ARK DATA CENTRES LIMITED

Re: Union Park, Bulls Bridge Industrial Estate, Hayes

O P I N I O N

Introduction

1. I am instructed to advise Ark Data Centres Limited ("**Ark**") which has obtained a series of planning permissions for a new data centre development on the former Bulls Bridge Industrial Estate, Hayes ("**the Site**").

2. The issue which has arisen is as a result of permitted changes subsequent to the initial grant of permission, resulting from the requirements of the proposed tenant, and how this can best be secured given the need to avoid conflicting permissions in the light of the line of authorities including ***Pilkington v. Secretary of State*** [1973] 1 W.L.R. 1527 and ***Staffordshire CC v. NGR*** [2003] J.P.L. 56, and which has been reaffirmed very recently by the Supreme Court in ***Hillside Parks Ltd v Snowdonia National Park Authority*** [2022] UKSC 30.

3. There is no issue as to the substance of the permission in that the local planning authority, the London Borough of Hillingdon ("**LBH**"), granted permission on 21 September 2021 for those changes. However, since the latest permission does not cover the whole area of the development it is critical that the original permission be varied to conform with what is to be built, to avoid a physical inconsistency between the permissions.

Summary of advice

4. I will set out the reasons for my advice below, but in summary since LBH has already granted permission for the substance of the change to that part of the development which it directly affects, an amendment to the original permission can lawfully be made as a non-material change under s. 96A of the Town and Country Planning Act 1990 ("**1990 Act**") since all that is proposed is to align the

requirements of that permission with the subsequent permission. This will also be consistent with the judgment of the Supreme Court in ***Hillside***.

Factual context: the planning permissions

5. Ark secured planning permission for a new data centre development on the Site on 15 April 2021. Planning permission was granted by LBH under reference 75111/APP/2020/1955 ("**Original Permission**")[1].

6. Subsequent to the grant of the Original Permission a tenant was found for part of the Site. The tenant wished to see certain changes to the development, notably to the design of the energy centres as well as in other respects. Since LBH did not consider that a number of the changes[2] could be made pursuant to either s. 96A or s. 73 of the 1990 Act, a further planning application was submitted, and planning permission granted by LBH on 21 September 2022 under reference 75111/APP/2022/1007 ("**New Permission**")[3]. Recital D to the accompanying s. 106 obligation dated 6 September 2022 described the context:

> "The Owner now wishes to pursue an alternative design for the energy centres and canal access to those provided for in the Original Planning Permission and has submitted the Planning Application to the Council for permission to develop the Site for the purposes and in the manner described in the Planning Application. On 24th March 2022 the Local Planning Authority accepted the Planning Application."

7. The Summary provided in the Officers' Report recommending the approval of this application includes the following:

> "**1. SUMMARY**
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> This application seeks permission for the redevelopment of the site to provide three energy centres, two visitor reception centres, a new footpath and cycleway link to the canal towpath, works to the highway, car parking, cycle parking, associated infrastructure, enclosures and necessary physical security systems, hard and soft landscaping, and ancillary uses, as well as associated external works. This is 'drop-in' application to the substantive parent permission granted under application reference 75111/APP/2020/1955 for a new data centre (Use Class B8), two energy centres, a substation, a visitor reception centre and ancillary works.
>
> The principle of the proposed development is established by the grant of the previous planning permission. The proposal is an appropriate use of a Strategic Industrial Location and the intensification of industrial capacity is supported from a strategic perspective. The proposed energy centres and visitor reception centres would be wholly ancillary to the main data centre which already has planning

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[1] Instructions, Enclosure 1.
[2] Other than the change in fuel in the energy centre which was amended pursuant to s. 96A.
[3] Instructions, Enclosure 2.

permission.

The economic benefit of information and communications technology infrastructure is acknowledged and supported by national, regional and local planning policies. As noted under Paragraph 81 of the National Planning Policy Framework (2021), significant weight should be placed on the need to support economic growth and productivity. There will be substantial economic benefits arising from the proposed development and the associated data centre in terms of employment and the associated national non-domestic rates (NNDR) and gross value added (GVA) increases would be significant. These benefits and considerations are given significant weight in the overall assessment of the planning balance.

The principle of such a design has also been established by the grant of the original permission on this site. Although the proposed development is substantial in height, bulk and mass, the changes to the proposal, as described within the main body of the report, are considered to be acceptable.

