COMMENTS ON NRW STATEMENT OF CASE
APPEAL 3215988

Site: Morfa, Trearddur Bay, LL65 2TY

Appeal by Timothy Davis of Eaden Homes Limited

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1 Introduction

1.1 General

1.1.1 References herein are to the Appellant's Statement of Case ('ASC') and the Respondent's Statement of Case ('RSC').

1.1.2 The Appellant has already dealt with the matters raised by the Respondent's Notice of Refusal dated 11th May 2018 in the ASC. In particular the Appellant has addressed the two reasons (see ASC) that the Respondent stated it relied upon when refusing the Appellant's application and the Appellant does not propose to rehearse the same arguments in these Comments. For the avoidance of doubt the Appellant relies principally on the ASC and additionally its comments herein to challenge the RSC.

1.1.3 The Appellants Comments will endeavour to follow the headings and paragraph numbering adopted by the RSC for ease of reference. This document has focused on the waste recovery issues in Section 2 and flood risk issues in Section 3.

2 Waste Recovery

2.1 Background on waste recovery (paragraphs 17 to 27)

2.1.1 The definition of recovery in Article 3(15) of the Waste Framework Directive (Directive 2008/98/EC) has been judicially considered in The Queen on the Application of Tarmac Aggregates Limited, (formerly Lafarge Aggregates Limited) v The Secretary of State for Environment, Food and Rural Affairs v The Environment Agency (Methley Quarry Case).

2.1.2 The Methley Quarry Case referred to the Opinion of Advocate General Jacobs (2001) and the case of Abfall Service AG (ASA) and Bundesminister für Umwelt, Jugend und Familie (ASA) in which judgment was delivered on 27th February 2002. In ASA the relevant test for recovery was explained in the following way:

i) "the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources."
ii) "It is for the national judge to apply that criterion in the present case in order to classify the deposit of the waste at issue in a disused mine as either a disposal operation or a recovery operation.
iii) The deposit must be assessed on a case-by-case basis to determine whether the operation is a disposal or a recovery operation within the meaning of that Directive.
iv) Such a deposit constitutes a recovery if its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose."

2.1.3 ASA is regarded as a leading case on the previous Waste Framework Directive which was replaced by Directive 2008/98/EC. Subsequent cases have affirmed the test laid out in ASA. As mentioned above the opinion of AG Jacobs and ASA was reviewed and considered by the Court of Appeal in the Methley Quarry Case. In a judgment handed down on 17th November 2015. Sales LJ (Floyd LJ and McFarlane LJ concurring) adopted the guidance from AG Jacobs and the test in ASA when deciding that the use of material was in accordance with the definition of recovery:

i) "… in line with the guidance given by both AG Jacobs and the ECJ referred to above, that the primary objective in using waste to construct the lakes, the reed-beds, the shallow water areas and the land bridge is the recovery of the waste, in the sense of replacing the use of primary materials in an operation which would have to be carried out for the purpose of ecological improvement of the Quarry site in any event, thus avoiding the need to use primary materials for that purpose as would otherwise have been the case, with the result that the backfill operation ought properly to be classified as a recovery operation within paragraph R10."

2.1.4 It is submitted the test for recovery is encapsulated in the ASA decision and nowhere in that decision is there any reference to the need for a planning obligation. In the Methley Quarry case the existence of a planning obligation was identified as the reasoning in support of the decision. Not a test in itself. It is to be noted that the existence of a planning obligation was not a factor in the ASA case but '*for safety or technical reasons to do with the mine itself*'. (See Methley Quarry case paragraph 13) below:

i) "In my view the test of the overriding purpose of an operation is the correct criterion for determining whether that operation should be classified as disposal or recovery. The decisive question is whether the waste is used — or reused — for a genuine purpose. Put another way, if waste were not available for a given operation, would that operation none the less be carried out using some other material? Applying that criterion to the case of a deposit of waste to fill hollow spaces in a disused mine, it would need to be determined whether, in the absence of that waste, those responsible for the mine would have had to arrange for the mine to be filled with other material for a purpose independent of storing the waste, for example for safety or technical reasons to do with the mine itself."

