site is part of an allocation in the West Berkshire Council Housing Site Allocations DPD, adopted on 9 May 2017. The allocation is for approximately 60 dwellings, and the latest Annual Monitoring Report in April 2021 noted that the allocated site is being relied upon by the Council as part of its five year housing land supply. Part of the allocated site has already received planning permission for 28 residential dwellings, and the Proposed Development is for 32 residential dwellings on the rest of the allocated site. AWE Burghfield is approximately 2km north east of the Site.
5. On 19 March 2020, pursuant to the Regulations, the Council extended the DEPZ for AWE Burghfield. The extended DEPZ (which is the current

DEPZ) includes the Site whereas the earlier DEPZ did not. In response to this extension of the DEPZ, the Council noted in its AWE Detailed Emergency Planning Zone Report (dated 12<sup>th</sup> March 2020) at para 5.11.1 that the off-site emergency plan would have to be updated. The updated off-site emergency plan has not been published.

6. An application for planning permission for the Proposed Development was submitted on 3 February 2022 (“the **Application**”). On 17 March 2022, the Council’s Emergency Planning Officer raised an objection to the Application ‘due to the number of properties within a dense populated area of the Detailed Emergency Planning Zone (DEPZ) and close proximity to the AWE Burghfield Site.’ The AWE Head of Estate Development and Planning responded to the Application on 7 April 2022, stating that the Proposed Development would constrain the operations of AWE Burghfield and is ‘directly contrary to safety and emergency planning advice and practice in light of the DEPZ required.’ I am instructed that ProVision understands that the Application is otherwise acceptable, but the Planning Officer has now advised orally that he would likely recommend refusal on these grounds.
7. The Regulations are designed to provide a framework for dealing with a potential radiation emergency arising from sites such as AWE Burghfield. The most relevant parts of the Regulations for the purposes of this Advice are as follows:
  - i) Regulation 8: The local authority must prepare a DEPZ on the basis of an operator’s recommendations;
  - ii) Regulation 11: The local authority must prepare an off-site emergency plan to cover the DEPZ;
  - iii) Regulation 12: The local authority must, at suitable intervals not exceeding three years, review and where necessary revise the off-site emergency plan;

- iv) Regulation 16: The local authority may charge the operator a fee for the performance of its functions under regulations 8, 11 and 12.

## Advice

### Disclosure of the Off-Site Emergency Plan

8. The Regulations and the Guidance do not explicitly address the issue of whether an off-site emergency plan should be published or not. There is no requirement to publish the plan, but there is no ban on publishing the plan either. The Guidance does mention that the prior information that must be provided to the public under regulation 21 should include ‘any links to the off-site emergency plan where it is published.’<sup>1</sup> The Guidance therefore does not suggest that it would be dangerous to publish the off-site emergency plan and indeed, clearly envisages that it may well be published.
9. It is also notable that a public version of the previous AWE off-site emergency plan was published in 2017. It is unclear why the Council has not published a similar public version of the current off-site emergency plan when it did so previously, as no justification or reasoning has been provided for this decision. The decision not to publish the off-site emergency plan also appears to be contrary to the Council’s own previous intentions, as para 1.3.2 of the 2017 off-site emergency plan notes that following any revision of the plan, ‘as appropriate an update of the public version of the plan will be placed on the internet.’ [underlining added]. I am unaware that this statement has not been withdrawn and give rise to an expectation that a public version as appropriate will be published.
10. Furthermore, the off-site emergency plan would constitute ‘environmental information’ under the EIR, and the starting point is that the Council must

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<sup>1</sup> Para 831 of the Guidance.

make the off-site emergency plan available on request. One of the exceptions to this duty is when disclosure of the information could be demonstrated to ‘adversely affect’ national security or public safety, (Regulation 12(5)(a)) but even if this exception did apply, the Council would have to show that the public interest in maintaining this exception outweighs the public interest in disclosing the off-site emergency plan. In reaching this decision, the Council would have to apply a presumption in favour of disclosure:

‘The Regulations give people a right of access to information about the activities of public authorities that relate to or affect the environment, unless there is good reason for them not to have the information. This is sometimes referred to as a presumption in favour of disclosure.’<sup>2</sup>

11. In practice, this means that the Council would be under a duty to disclose as much of the off-site emergency plan as possible without adversely affecting national security or public safety. The Council was able to do this in 2017 by producing a public redacted or edited version of the off-site emergency plan, and there is no apparent reason why the Council should not take the same course of action now.