As previously permitted, the proposed development would deliver general public realm improvements, including footpath widening and a pedestrian crossing along North Hyde Gardens, and an enhanced pedestrian and cycle ramp providing access from the canal to North Hyde Gardens.

A Section 106 legal agreement is proposed to ensure that all obligations secured under the original planning permission are fulfilled. Additional obligations include an increased air quality damage cost due to the proposed change in back-up generator technology from gas to Hydrotreated Vegetable Oil (HVO) diesel generators and a carbon offset contribution, required to achieve net zero-carbon in line with London Plan (2021) Policy SI 2.

Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that planning applications should be determined in accordance with the development plan unless material considerations indicate otherwise. In view of the original planning permission granted on this site, the proposal is considered to be acceptable and is recommended for approval, subject to a Section 106 legal agreement and planning conditions."

8. The red line of the New Permission includes the energy centres but excludes part of the Site, including the data halls, in contrast to the redline of the Original Permission. However, its status as part of the overall development was made clea in the Officers' Report at para. 7.01:

> "The proposed energy centres and visitor reception centres would be wholly ancillary to the main data centre (Use Class B8) which already has planning permission (ref. 75111/APP/2020/1955). If recommended for approval, this would also be secured by planning condition. As such, the proposed development is an appropriate use of the Strategic Industrial Location (SIL), in accordance with Policy E4 of the London Plan (2021)."

9. Both permissions imposed as condition 3 a requirement that the development shall not be carried out except in complete accordance with the specified supporting plans and/or documents which differed between the two permissions.

10. The changes brought about to the Original Permission by the New Permission

are described in para. 3.2 of the Officers' Report:

"The changes are summarised below:

- Energy Centre 1 (EC1): EC1 is to be located in the north-eastern corner of the application site. This is the same portion of the application site that the eastern portion of EC1 was positioned (and permitted) as part of the original application. It will be laid out with switchgear rooms centrally with the generators located in the eastern and western portion of the block. Metal facade panels are introduced at the north elevation, with exposed structural bracing to highlight the robust framing system. An aluminium louvred system is applied to the south and west elevation which allows for air circulation as well as contributing to the articulation of the facade as seen from North Hyde Gardens upon arrival to the site. A modular pre-planted green wall planter system is proposed for the eastern elevation.

- Energy Centre 2 (EC2): EC2 is located on the southern side of North Hyde Gardens, in almost the exact same position as Energy Centre 2 as permitted as part of the original application. The design approach for EC2 matches that of EC1 and EC3.

- Energy Centre 3 (EC3): EC3 is located to the west of EC1, separated from it by a rectangular portion of land that will be landscaped. It's location is similar to that of the western portion of EC1 as previously permitted but also extends further westwards. EC3 is proposed as a four-storey building with switch rooms located at the front and generators at the back. At its northern elevation, a solid brickwork will be provided at ground level with the same treatment for the northern elevation of EC1 provided at the upper levels. A mix of green walls and cladding are proposed for the southern, eastern, and western elevations.

- Visitor Reception Centre 1 (VRC1): VRC1 is the eastern visitor reception centre and will serve Block 1 of the data centre. It is located in an identical location to that of the Visitor Reception Centre permitted as part of the original application. It is proposed as a two- storey building with a green roof, enveloped by insulated metal panels and curtain wall to allow natural daylight into the occupied spaces.

- Visitor Reception Centre 2 (VRC2): A second Visitor Reception Centre is to be located

on the southern side of North Hyde Gardens where it turns eastwards towards the flyover. The original application showed this portion of the site being laid as hardstanding associated with parking provision. A sedum green roof is proposed and the facades are clad with metal panels and curtain wall to ensure sufficient daylight reach the workstations.

- Canal Towpath Link: A pedestrian and cycle link is proposed to connect from the application site to the towpath on the northern side of the Grand Union Canal. The link is to be positioned on the eastern side of the North Hyde Gardens Road Bridge and will be an alternative to the link that was proposed to be located on the western side of the Road Bridge as per the original permission. The towpath link could now be delivered entirely on land under the control of Ark (compared to the original application which included land under the ownership of the Canal and River Trust) which should provide greater assurance with regards to its deliverability.

