

Bestway Statement of Case to 'Matter 9 - Brent Cross Cricklewood'

Appendix CPS5

Legal Opinions prepared by Richard Drabble QC,
dated 16th May 2008 and 4th December 2008

RE: BESTWAY HOLDINGS

GERON WAY SITE

OPINION

Introduction

1. The purpose of this opinion is to set out my views on the current planning status of the Bestway site at Geron Way, Cricklewood. It is prepared in advance of the submission of a planning application by Bestway (Holdings) Limited and is designed to inform consideration of that application. It is written after a full consideration of the history of the UDP and the Regeneration Area Development Framework which has been adopted by Barnet as supplementary planning guidance. It is also informed by correspondence with Barnet, as referred to in the body of the Opinion, and by responses by Barnet made to requests for information under the Freedom of Information Act.

2. My overall conclusions can be summarised as follows:-

- (i) The site is not allocated as a waste handling facility (“WHF”) in the statutory development plan – the UDP.
- (ii) The purported allocation of the site by the Development Framework was unlawful because no consideration at all of the suitability of the site for a WHF was carried out by the planning authority. The

authority was not a party to any site selection exercise and cannot even now explain the rationale for the selection of the site as the appropriate site for a WHF. In the circumstances, no weight at all should be given to the Development Framework because it does not record any legitimate process of site allocation by the planning authority.

- (iii) No site selection process has been carried out by *anyone* with the intent of securing an appropriate site for the WHF. No rationale exists for the selection of this site as the appropriate site for meeting the needs of the North London Waste Authority; nor does there appear to be any reasoned justification for the basic proposition that the WHF should be re-located at all. I have seen the Report on Waste Management Issues prepared by WSP, and considered the background documentation considered in the Report, in particular the Scott Wilson Report of July 2004 and the SLR Report of November 2006. I agree with the conclusion reached by WSP that the waste proposals for the Bestway site are based upon selecting a site on an arbitrary basis in waste planning terms and then including facilities that will fit onto the site rather than selecting a site on the basis that it is the right site to meet the requirements of NLWA. This is a fundamental point on the merits, whatever the development plan status of the site.
- (iv) It follows that the planning justification for the Bestway application put forward in the Planning Statement is correct.

The written text of the UDP

3. The starting place for a consideration of whether the site is actually allocated, in statutory development plan terms, for use as a WHF is the written text of the UDP. If there is any conflict between the text and the proposals map the text prevails – see regulation 44 of the Town and Country Planning (Development Plan) Regulations 1999 and the note within the UDP (at paragraph 13.3.2).

4. I consider first policy C7. This provides:-

“The council will seek to provide the following through planning conditions and/or section 106 agreements:-

(vi) provision of an enhanced, rail-linked waste transfer station serving North London”

5. This is not a policy that allocates any site, a fact confirmed by paragraph 12.3.26 which immediately precedes it and which starts:-

“The Department of Transport advises that the railway lands at Cricklewood have an important role to play in the provision of passenger train stabling and depot facilities. (This is in addition to the need for any rail freight and waste transfer facilities).”

6. This text suggests that the draftsman of the Plan thought the most likely site for the “enhanced” waste transfer facility was the “railway lands”. I return to this issue later.

7. Policy C10 is also relevant. It provides:-

Within the area defined on the Proposals Map as rail-related employment land and mixed use land, the council will require the provision of:

- ...
- **Rail-linked waste transfer and materials recycling facilities”**

8. The area referred to is approximately 150 metres to the east of the Bestway site and includes the existing rail tracks, the sidings to the east of the tracks, the existing Waste Transfer Station, the rail head to the west of the main line and the land in the middle of the railhead. I refer to this area below as the “RREL & MUL” (rail-related employment land and mixed use land). It does not include the Bestway site.
9. Section 13.4 of the UDP includes a schedule of proposals set out in table 13.1. It includes an entry for a “ New Waste Transfer Station”, reference 39. The table states that the area is unknown and describes the current ownership as Network Rail. This would be consistent with the view that the enhanced waste facility was to be located in the “railway lands” ie the RREL & MUL, in keeping with the comments I have made above on policy C10 and paragraph 12.3.6.
10. Pausing here, it is crystal clear that the written text of the UDP is inconsistent with the allocation of the Bestway site for a WHF. Indeed there is a strong (and in my view correct) argument that the text envisages the allocation of the RREL and MUL for such a use, with the effect that a proposal for the use of the Bestway site for a WHF would be a departure from the statutory development plan for this reason alone.

11. The view that the UDP does not allocate the Bestway site for a WHF is shared by the planning authority itself. In a letter dated 25th May 2007 the Planning Policy Manager wrote:-

“...the UDP does not in fact allocate a site for such purposes. Policy C7 states that certain infrastructure will be provided through conditions or s106 agreements.....Subsequent allocation of the site emerged through the process of preparing the non-statutory Development Framework.....”

12. Thus it is clear that the written text contains no allocation. I turn now to the issue of the Proposals Map.

The Proposals Map

13. The printed map that accompanies printed versions of the UDP available to Bestway contains no allocation for a WHF. However, the electronic version does show proposal 39 on the Bestway site. For the reasons set out above, even if the electronic version were the official Proposals Map, it would take the matter no further because it would be inconsistent with the written text and the text would prevail. However, there is no evidence that the electronic version does reflect the official Proposals Map, for reasons which I shall explain.

14. In paragraph 5.2 and 5.3 of a letter dated 13th March 2008 from Eversheds (instructed by Barnet) Judith Damerell explained the divergence between the

currently available published Proposals Map and the electronic version on the basis that the available published map contained a “printing error” and the electronic version more accurately reflected the Proposals Map that was approved by the Council for the purposes of adoption.

