IN THE MATTER OF
Town and Country Planning Act 1990,
Air Quality Directive 2008/50/EC and
The Environment Act 1995

DEVELOPMENT AT PERRY COURT
AND THE AIR QUALITY ISSUES
(application number 15/504264)

ADVICE

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1. I have been asked to advise Swale Borough Council regarding the Air Quality issue that has arisen on this application for proposed development at Perry Court, London Road, Faversham. The Council is due shortly to consider planning application number 15/504264 outline application for large scale development on 31 March 2016. I am aware that my Advice is likely to be made available to the public.

2. Some of the Objections have raised the issue of the likely adverse effect on Air Quality as one of their objections to the development. They have provided a copy of counsel's opinion (the "Mr McCracken Opinion") which they consider supports their objection to the application, that the committee has no other option than to reject the current Perry Court application on this ground. The applicants have had the chance to respond to this. They have provided their own counsel's opinion (the "Mr Hill Opinion") in direct response to the points made by Mr McCracken. They have also submitted further air quality assessment work at the Council's request. Their case is that *"...it would be unlawful and indeed, given the factual analysis, perverse of the Local Planning Authority to refuse permission for the proposed development at Perry Court on the basis of the views expressed by Mr McCracken QC in his advice for Clean Air London."*

3. Briefly put, the air quality issue arises because of the increase in ambient air pollution that may arise from the increased traffic generated by the proposed development. In particular, the site is located near to the Ospringe Air Quality Management Area ("AQMA") which has been designated because a likely breach of the required nitrogen

dioxide (annual mean) objective.[1] Nitrogen dioxide (NO_2) is the main pre-cursor for ground-level ozone which is very harmful to human health, causing major respiratory problems and leading to premature death. Most nitrogen dioxide originates in traffic fumes. The UK objectives are intended to implement the European Directive 2008/50/EC on ambient air quality and cleaner air and the limits it places on air pollution. Under European law, the NOx limits should have been achieved by 1 January 2010 (or by 1 January 2015 if an extension was granted). The South-East is one of 16 zones across the UK where this has not been achieved.

4. The justification for the limit values for each pollutant is made clear in the Directive:

> "Art 2(5) 'limit value' shall mean a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained;"

The legal framework

5. The possible adverse effect on air quality is clearly a material planning consideration, and particularly wherever an AQMA has been designated. This is set out in the NPPF, the PPG and in the development plan. The applicant's Planning Statement states that the proposed development would be in accordance with national policy and local policies including saved Policies SP2, FAV1 and E1 of the adopted Swale Borough Local Plan (2008) and Policy DM6 of the draft Local Plan (December 2014). The relevant policy background is summarised in the Environmental Statement (chapter 9), and I do not propose to repeat it here. In a nutshell, the essential question is the one raised in the PPG flowchart:[2]

> "Will the proposed development (including mitigation) lead to an unacceptable risk from air pollution, prevent sustained compliance with EU limit values or national objectives for pollutants or fail to comply with the requirements of the Habitats Directives ?"

If the answer to this is 'yes' the PPG advises the LPA to

> "consider how proposal could be amended to make it acceptable or, where not practicable, consider whether planning permission should be refused."

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[1] The "Swale Borough Council Air Quality Management Area No 2 – Ospringe Street, Faversham, Kent", made under the Environment Act 1995, s.83(1), which came into effect on the 1 May 2011.
[2] See PPG [ID: 32-009] under the heading *How do considerations about air quality fit into the development management process?*

6. The specific requirement on the local planning authority to take account of the objectives of the Directive, and the likely effects on air pollution generally, is set out in the NPPF and it would be vulnerable to legal challenge in the court if it did not. The Council must be satisfied that the new development must be appropriate for its location (NPPF §120), that it will not contribute to unacceptable levels of air pollution and that it will comply with the EU limit values, taking into account cumulative impacts (NPPF §124). The possible adverse effect on air quality in the AQMA is clearly a material planning consideration. It is close enough to the AQMA for the predicted increase in traffic emissions generated by the proposed development to have the potential for an adverse impact on air quality within it. The planning decisions should ensure that the new development at Perry Court, to the extent that it affects the Air Quality Management Area, is consistent with the local air quality action plan (in effect, applying NPPF §124).