- Second Vehicular Access: A second vehicular access is proposed to the west of EC3 and approximately 85m west of the vehicular access permitted as part of the original application. The second vehicular access will serve Blocks 2 and 3 of the permitted data centres building. It will be integrated within the existing security arrangements and provide an access lock for pedestrians and vehicles.

> - Back-up Generators: The previously permitted gas back-up generators are proposed to be replaced by diesel generators which utilise Hydrotreated Vegetable Oil (HVO) as a fuel source."

11. It follows that the point will come when the implementation of the New Permission will give rise to difficulties with continued reliance on the Original Permission since the construction of the development permitted by the New Permission will render it physically impossible to continue with the implementation of the Original Permission given the changes brought about by the New Permission. While that would not render unlawful that part of the Original Permission that had already been implemented, it would prevent its further implementation and completion. Depending on the phasing of construction, this could happen at a relatively early stage in development.

12. This results from the principle established in ***Pilkington*** and reaffirmed in ***Hillside***, namely that:

> "a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission)."

13. It is therefore important that the position be regularized to ensure that the Original Permission is brought into conformity with the changes made by the New Permission and that the implementation of the New Permission does not then render the continued implementation of the Original Permission in breach of planning control.

14. Whilst it has always been intended that the development of the majority of the Site will be pursuant to the Original Permission (which has already been implemented), with the New Permission relating solely to those parts of the Site where the development needs to be changed to meet the requirements of the tenant, there is not a single permission which authorises this.

15. Since LBH granted the New Permission and did so on the basis that it would be developed alongside development under the Original Permission, my Instructing Solicitors suggest that an amendment could be made under s. 96A of the 1990 Act as none of the changes that need to be made to the Original Permission (whether connected to the ***Hillside*** issue or not) are material since they are all matters that LBH has already considered and found acceptable in granting the New Permission.

16. I am instructed that this strategy was made clear to LBH when the application for the New Permission was made and has formed the basis of discussions since. See Savills' letter of 30.9.22[4] which sets out the proposal to amend in detail, describing the three elements to amend:

> "**Element 1 – Description of Development**
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> The first is to amend the description of development of Permission A so that it makes no reference to any of the elements that are to be delivered in accordance with Permission B. The proposed description of development is replicated below with the text to be removed shown as being crossed through:
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> > "Site clearance and preparation, including the demolition of remaining buildings, and the redevelopment of the site to provide: a new data centre (Use Class B8), two MV Energy Centres (including stand-by generation plant), a HV Sub-Station, a visitor reception centre, plant, the creation of a new footpath and cycleway link to the canal towpath, works to the highway, car parking, cycle parking, associated infrastructure, enclosures and necessary physical security systems, hard and soft landscaping (including works to the River Crane) and ancillary uses, as well as associated external works."
>
> Using a non-material amendment under Section 96A of The Town and Country Planning Act 1990 is accepted as the correct way to amend a description of development and has been accepted as the right approach in LBH's determination of application reference 75111/APP/2021/3607. This is consistent with the judgment of the Court of Appeal in Finney.
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> **Element 2 – Amending and Removing Plans**
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> The second element is to substitute certain plans and remove other plans that were listed as approved under Condition 2 of Permission A so that they no longer make any reference to any of the elements that are to be delivered in accordance with Permission B.
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> The plans to be substituted are those that show the entirety of the development that was permitted as part of Permission A. These are to be replaced with plans which show those elements that are to be delivered in accordance with Permission B as being greyed out. The remainder of the site is shown as being as permitted through Permission A because it is going to be delivered in accordance with that permission. By doing so, this element effectively removes the ability to deliver the two energy centres, visitor reception centre, and canal ramp that were permitted as part of Permission A (because they are to be delivered in accordance with Permission B). The table below shows the plans to be substituted in the left-hand column with the referenced of the revised plans shown in the right-hand column …
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> **Element 3 – Rewording Conditions**
>
> The third element is to re-word and remove a number of conditions. The purpose of this is to ensure that those conditions that relate specifically to the energy centres, the canal access ramp and visitor reception centre are removed and the remainder of the conditions make no reference to the energy centres or visitor reception centre (which are now to be delivered in accordance with Permission A).
>
> The conditions to be removed are as follows:

[4] Instructions, Enclosure 6.

- Condition 7 (Abellio Land);
- Condition 11 (Canal Access Ramp);
- Condition 28 (Generator Commissioning); and
- Condition 29 (Gas Fire Back-Up Generators).