### Effect of the DEPZ

12. The Council seems to be operating under the misapprehension that the DEPZ acts as a ban on all development within the DEPZ. This is not the case. The Regulations and the Guidance do not state anywhere that development should be prevented from coming forward just because it is in the DEPZ. On the contrary, there are many passages in the Guidance which acknowledge that development will take place in the DEPZ. The following list provides a few examples:

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<sup>2</sup> ‘What are the Environmental Information Regulations?’ Guidance from the Information Commissioner’s Office. <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/what-are-the-eir/#2>

- i) Para 481: 'reasonable fees may be agreed with the operator for... considering and implementing changes which may impact on the detailed emergency planning zone or the off-site emergency plan... For example, costs may be recovered for considering revision to the detailed emergency planning zone and/or for updating the off-site emergency plan if planning permission was sought for a new development within or adjacent to a REPPIR emergency planning zone.'
- ii) Para 378: 'Reviewing is a fundamental process, examining the adequacy and effectiveness of the components of the emergency plan and how they function together... The review process should take into account... any changes in the detailed emergency planning zone or the outline planning zone; for example, a new school or hospital.'
- iii) Para 240, when deciding on the extent of the DEPZ: 'Other premises-specific factors should be considered on a case-by-case basis. These might include developments being undertaken on or around the premises.'
- iv) Para 250: 'In order to understand if a change in the local area necessitates a re-determination [of the DEPZ], the local authority should consider developments within or adjacent to the detailed emergency planning zone taking into account their potential impact on the effectiveness of the emergency plan.'
- v) Para 612 on providing prior information to the public: 'The reason for repeating the information at regular intervals, regardless of whether there have been significant changes in the meantime, is to cater for changes in the population likely to be affected, such as new housing or industrial developments'.

13. The Council must therefore consider whether the Proposed Development would be capable of being accommodated within the existing off-site emergency plan, and it is not enough for the Council to assert that the Proposed Development is automatically unsuitable because it falls within the DEPZ. Indeed, such a blanket ban approach has not been adopted for other applications within the DEPZ. On an outstanding application for approval of reserved matters for up to 100 residential dwellings for Land North of Dauntless Road (planning application no: 22/00325/RESMAJ), the AWE Head of Estate Development and Planning has recommended a condition be imposed that requires a landline phone to be fitted in each individual property. The site for that application is also in the DEPZ, and if that condition can secure compliance with the off-site emergency plan, it does not appear that there is any reason why the same condition could not secure compliance with the off-site emergency plan for the Proposed Development.
14. Disclosing the off-site emergency plan (or at the very least a public version) would allow T A Fisher & Sons Ltd to engage constructively with the Council in deciding whether the Proposed Development could be accommodated within the off-site emergency plan.
15. Whilst it is of course impossible to comment with certainty without having seen the off-site emergency plan, there is no apparent reason before me why a relatively small development of 32 residential dwellings in an already residential area would imperil the implementation of the off-site emergency plan. From the material provided by the Council so far, it does not appear that the Council has considered whether the Proposed Development could be accommodated or not, as the Council has instead effectively treated the DEPZ as a moratorium on all development.



16. Finally, I note that even if the Proposed Development would be incapable of being accommodated within the off-site emergency plan, under regulation 12 a local authority must, at most every three years, review and (where necessary) revise its off-site emergency plan. The Regulations therefore envisage that new development will come forward in a DEPZ and that local authorities must, when necessary, revise their off-site emergency plan in response.
17. The Council should therefore be taking a proactive approach to development proposals by assessing whether the Proposed Development can be accommodated within the off-site emergency plan, and even if it cannot be accommodated, the Council must consider whether the off-site emergency plan should be revised to accommodate a Site that is allocated for residential development as part of the Council's five year housing land supply. Under regulation 16, the Council would have the power to charge AWE Burghfield a fee for any costs reasonably incurred in revising the off-site emergency plan.

### **Conclusion**

18. My conclusions are set out in the Summary of my Opinion, above. I would be happy to discuss any issues arising from this Opinion, should that be useful.

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4<sup>th</sup> May 2022