7. The two legal Opinions that have been submitted discuss the effect of the Air Quality Directive, and do not deal with the national considerations in any detail. In that sense, the legal issue is whether the recent developments in European law have added an additional test, in the situation where there is an acknowledged breach of air quality standards for NO_2 in the UK, to those set out in national policy.

8. The recent developments in the law that have arisen are because of ongoing litigation about the UK's breach of European air quality limit levels on NO_2, taken by an NGO, Client Earth, against the Secretary of State. Having initially lost their case in the High Court and Court of Appeal, they have been winning every point since then. The current position is this:
    a. The UK's Supreme Court made a declaration in 2013 that the UK is in breach of its obligations under the Air Quality Directive to meet the limit levels for NO_2 , which includes the South-East– reported at [2013] UKSC 25;
    b. The matter was referred by the Supreme Court to the European Court of Justice, reported as *Case C-404/13 Client Earth* [2015] CMLR 55. The CJ-EU confirmed that the UK was in breach, and that the obligation was not just to establish an action plan, to ensure that it contained measures to comply with the Directive. It was for the national courts to provide an effective remedy;

c. In the light of this, the UK Supreme Court ordered the UK to submit further Air Quality action plans to the European Commission – see R *(on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28. These had to be submitted by 31st December 2015, and that has been done following consultation on their contents;

d. Client Earth have filed a challenge to these new plans, in April 2016, as they allege that these plans do not go far enough or quickly enough to ensure compliance. Where a Member State finds itself in a breach of the Directive's limit values it is obliged to draw up an air quality action plan for the zones in question, setting out appropriate measures to keep the exceedance period "as short as possible" (art.23(1) of the Directive);

e. Even without this litigation, the UK is under pressure to comply. The European Commission has initiated its own Formal Complaint against the UK[3] (and many other Members States). The whole process may take several years to be completed, and it may or may not lead to fines being imposed against the UK for the continuing infraction.

9. I know a query has been raised about whether an individual, or a NGO, would have standing to bring a challenge against the failure by a local authority to act on the Air Quality Directive requirements – rather than just against the Secretary of State. I can confirm that the relevant articles of the Air Quality Directive 2008/50 on action plans can be considered to have direct effect regarding Action Plans only. This point was covered in *Case C-404/13 Client Earth* [2015], which also confirmed the statement to this effect in the earlier *Case C-237/07 Janacek v Freistaat Bayern*_[2008] E.C.R. I-6221. Indeed, Mr Janacek's action was against his local authority, which had refused to make an action plan. The case went to the European Court as a reference on preliminary points of law. As the Court said in *Case C-237/07 Janacek*, at paragraph 39, that:

> *"It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts."*

[3] Press Release 20 February 2014, IP-14-154_EN

The objectors' arguments

10. The problem that has been raised by the objectors is in essence whether the UK planning authorities now need to take a more stringent approach. As the objection from Mr and Mrs Chamberlain states: [4]

> "Analysis on Ospringe Street conducted by Swale Borough Council details that these air quality limits are already in breach. As such committee [stet] has no other option than to reject the current Perry Court application. Any decision counter to this could expose the committee to significant, complex and costly legal challenges in line with 2008/50/EC."

11. I consider that there is still a choice. The breach of the Air Quality limits in a nearby AQMA does not dictate that permission for this development must be refused. It is also important to note that the objector's argument goes further than the legal advice that they rely upon - the Opinion prepared for Clean Air in London by Robert McCracken QC "Clean Air in London- Air Quality Directive 2008/50/EC and Planning" (dated Michaelmas 2015). Where, as in the case of the Perry Court application, we are dealing with an existing breach in the AQMA, the QC's opinion is that a planning application would only be refused if it made the breach "significantly worse". He also includes the point that it should be refused where it may cause significant delay to the achievement of compliance with the limit values (ie. that the compliance will take longer).