These conditions are to be removed because they relate solely to development that was permitted in the area of the site that is to be greyed out as a result of Element 2. Development in this area will now be governed by the conditions attached to Permission B and in the case of the canal access ramp, the delivery of the new access approved pursuant to Permission B is secured through the new planning obligation dated 6 September 2022 and which requires that new access to be delivered prior to the occupation of the data halls to be developed under Permission A.

The conditions to be amended are as follows:

- Condition 8 (Materials);
- Condition 9 (Landscaping Scheme);
- Condition 10 (Green Walls and Roofs); and
- Condition 16 (Drainage Details).

Included at Appendix 5 is a table which shows the proposed re-wording of Conditions 8, 9, 10, and 16. These conditions are to be amended because they explicitly reference areas of the development that were permitted in the area of the site that is to be greyed out as a result of Element 2.

The application seeks no further amendments to the conditions and does not change either their trigger point or the documentation that is required for their discharge."

Advice sought

17. While LBH has not expressed any specific concerns with the lawfulness of the proposed approach, it has indicated that it is not familiar with the approach and therefore I have been asked to consider the risk arising from the *Pilkington* principle, and its latest restatement in ***Hillside***, and the use of s. 96A in these circumstances to mitigate that risk

Legal principles: *Hillside* and the *Pilkington* principle

18. Under the *Pilkington* principle (see ***Pilkington v. Secretary of State for the Environment*** [1973] 1 W.L.R. 1527), while multiple different permission may be granted for a specific site, the implementation of any one of them is dependent on whether the implementation of another has rendered it physically impossible now to implement the other permission according to its terms.

19. That principle was approved by Lord Scarman in ***Pioneer Aggregates (UK) Ltd v Secretary of State*** [1985] AC 132, e.g. at 145, has been considered and applied by the Court of Appeal, for example, in ***Staffordshire CC v NGR Land***

Developments [2003] JPL 56 and most recently by the Supreme Court in ***Hillside***, especially at [43] and [45] (below).

20. The principle was put very clearly by Jonathan Parker LJ in the ***NGR*** case at [55]-[56] (emphases added) in terms of whether it was possible to carry out the permission in accordance with its terms (emphasis added):

> "55. In *Pilkington* Lord Widgery CJ made it abundantly clear, as I read his judgment, that in considering whether an earlier permission was still valid, it was irrelevant that the carrying out of the permitted development might breach a condition attached to a later permission; rather, the correct test was whether it was physically possible to carry out that development in accordance with the terms of the earlier permission. This is a theme which runs through the entirety of Lord Widgery CJ's exposition…
>
> 56. The ratio of the decision in *Pilkington* , in my judgment, is that development pursuant to the earlier permission could not be carried out in accordance with its terms since the earlier permission contemplated that the remainder of the site would consist of a smallholding, whereas development carried out in implementation of the later permission — i.e. the building of a house on the centre of the site — had (to use Lord Scarman's word in *Pioneer* at page 145A) "destroyed" the smallholding. I respectfully agree with the observations of Buxton J in *Arfon* on the concept of physical impossibility in the context of Pilkington . It was physically possible to build the bungalow on site A, since that part of the site remained vacant. But it was not possible to carry out the physical development permitted by the earlier permission in a manner which accorded with the terms of that permission…"

21. This was approved by the Supreme Court in ***Hillside*** by Lord Sales and Lord Leggatt (who gave the sole joint judgment of the Court). At [35]-[36] and [40] it was held:

> "35. We do not accept that the decision in the *Pilkington* case can be explained on the basis of a principle of abandonment, nor indeed that there is any principle in planning law whereby a planning permission can be abandoned.
>
> 36. In the first place, this explanation is directly contrary to the court's reasoning in the *Pilkington* case. Lord Widgery said in terms, at p 1532H:
>
> > "My views on this matter are not based on any election on the part of Mr Pilkington; they are not based on any abandonment of an earlier permission … I base my decision on the physical impossibility of carrying out that which was authorised in [the earlier planning permission]."
>
> ….
>
> 40. Counsel for the Developer have not argued that this court should depart from the decision of the House of Lords in *Pioneer Aggregates* nor made any criticism of Lord Scarman's reasoning. We would endorse that reasoning, which also confirms that the correct explanation of the *Pilkington* case is, just as Lord Widgery stated, that the development carried out in building a bungalow under the later permission had rendered the earlier planning permission incapable of implementation."