2.1.5 At paragraph 21 of the RSC the Respondent states the WRP guidance is designed to be a standardised way of applying the test for recovery versus disposal activities and to create a level playing field for customers. This is clearly an incorrect approach. The WRP guidance narrows down what might be ordinarily considered to be a recovery operation by the rigid application of tests that are simply no more than an inexhaustive set of examples of what Lane LJ described 'as reasoning in support of this conclusion'. The true test is as laid out in the ASA case (as affirmed by following cases including the Methley Quarry case) and each recovery

permit application must be considered on a case-by-case basis and not by the standards of the Respondent's rigid straightjacketed WRP guidance which the Respondent (wrongly) appears to regard as the legal test.

2.1.6 The correct test is as stated by AG Jacobs and referenced by Sales LJ at para 13:

i) "The decisive question is whether the waste is used — or reused — for a genuine purpose. Put another way, if waste were not available for a given operation, would that operation none the less be carried out using some other material?"

2.1.7 Applying the correct test to the Appellant's situation the answer to A G Jacobs' question would be 'yes' . As mentioned in paragraph 201 *'since the application was submitted the Appellant had commenced the land raising works using primary materials comprising quarried limestone'.* In addition to the utilisation of primary materials, which demonstrates the operation would nonetheless be carried out using non waste material, the 1983 planning permission requires strict adherence to approved plans that contain details of the levels agreed at 3.4m AOD. As submitted in section 2 of the ASC the Appellant proposes the use of locally sourced waste to avoid the need to use natural resources such as stone.

2.2 Requests for further information (paragraphs 29 to 131)

2.2.1 The use of waste materials by the Appellant for the completion of a formation level is a legitimate recovery operation. The reasoning in support of such conclusion has been provided to the Respondent as explained in the ASC but the Respondent has chosen to dismiss it and has reached the wrong conclusion. This is undoubtedly because of the influence of the WRP guidance that is not the definitive test.

2.2.2 In response to paragraphs 81 and 82 (Physical and Chemical characteristics of waste) we are not sure why this is included as the proposed waste type and characteristics was not raised as a reason for refusal of the permit. The Appellant believes satisfactory responses were provided to the Schedule 5 Notice.

2.2.3 In response to paragraph 85, the Appellant provided the Respondent with evidence of financial gain by using non-waste materials. Such evidence has not been challenged. At paragraph 201 the Respondent acknowledges the Appellant has commenced the land raising works using primary aggregates. The Appellant has done this because the Respondent has refused to grant the Appellant's application and the Appellant has been forced to use primary materials which might otherwise have been replaced by waste serving a useful purpose. This evidence satisfies at least one of the 3 tests of the WRP guidance and certainly provides positive affirmation the intention is to use waste for a genuine purpose.

2.2.4 As stated in the ASC and demonstrated in the supporting bundle of documents the Appellant has a safeguarded planning permission that permits the development in accordance with detailed plans which contain levels agreed to meet 3.4m AOD. If the development was not carried out strictly in accordance with the plans that would involve a breach of planning control. One of the conditions of the planning permission clearly requires the carrying out the development "strictly in accordance with the plans attached to this permission." Any departure from the levels shown on the plans would involve a breach of condition. There is nothing to indicate that the local planning authority would permit the development to go ahead otherwise than in accordance with the planning permission.

2.2.5 In response to paragraphs 49, 63, 64, 83, 84 and 86, the Appellant has provided the Respondent with evidence of the planning permission to satisfy the Respondent's request for evidence to demonstrate an obligation to raise the levels and 'to demonstrate the function of the work and why the work needed to be done'. According to NRW's operational instruction (which appears to pre-date the changes made to Schedule 9 EPR2016) if the planning permission submitted hadn't clearly covered the permit activity or the area to be permitted the application wouldn't have been accepted as duly made (see paragraph 35).

2.2.6 As in the Methley Quarry case it would be pure speculation, unsupported by any evidence to suggest the local planning authority would permit development other than in strict accordance with the plans. Clearly the planning permission provided to the Respondent is evidence that there are enforceable planning obligations. Once the Appellant has determined to carry out the development it is obliged to meet the levels detailed on the plans. It cannot comply with the planning permission if it does not do so.

Paragraphs 70 – 75, 86, 89, 92 and 126-131 of the RSC clearly demonstrates how the Respondent has failed to properly consider or assess the evidence submitted by the Appellant.