12. Looking at the three points that arise from the objections:

(a) (Mr and Mrs Chamberlain's objection that there is no option to refuse) There are clearly options available other than to refuse to grant planning permission, and national policy would require the Council to consider how the development could be modified. Their point is not supported by the legal opinion;

(b) (McCracken QC's first point, whether the development would make the levels in the AQMA significantly worse) The technical evidence will determine whether the development would make the levels in the AQMA "significantly" worse, and this remains the relevant test. That can take account of mitigation measures, both in terms of the scheme itself and in terms of any improvements in air quality from other local and national measures. It also needs to look over a longer time period, as the policy

[4] Their objection email and its attachments, dated 15th November 2015.

requirement is to sustain compliance with and contribute towards EU limit values. I have considered the evidence below;

(c) (McCracken QC's second point whether the development would significantly delay compliance in the AQMA with the limit values.) Mr McCracken's point would only apply to those developments which affect the Action Plan as a whole, in the sense that the limit values would not then be achieved in as short a time as they would otherwise be. The focus needs to be on the adverse effects of this development. Again this largely turns on the evidence. But there is a debate about whether the air quality limits are objectives, to be achieved by the action plan, or whether they restrict each development. I discuss this further below. I consider that the issue is with the plan as a whole, and disagree with McCracken's view that it restricts the grant of individual developments directly which relies on an analogy drawn from the context Water Framework Directive. The UK's compliance with the limit values in the Air Quality Directive depends on the measures in the national and local Action Plans as a whole.

13. I disagree with Mr McCracken about what the remedy for any breach should be. Whilst the point does not strictly arise on this decision (given the evidence), I should not let the point go without further comment. Mr McCracken QC states that permission should be refused. He relies on an analogy with the Water Framework Directive, and the European Court of Justice decision on it in *Bund fur Umwelt und Naturschutz Deutschland eV v Germany* (C-461/13) ("the Weser dredging case"). The court had to consider the extent of the legal requirement to ensure that there was no "deterioration" of surface waters for the purposes of Directive 2000/60 (the Water Framework Directive). The court ruled that the decisionmaker cannot treat the effect on the status of the water body as a general objective, as "*any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans and programmes of measures*" [§50]. It was held that:

> "Member States are required - unless a derogation is granted - to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive."

14. I disagree that that analogy with the WFD can be drawn. The Water Framework

Directive has its own specific framework. In particular, projects may still be authorised pursuant to the system of derogations provided for in Article 4 of the WFD Directive 2000/60. The court relied on the existence of this derogation regime as it "constitutes a matter which confirms the interpretation that prevention of deterioration of the status of the bodies of water is binding in nature" [§44]. There is no similar provision in the Air Quality Directive.

15. The remedy under the Air Quality Directive for a failure to meet the limit values remains to require better Air Quality Action Plans. That is indeed what ClientEarth have been seeking in their litigation (in reliance on Article 23 of the Air Quality Directive) – that the measures in them ensure that the exceedance period can be kept as short as possible.

The applicant's arguments

16. The Hill Opinion takes a more robust approach. Whilst I do have reservations about the Mr Hill Opinion (see below), I would agree with the best point that he makes is that, even if one adopts Mr McCracken's approach, the evidence does not support the refusal of planning permission on this ground. Whilst there is evidence of some impact on air quality, it is not a significant impact:
    a. If one accepts the evidence of the Acoustic Air consultants in full, there will be some 'moderate' impacts in the opening year of the development (now taken to be 2020) which will diminish to negligible impacts by 2025. This is based on the assumption that there will be improvements in the air quality baseline generally.
    b. If one is more cautious about those projected national improvements, the worst case scenario is that there will only be some moderate impacts before any further mitigation measures are taken into account. I have discussed the evidence further below.

17. I do take issue with the point made in Mr Hill's Opinion that the competent authorities are not obliged to take measures to ensure that the limit values are never exceeded and that they only have to ensure "a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests" (his §19, with the emphasis he places on certain passages in the case of *Janacek*).