22. In setting out their analysis of the *Pilkington* principle, Lords Sale and Leggatt held

(emphasis added):

> "41. The principle underlying the *Pilkington* case can be analysed further. In the passage of his judgment quoted at para 36 above Lord Widgery said that his decision was based on the "physical impossibility" of carrying out what was authorised by the unimplemented planning permission; and elsewhere in his judgment he used the phrase "practical possibility" (see p 1532C). Two points arise from this. First, it is important to recognise that the test of physical impossibility applies to the whole site covered by the unimplemented planning permission, and not just the part of the site on which the landowner now wishes to build. Thus, in the Pilkington case, as pointed out in later cases, it remained perfectly possible to build a bungalow in the position authorised by the earlier, unimplemented planning permission, as that part of the site remained vacant. The reason why it was not physically possible to carry out the development authorised by the earlier permission was that the proposal for which permission was granted involved using the rest of the land as a smallholding and this could not be achieved when part of that land was occupied by the first bungalow: *see R v Arfon Borough Council C Ex p Walton Commercial Group Ltd* [1997] JPL 237; *Staffordshire County Council v NGR Land Developments Ltd [*2002] EWCA Civ 856; [2003] JPL 56, para 56*;* and *R (on the application of Robert Hitchins Ltd) v Worcestershire County Council* [2015] EWCA Civ 1060; [2016] JPL 373, para 42 .
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> 42. A second point to note concerns Lord Widgery's formulation of the relevant test (in the passage quoted at para 31 above) as "whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented" (emphasis added). The words "or authorised to be done" ought, we think, to have been omitted as they are not consistent with the ratio of the decision.
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> 43. On the facts of the *Pilkington* case the planning permission which had already been implemented included a condition that the bungalow built in accordance with that permission should be "the only dwelling to be erected" on the plot. Lord Widgery, however, specifically stated that his decision did not in any way depend on the fact that building the second bungalow would be a breach of this condition (see p 1532H). What mattered, as he made clear, was whether it was physically possible to carry out the development authorised by the terms of the unimplemented permission. That depends upon (a) the terms of the unimplemented permission and (b) what works have actually been done. It would not make sense to have regard to the terms of the permission under which development has already taken place, as a central theme of the judgment is that mere inconsistency between the two permissions does not prevent the second permission from being implemented. What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms.
>
> …
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> 45. In essence, the principle illustrated by the *Pilkington* case is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission). Unlike a doctrine of abandonment, this principle is consistent with the legislative code. Indeed, as Lord Scarman observed in *Pioneer Aggregates* at p 145C, it serves to "strengthen and support the planning control imposed by the legislation". Where the test of physical impossibility is met, the reason why further development carried out in reliance on the permission is unlawful is simply that the development is not authorised by the terms of the permission, with the result that it does not comply with section 57(1) ."

23. Of specific relevance here, the Supreme Court considered how inconsistencies might be dealt with to avoid the problem of physical incompatibility:

> "**Departures must be material**
>
> 69. The *Pilkington* principle should not be pressed too far. Rightly in our view, the Authority has not argued on this appeal that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission – all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: see *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, 230. What is or is not material is plainly a matter of fact and degree.
>
> 70. There is no inconsistency here with section 96A of the 1990 Act (referred to at para 24 above). If the planning authority makes a change to a planning permission under section 96A because satisfied that the change is not material, this will have the benefit for the landowner that it can be certain that the altered pattern of development is indeed within the scope of the permission. It could not afterwards be said that there has been any departure at all from the scheme for which permission has been granted. If, on the other hand, the landowner alters the pattern of development in an immaterial way without first obtaining a variation under section 96A, it does not follow that the development must be treated as unauthorised by the original, unvaried permission. In such a case the landowner will simply be more exposed to possible arguments in later enforcement proceedings that the change was in fact material, which would then have to be decided by a planning inspector or a court. That has always been the position under the planning legislation, including before section 96A was added to give the facility to amend a permission."

24. The Court also gave its views on the use of "variation permissions" at [73]-[77] (not restricting the comments to s. 73 permissions) but what is relevant to note is that here the variation permission deals with the changes proposed but did not apply to the whole site (see [74]) or vary the Original Permission.