2.2.7 In a similar way in the Methley Quarry case Tarmac applied for planning permission for an extension of its sand and gravel operation. Planning was granted subject to conditions including a restoration condition. There was no obligation on Tarmac to implement the planning consent. Tarmac chose to do so triggering its obligation under the restoration condition. The Respondent is suggesting (see RSC paragraphs 126-131) that the Appellant's case is different to the Methley Quarry case in that:

i) Tarmac's proposals were approved by the Council (the restoration condition). **Comment** – the levels shown on the plans referred to in the 1983 planning permission were approved by the local planning authority and the planning permission required strict adherence to the plans.

ii) In Tarmac's case a date was given by which time the restoration work needed to be completed. **Comment** - this is an irrelevant consideration.

iii) The Appellant's permission did not contain a condition to raise the land. **Comment** - not to raise the land would be a breach of planning control and a breach of condition.

iv) The planning authority in the Tarmac case would have taken enforcement action if they had failed to restore the quarry this was whether waste or not waste was used. **Comment** – this is speculation as it was not known what action the planning authority would have taken. At paragraph 42 i) of the Methley Quarry case it is stated the Council had never 'given any grounds for thinking that it had changed its mind about the importance of the public interest in issue or about the need to hold tarmac to the restoration condition."

v) No enforcement action has been taken to force the Appellant to build the houses for which they had planning permission. **Comment** - this is hardly surprising given implementation of a planning permission is voluntary. The 1983 planning permission has been implemented and there are no relevant time conditions and no basis for the local planning authority to enforce against the Appellant provided the Appellant complies with the planning permission. The evidence indicates the local planning authority is prepared to enforce against activities not in accordance with planning permission. No enforcement action was taken against Tarmac to implement its planning consent.

2.3 Paragraphs 132 to 165, 177, 181 and 192

2.3.1 In paragraph 132 the Respondent asserts that no evidence to demonstrate an obligation to do the work was submitted in the response to the Schedule 5 Notice. This is plainly incorrect because the Respondent was provided with the 1983 planning permission and was therefore provided with the requisite evidence.

2.3.2 The response in paragraph 134 is clearly incorrect because there is clearly an obligation to raise land levels in accordance with the levels detailed on the approved plan.

2.3.3 Paragraphs 134 – 137 contains comments on the Planning Inspector's decision (22.08.1988). We refer to the submissions in section 2.5 of the ASC.

2.3.4 Paragraphs 138 and 156 typify the Respondent's misguided approach to the question of planning. In the Methley Quarry case it would also be the case (as it would in all cases where planning is granted) that there was no specific obligation to carry out the development (i.e. implement the permission by commencing the extraction of sand and gravel). There was absolutely no need for the Appellant to seek to further justify its position in the way it felt compelled to (see paragraphs 139 – 155) to attempt to deal with the Respondent's incorrect approach to the application of the recovery test.

2.3.5 The Respondent's position (see paragraph 157) as regards the appeal that led to the decision in 1988 appears difficult to reconcile with the facts. The deposit of waste, the subject matter of the appeal, was granted planning permission by the Planning Inspector.

2.3.6 The Respondent's refusal of the planning application on the grounds of no obligation to carry out the work is clearly wrong. (See Paragraph 157 – 165, 177, 181 & 192)

3 Flood Risk

3.1 Paragraphs 7 to 13

3.1.1 Contrary to the assertion in Paragraph 13 of the RSC, it is not necessary for the activity to be assessed as part of the application process against the requirements of TAN 15. There is no requirement to assess the risk posed by flooding to the site or elsewhere in accordance with TAN 15 set out in the Environmental Permitting (England and Wales) Regulations 2016, the Water Act 2014, the Pollution Prevention and Control Act 1999 or the Waste Framework Directive.

3.1.2 Whilst the information set out in Paragraphs 7 to 13 of the RSC would be relevant to a planning application for a new development, the matter of flood risk is relevant to the application only as set out in the following Sections:

3.1.3 It is specified in the UK Government Guidance on waste recovery plans (WRP Guidance) under the heading "Meeting quality standards" that the finished landform will not increase flood risk elsewhere, or cause soil erosion or pollution to watercourses. Such practice would be consistent with the Defra Construction Code of Practice for the Sustainable Use of Soils on Construction Sites dated September 2009, as reproduced in the now withdrawn RGN13.

3.1.4 As set out above, the overriding test for determining whether an operation is waste recovery is *"if waste were not available for a given operation, would that operation none the less be carried out using some other material."*

3.1.5 As set out above also, this test is met by the operation and the WRP guidance narrows down what might be ordinarily considered to be a recovery operation by the application of an inexhaustive set of examples of reasoning in support of this conclusion. The specification that the finished scheme will not increase flood risk elsewhere is therefore set out in the guidance in order to assist the Respondent in forming a judgement as to whether the operation would have gone ahead if waste could not be used.