18. That is an out of date approach. That case was considering the provisions of the old Directive (EC/96/62). I do not agree that the new Directive's requirement for the period to achieve compliance to be "as short as possible" is consistent with the gradual compliance allowed for by this old ECJ case under the old AQ Directive.

19. I can do no better than to quote what the European Commission has already said, back in 2013. It dealt with this point directly in its *Observations* on the *Client Earth case Case C-404/13* (dated 5 December 2013):

> "102.Under the legislation at that time, a Member State was indeed obliged to take measures *"to reduce the risk or limit the duration of an occurrence"* but not to *"take measures to ensure that those limit values and/or alert thresholds are never exceeded"* . However, and by contrast, the second subparagraph of Article 23(1) is premised not on the exceedance of a limit value before the attainment deadline, but on an existing breach of Article 13. Therefore, Member States *"shall set out appropriate measures, so that the exceedance period can be kept as short as possible"* . In other words, the measures must be appropriate not only to limit the duration of an exceedance, but to bring the infringement to an end in the shortest time possible. This is an obligation of result.
>
> "103. Moreover, as already mentioned, while the Court in *Janacek* (at paragraph 46) admitted that the Member State retained a margin of discretion in deciding the measures to be adopted pursuant to Article 7(3) of Directive 96/62, as argued above the second subparagraph of Article 23(1) of the Air Quality Directive does not allow Member States such a wide margin of discretion, but rather requires Member States to act in a manner that brings the infringement of Article 13 to as swift an end as possible by foreseeing in its plans effective, proportionate and scientifically feasible measures to address the specific emissions problem in the relevant zone. It is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that Community law is complied with."

20. I would also take issue with the statement that "*there is no stand-alone legal duty in the Directive which requires local planning authorities to impose the burden of ambient air quality compliance on an individual development.*" (Hill para 20) This is correct only in the strict sense that the Directive is not phrased in that way, and there is no caselaw (unlike the Weser dredging case) to support such a duty under the Directive. But a refusal could follow from an individual development's failure to comply with an ambient air quality limit. If the situation arose where a development would cause a significant breach of the Air Quality limit values, or to fail to sustain compliance with them, which could not be practicably mitigated, national policy would direct that this is a reason for refusal. There are a number of planning appeal decisions on large-scale housing developments which have had to

consider the point. It could also be argued that a refusal would follow in a case where a development prejudiced the measures that are set out in the Action Plans, particularly where compliance now needs to be achieved in as short a time as possible. The evidence shows that this is not the case here.

The evidence on the Air Quality Action Plans

21. The Council should take account of the national action plans that have now been produced. The Government's stated aim is to achieve compliance with the EU limit values in the shortest possible time. The new Action Plans include those measures that have been implemented, will be implemented, or are being considered for implementation. Until we know more about the Court's view of the detailed criticisms that ClientEarth have, I consider that we can assume that these national Plans are adequate and that it is their enforcement that will be the important part to ensuring compliance.

22. It is worth noting what these new national action plans rely upon. There is a 'UK overview document' which sets out, amongst other things, the national measures that are to be applied. I would note that the UK Overview document supports the conclusion that any assessment of compliance can take account of a reduction in the baseline concentrations. Indeed, it states at §1.3 that:

> "The assessment undertaken for the South East non-agglomeration zone indicates that the annual limit value was exceeded in 2013 but is likely to be achieved before 2020 through the introduction of measures included in the baseline."

23. There are then AQAP documents for each of the zones, in the form of an updated air quality plan for the achievement of the EU air quality limit values for nitrogen dioxide (NO_2). Swale BC is one of the 72 local authorities included in what is called "the South East non-agglomeration zone".[5] The document for the South East non-agglomeration zone (ref: UK0031) is an update to the air quality plan published by Defra in September 2011. In the section that sets out the details of the local air quality measures, there are 35 measures listed for the Swale BC area (at pp.162-166, in Table C.1 Relevant Local

[5] The Directive identifies "zones" and "agglomerations", and agglomerations are defined as those conurbations with a population in excess of 250 000 inhabitants (Art. 2(17)).