15. The problem is that there is no evidence other than the assertion in the letter that a Proposals Map in any form was put to Council. Barnet, not unnaturally, have been asked by those instructing me to provide such evidence but nothing that I have seen bridges the gap.

16. In particular, Barnet have supplied a “certified” copy of the Proposals Map, but it is clear on examination that it is not a copy of a Proposals Map held in hard copy form by Barnet and produced in June 2005, consistently with the account in Judith Damerell’s letter. It bears a date of May 2006. The certificate states that it is a true copy of a June 2005 map. The reference to “certification” is of course a reference to the procedure under s229 (4) of the Local Government Act 1972 whereby a certified photocopy of an original is admissible in evidence. But it must of course be a true copy of the original; and as I say it is clear on the face of the Proposals Map certified by Barnet that it is not a copy of a document produced in June 2005. The certificate is of no value and takes the debate no further forward at all.

17. Accordingly, there is no evidence of an adopted Proposals Map containing an allocation of the Bestway site. I repeat that even if there were it would be inconsistent with the text.

The Development Framework

18. As the letter of the 25th May 2007 quoted above states, the Development Framework does “allocate” the Bestways site. Quite apart from the fact that such an allocation goes beyond the normal role of SPG, it is clear that no weight should be attached to the Framework in this respect for the reasons I have already summarised at the start of this Opinion. In a response to a FOI request for information about the “Decision to relocate a waste handling facility at the site” Barnet replied “This was a proposal by the developer not the council. No information available.” Accordingly Barnet do not purport to have considered any justification for the selection of the Bestway site. The absence of any independent thought, or even any audit of the developer’s site selection exercise by the planning authority, is confirmed by a letter dated 27th September 2007 from the Director of Planning and Environmental Protection which states:-

“The Council has not undertaken any separate studies nor will it have detailed technical material to determine the exact siting of a replacement waste facility.....”

19. It is trite law that a planning authority must make its decisions on the basis of independent consideration of the issues involved (even if it relies on eg material

produced by a landowner's consultant). Here the decision to promote the Development Framework in a form which appeared to allocate the Bestway site was uninformed by any consideration of whether it was the appropriate site on which to meet NLWA's needs (or indeed even any independent consideration of whether the "enhanced" waste facility should be created by relocation rather than by re-development of the existing facility). It is clear that in this respect the Development Framework is no more than an expression of the developer's un-audited preference and for this fundamental reason is not entitled to any weight.

20. I am conscious both of the fact that the Development Framework was in front of the Local Plan Inspector and of the terms of policy C1. I do not consider that this alters the perspective set out above. C1 ends with the words:

"Development proposals will be supported if they are consistent with policies of the UDP and their more detailed elaboration in the development framework."

21. For the reasons set out above, a proposal for a WHF on the Bestway site would be inconsistent with the UDP. The provisions of the Development Framework in this respect cannot be seen as a more detailed elaboration of the UDP policies; further the general provisions of C1 cannot overcome the fact that at no stage has the planning authority given any consideration at all to the technical suitability of the site or the need for relocation rather than redevelopment.

22. Similarly, I am conscious of the fact that the Inspector recommended that the location of the WHF be shown on the Proposals Map. I am unclear what location

he had in mind; but in any event no such location was shown on the Proposals Map and even if it had been it would have been unsupported by any consideration of the relevant technical issues and would have conflicted with the text of the UDP.

Richard Drabble QC

Landmark Chambers

16th May 2008

RE: BESTWAY HOLDINGS

GERON WAY SITE

OPINION

1. The purpose of this Opinion is to respond to the advice provided by Norna Hughes of Nabarro to the Brent Cross Cricklewood Development Partners dated October 2008, in response to my earlier Opinion provided in May 2008. It is concerned with the status of the Bestway Site in development plan terms. I remain of the clear view that the Bestway site is not allocated as a WHF in the UDP.
2. Norna Hughes' advice proceeds on the basis that there is a conflict between policy C10 on the one hand and the table 13.1 on the other. I do not accept this. There is no textual conflict between these policies at all. Taken together, they point conclusively against the allocation of the Bestway site as a WHF. Such an allocation is inconsistent with the text of *both* provisions. The only support for such an allocation comes from the alleged identification of site 39 on the *proposals* map (I should say that I have not seen any proposals map other than those referred to in my first advice – so cannot take any further the issue of what the adopted proposals map actually showed). However, as the Nabarro's advice accepts, where there is a conflict between the text of the plan and the proposals map, the text prevails.

3. That is clearly the situation here. The Nabarros' advice accepts that on its face C10 is inconsistent with an allocation of the Bestways site – hence their acceptance the policies pull in different directions.
4. Turning to the table, no part of the text identifies the Bestway site. The site description is "*New waste transfer station Cricklewood*". This does not help with location. The reference is 39, but this is meaningless without reference to the proposals map. The ownership is given as "Network Rail". This is completely inconsistent with the allocation of the Bestway site; but consistent with the allocation of part of the railway lands. C10 and the table do not pull in different directions but rather complement each other. One can only get to any reference to the Bestway site by looking at the proposals map; and finding that it locates site 39 in a place inconsistent with the wording of the UDP. In these circumstances the proposals map is to be ignored.
5. I do not consider that any of the other material considered in the Nabarros' advice is capable of altering the simple conclusion I have expressed above.
6. I also consider that the explanation of the site selection exercise contained in the advice is wholly unconvincing, The Council is on record as saying that it did not give any independent thought to site selection, and the material referred to in the advice is sparse in the extreme.

Richard Drabble

Landmark Chambers

4th December 2008