3.1.6 For example, it stands to reason that if there were no obligation to undertake the work, and the operator could not achieve a significant financial gain using non-waste materials, the

operator may seek to use wastes at a lower cost compared to using non-waste materials. Such wastes may have a lower cost due to their characteristics as part of the finished landform increasing flood risk elsewhere, or resulting in soil erosion or pollution to watercourses. As such, it may be possible to make significantly more profitable an operation which uses waste material where the same operation may not have gone ahead using non-waste materials. Such an operation would therefore fail to satisfy the recovery test as discussed above. In this scenario, the regulator could justify the operation being designated as a disposal activity on the basis that the only way to make the operation financially viable would be to use wastes which do not meet appropriate standards. This is clearly not the case for this application.

3.1.7 Based on the above, it is incongruous with the established definition of recovery to refuse an application for a waste recovery operation which would have gone ahead if waste could not be used on the grounds that it may increase flood risk. The Appellant has demonstrated clearly both financial gain by using non-waste materials and an obligation to do the work. Therefore, as it has been established that the operation would go ahead using non-waste materials, there is no justification for the Respondent to refuse the application on the flood risk grounds set out in Paragraphs 7 to 13 of the RSC.

3.2 Paragraphs 14 to 16

3.2.1 The statements of fact in these paragraphs are acknowledged and have been taken account of as part of the application.

3.3 Paragraphs 166 to 176

3.3.1 The respondent has cited in paragraphs 166 and 167 the TAN 15 document and hydrological setting of the works as justification for requesting from the Appellant consideration of the risk posed by flooding elsewhere and hydraulic modelling. The assertion that such modelling is required as part of the application process is incorrect. There is no requirement as part of the legislation relevant to the application or recommendation in the relevant guidance that hydraulic modelling should be undertaken and the lack of provision of this information is no justification for the refusal of the application.

3.3.2 The response from the Appellant dated 26 July 2017 to the Schedule 5 Notice 27 June 2017 (2234-A13, pages 3 – 16 of 16) established that the works will be undertaken using subsoils from the surrounding area in paragraph 2.3 (2234-A13, pages 8 – 9 of 16), hence runoff would not be increased. Provisions are set out in paragraph 2.2 (2234-A13, page 8 of 16) of the response in order to minimise the potential for the generation of silt laden runoff.

3.3.3 Confirmation of the types of waste to be accepted at the site along with verification procedures so that the deposition of the wastes does not pose a significant risk of pollution were set out in paragraphs 4.1 to 4.3 (2234-A13, pages 12 – 13 of 16).

3.3.4 Based on the information referenced above, the Respondent had sufficient information following receipt of the response (2234-A13, pages 3 – 16 of 16) to be satisfied that the waste material to be deposited at the site would meet the appropriate standards in that there would be no increase in flood risk elsewhere, or resulting soil erosion or pollution to watercourses compared with the situation where non-waste materials were used. The Respondent therefore was sufficiently informed at this point to establish that the waste was being used in substitution of non-waste materials, therefore conserving natural resources consistent with the established definition of waste recovery. Any further assessment of the risk posed by flooding elsewhere as a result of the development is therefore supererogatory to the requirements of the relevant legislation irrespective of whether it is requested in a Schedule 5 Notice as referenced by the Respondent in Paragraph 168.

3.3.5 Based on the above, any refusal by the respondent on the grounds that quantitative flood modelling had not been undertaken is a clear mis-application of the WRP Guidance, given that it was clearly demonstrated that the waste would be used in substitution of non-waste materials. Nevertheless, the Appellant wished to re-assure the Respondent that the consented finished landform would not increase flood risk elsewhere and addressed the matters raised by the Respondent in paragraphs 2.5 to 2.11 (2234-A13, pages 10 – 11 of 16) .

3.3.6 The refusal by the Respondent to accept the re-assurances provided by the Appellant as described in paragraphs 168 to 170 does not justify the refusal of the application on flood risk grounds, irrespective of the technical matters discussed. Notwithstanding the above, in the interests of expediting insofar as possible the determination of the application, the Appellant obliged insofar as reasonable the Respondents requests for further flood risk assessment.

Paragraph 170 acknowledges the provision of clarification by the Appellant. The Appellant's assessment of the risk posed by flooding elsewhere are provided also in the ASC along with the conclusion that flood risk will not increase elsewhere. The statement by the Respondent that the information was speculative and not substantiated by evidence is incorrect as the assessment was based on a thorough approach from first principles, concluding that further assessment (along with much of the assessment undertaken) was not necessary.