Authority measures within South East (UK0031). This includes 'Mitigation of impact of traffic increases from new development'. Indeed, one of the measures listed in Annex XV of the Directive that are appropriate for inclusion in an Action Plan are "measures to encourage a shift in transport towards less polluting modes". The Council should take account of the point that the measures in the Travel Plan for this Perry Court development will indeed help promote this AQAP measure.

The evidence on Air Quality for this development

24. Evidence on the likely impacts on air quality has been provided as part of the planning application. The original application included a study by the consultants, Acoustic Air, and this was included as part of the Environmental Statement. The applicant still stands by the ES, and has not altered its conclusion that there are not likely to be any significant environmental effects on air pollution levels.

25. There are a number of points that are not in dispute:
    a. As the ES identifies, there is no evidence that the application Site itself will be adversely affected by air pollution.
    b. The key issue is "*the potential effects of traffic generated by the Development upon dwellings adjacent to the A2 London Road to establish that there will be no adverse effects upon existing standards of air quality*" (para 9.62 in the ES).
    c. The ES report concentrates on NO_2 and PM_{10} as all other air quality objectives are met.
    d. The impact assessment shows that, with the exception of the locality of the Ospringe AQMA, all the ambient concentrations lie well below the limit values. With the addition of the development's traffic, there would be no significant change (ES, para 9.83).
    e. Even within the AQMA, as the ES states, the baseline conditions for the levels for PM_{10} are well below the limit values.
    f. The sole issue is with the levels of NO_2 in the AQMA.

26. There is an ongoing concern about the proximity of the Ospringe AQMA to the development site. Mr Wilcock asked for a more thorough atmospheric dispersion assessment to be carried out. This evidence has been provided. A further air quality report, the legal opinion from Tom Hill QC and an improved Travel Plan were submitted

on 5th February 2016 by Barton Wilmore on behalf of the applicant. The Environmental Statement itself has not had to be updated, as it is said that the likely significant effects on the environment remain the same.

27. The further air quality assessment dispersion modelling by Acoustic Air Limited has looked at the effects of the development alone, and in combination with other permitted development, on the air quality EU pollutant limit values and national objectives. Their assessment has concluded that the development would not lead to unacceptable risks from air pollution nor would it prevent compliance with limit values and objectives. In addition the assessment identified that the development will not lead to any significant changes to air pollution within the Ospringe Air Quality Management Area. A large component of this analysis relies upon the improvements in the background NO_2 concentrations that are expected at the national level by 2020, and in particular by 2025. Although there will be more traffic passing through the AQMA as a result of the development, the general baseline conditions will be far more favourable and not in breach of the limit values.

28. This evidence has been reviewed by the Council. I see that the recommendation from the Council's Environmental Health Team is that they have withdrawn their objection in the light of the new assessment. However, the Environmental Health Team has sought a "developer contribution to mitigate the effects of the development on the air quality in Ospringe" (as advised at the meeting on 15 October 2015). There is a concern that the mitigation measures as such are fairly limited.

29. When considering whether an impact is "significant" the Council can draw on the Guidance produced by the environmental specialist organisations, Environmental Protection -UK (EP-UK) and the Institute of Air Quality Management (IAQM) on "Land Use Planning & Development Control: Planning for Air Quality" (May 2015, v1.1). Whilst the applicant's Environmental Statement only refers to the 2010 edition, the 2016 Acoustic Air Ltd study does refer to this latest guidance. Any air quality assessment must first identify the likely magnitude of any change arising from the development, and then identify how "significant" that scale of change is in the local circumstances. The nearer an area is to the limit value, the more a small change is likely to be seen as significant. For the reasons they given, the 'moderate' level of impact identified is not considered to be significant.

30. I note that the ES and the 2016 Study therefore state that no mitigation is required to restrict the impact from road traffic on the AQMA. That is no really accurate – they are really referring to their view that no further mitigation is required. I note the Mr Hill's Opinion assumes that planned mitigation in the form of the Travel Plan will be part of the development, and could be improved (his §6). Indeed, both the reports rely upon the traffic data provided by the transport engineers, which takes account of the Travel Plan. That is clearly a mitigation measure in this context, as the measures set out in the Travel Plan will reduce traffic generation. It is clear that the air pollution situation would be worse in 2018/2020 with the development than without it, and so restrictions to reduce that effect to an insignificant level are appropriate. The real dispute is over whether further measures are necessary than those that have been proposed.

31. So, whilst the main justification for the Travel Plan is due to the highway requirements, it is also being used to assist in mitigating the effects on ambient air quality from the additional traffic. As the covering letter from Barton Wilmore (dated 5 February 2016) states, their suggested Travel Plan has been updated to include additional on-site facilities and measures, aimed at reducing air pollution from traffic, including:

    - Electric car charging points with dedicated car park spaces;
    - Dedicated bike stands and/or bike locker area for employment zones;
    - Shower facilities for employees;
    - Provision of a Green Voucher for each household;
    - Provision of a Bicycle User Group; and
    - Option to enter into a car share database with annual prize draw for registered residents/employees.
    - a Travel Plan Coordinator will be employed to ensure that delivery of all transport infrastructure is implemented.

    They have also suggested that, following the initial five years, if a 10% modal shift target is not met, the Travel Plan coordinator will be employed until the targets are met. To encourage the necessary mode shift, additional measures will be considered. These could include:

    · bespoke car share database
    · repeating the public transport taster ticket offer
    · repeating green voucher
    · contribution for a car club

32. The wording of suggested condition 9 does not yet contain an enforcement provision if the monitoring shows a failure to meet the targets. Further funding could also be provided in a section 106 obligation. The current draft of condition 9 states:

> "No dwelling … shall be occupied until a Travel Plan has been submitted to and approved in writing by the Local Planning Authority and it shall thereafter be implemented in accordance with the approved detail. There shall be an annual review of the Travel Plan (for a period of 5 years from the date of approval of the plan) to monitor progress in meeting the targets for reducing car journeys."

33. Given the uncertainties in predicting the reduction in the baseline conditions, upon which the air quality assessments heavily rely, it would appear to be appropriate to continue to monitor the situation and to require further steps. The trigger points for the additional measures would not just be if the traffic does not reduce by 10% but also if the measured levels of air quality in the AQMA remain as high as they are at present (or as they are in the 2020, Table 4.5 of the 2016 study). This point can be added to the reasoned justification for the condition as well.

34. If the Council considers that additional measures are required, it needs to justify why this is the case, and then to ensure that this is part of the section 106 agreement or the conditions. The additional Travel Plan provisions are reasonable ones to consider. As the PPG states:

> "Mitigation options where necessary will be locationally specific, will depend on the proposed development and should be proportionate to the likely impact."
>
> [ID: 32-005]

The examples of other mitigation measures given in the PPG [ID: 32-008] include:

> "…
> · promoting infrastructure to promote modes of transport with low impact on air quality;
> · controlling dust and emissions from construction, operation and demolition; and
> · contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development."

Other measures could include: limitations on vehicle parking; further requirements to make provision for alternative transport; or even a reduction in scale of the development. At the moment, the evidence does not suggest that these are necessary.

Conclusions

35. For the reasons set out above, I do not accept the points made by the objectors relying upon the McCracken Opinion that a local planning authority must refuse planning permission in these circumstances. The Council has a considerable body of evidence about the likely impacts before it. The expert opinion is that the scale of the impact on air quality is not sufficiently significant, even when a more sceptical view is taken than the one expressed by Acoustic Air that the impacts will be negligible by 2025, and that there are clearly additional mitigation measures that can be required which would further reduce the likely impacts. On this basis, although the likely impacts are a material planning consideration, there is no evidence of significant harm.

36. If I can be of further assistance, please do contact me in chambers.

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31 March 2016

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