3.3.7 The Respondent's queries regarding the risk posed to flooding elsewhere pertain to ground levels in respect of the consented landform and have no relevance to the waste recovery plan. Neither the Respondent nor Isle of Anglesey Council would have the power to undertake enforcement action against the Appellant on flood risk grounds were the consented landform to be constructed using non-waste materials.

3.3.8 As discussed in paragraphs 172 and 173, the Appellant agreed to an extension to the determination deadline at the Respondent's request. For the avoidance of doubt, this was a commercial decision on the part of the Appellant in order to avoid the possible the refusal of the application and the need to appeal.

3.3.9 In paragraph 174, the Respondent states that their intention to refuse the permit application as set out in the email dated 17 October 2017 on the basis "… the waste recovery plan did not meet the definition of recovery based on;

a) "no evidence to demonstrate that there was an obligation to do the work"; and
b) "consideration of flood risk to the surrounding areas."

3.3.10 As shown at 2234-A10 page 17 of 41, the email dated 17 October 2017 stated reasons as

a) "no planning obligation"
b) "inadequate consideration of flood risk to the surrounding areas"

3.3.11 The RSC is inconsistent with the correspondence referenced. Nevertheless, it has been set out in respect of Ground 1 that refusal of the planning application on the grounds of no obligation to carry out the work is clearly wrong. The statement that there was inadequate consideration of flood risk to the surrounding areas as part of the application is clearly inconsistent with the degree of assessment commissioned by the Appellant, taking into account the requirements of the relevant legislation and guidance. Furthermore, if the Respondent intended to refuse the application on the basis that the waste materials used would not meet the appropriate standards, *i.e.* by the Respondent saying that it considers that there is an increase in flood risk, it would have been appropriate to provide evidence that the runoff characteristics of the waste would result in an unacceptable increase in runoff compared to the situation where non-waste materials were used. No such evidence was provided by the Respondent at the time or subsequently as part of the application or appeal process.

3.3.12 As set out in paragraphs 175 to 176 and 178 to 180 the Appellant acquiesced to the extension of determination deadline and obtained from the Respondent and others the information recommended by the Respondent. The information was reviewed by the Appellant with the intention of expediting the determination of the application by addressing the concerns of the Respondent. None of the information recommended by the Respondent is relevant to the assessment of whether the waste would meet appropriate standards as a replacement for non-waste materials.

3.4 Paragraphs 182 to 203

3.4.1 The Appellant made a commercial decision to attend the meeting and explore the possibility of undertaking the further modelling. Notwithstanding that there is no requirement or recommendation set out in the legislation or guidance relevant to the application, the Appellant, based on the intransigent position of the Respondent sought to avoid, if cost effective to do so, the refusal of the permit. The Appellant wished to provide as much assurance to the Respondent as possible that their concerns pertaining to the consented land raising works, which were not justification for not granting a recovery permit, could nevertheless be addressed in a technical manner.

3.4.2 As set out in the ASC the written commitment by the Respondent to refuse the application irrespective of the results of the modelling meant that there would be no commercial advantage in undertaking the modelling. The possibility of undertaking the modelling was not considered further.

4 Conclusions

4.1 Recovery

4.1.1 The Appellant maintains that the proposed activity is consistent with the definition of waste recovery and is confident that sufficient information has been provided as part of the application process for the Respondent to be satisfied that the proposal is a recovery operation and issue the permit.

4.1.2 It is clear that a prohibition on the use of waste to construct the consented development would not prevent the development from proceeding but it would be with natural non-waste materials. This situation would be contrary to the waste hierarchy [Regulation 12 of the Waste (England and Wales) Regulations 2011, for which the Respondent is the regulator.

4.2 Flood risk

4.2.1 As part of the application process, it is for the Respondent to determine only whether the use of waste materials in constructing the consented landform in substitution of non-waste materials will increase flood risk. The Applicant has clearly demonstrated as part of the application process that this is not the case, which has not been contested by the Respondent.

4.2.2 The Respondent has mis-applied the WRP guidance and refused the application on the basis of concerns regarding the ground levels in respect of the consented landform. Whilst not required to as part of the application process, the Appellant has sought to re-assure the Respondent as far as possible in respect of these concerns. Nevertheless the consented ground levels could be achieved as stated in 4.1.2 above.