25. Accordingly, as noted already, the point will come when the implementation of the New Permission will give rise to difficulties with continued reliance on the Original Permission since development under the New Permission will render it physically impossible to continue with the implementation of the Original Permission. While that would not render unlawful that part of the Original Permission that had already been implemented, given the judgment in ***Hillside*** at [64] and [65], it would likely prevent its further lawful implementation and completion.

26. That risk requires to be addressed.

Amendment to the Original Permission

27. S. 96A provides that a permission may be amended (as opposed to the grant of a new permission if s. 73 powers are used) on the application of a person with an interest in the land to which the permission relates:

> "(1) A local planning authority may make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission or permission in principle as originally granted.
>
> (3) The power conferred by subsection (1) includes power to make a change to a planning permission—
>
> (a) to impose new conditions;
>
> (b) to remove or alter existing conditions. …"

28. It is self-evident that the use of s. 96A is restricted to changes that are not material, which is a matter of judgment for the planning authority subject to ***Wednesbury***. The question here is whether any of the changes proposed, which align the two permissions by simply excluding what has been granted permission by the New Permission, is a material change.

29. As Savill's letter pointed out the overall development will not change since it will be that which was originally permitted with the changes made by the New Permission:

> "The plans to be substituted are those that show the entirety of the development that was permitted as part of Permission A. These are to be replaced with plans which show those elements that are to be delivered in accordance with Permission B as being greyed out. The remainder of the site is shown as being as permitted through Permission A because it is going to be delivered in accordance with that permission. By doing so, this element effectively removes the ability to deliver the two energy centres, visitor reception centre, and canal ramp that were permitted as part of Permission A (because they are to be delivered in accordance with Permission B)."

30. The amendment to the Original Permission simply removes/amends the areas of overlap with the New Permission to avoid the creation of physical incompatibility within the ***Pilkington/Hillside*** principles. The development that will result will be precisely what LBH anticipated would be the case when it granted the New Permission without the risk of incompatibility since the s. 96A application would simply remove the incompatible elements. Indeed, as noted above, the Officers' Report for the New Permission recognised that it was part of the overall

development – describing it as "wholly ancillary to the main data centre".

31. It would be possible to achieve a similar outcome by simply amending the Original Permission to replace the plans and conditions to align the totality with the New Permission and not to exclude the area of the New Permission, but the method proposed has the same effect and avoids any uncertainties about which permission is being implemented.

32. In ***R (Fulford Parish Council) v City of York Council*** [2020] PTSR 152 the Court of Appeal affirmed the use of s. 96A to amend conditional reserved matters approvals. In reaching his conclusion on that issue, and considering the scope of s. 96A, Lewison LJ held (addressing one of the Claimant's submissions):

> "38. I accept that public participation in environmental decision-making is important. But section 96A is concerned with a situation in which the environmental decision has already been taken, with the public participation that is required. The power under section 96A is confined to changes which are not material. The need for public participation in non-material changes does not seem to me to be so pressing."

33. This is apt to describe the present circumstances where the changes proposed only seek to align the Outline Permission with the New Permission which has already been subject to an application process including public consultation. The decision to permit the changes has already been taken. There is nothing new of substance proposed as the Savills' letter makes clear.

34. In the circumstances of the Site and the permissions that have been granted, the alignmment of the two to eliminate the risk of incompatibility when the substance of the change has already been granted permission, is within the scope of s. 96A. Indeed, my experience from dealing with many large schemes where amendment is needed is that s. 96A is used in order to enable changes to be made to avoid incompatibility issues, where the LPA has control in any event over the changes, and has already approved them through the normal application process (with consultation and meeting any other procedural requirements e.g. EIA).

35. The purpose of the 'non-materiality" requirement is to avoid changes being made which effectively side steps the protections of the planning application process e.g. consultation, environmental assessment etc. The grant of the New Permission here has meant that none of those protections has been lost: see Lewison LJ in the ***Fulford*** case, above.

36. Moreover, given the grant of the New Permission, the use of s. 96A falls comfortably within one of the purposes of s. 96A noted by Lewison LJ in ***Fulford***:

> "44. One of the purposes of section 96A was surely to formalise minor differences between, say, approved layout plans and "as-built" development. In days gone by this used to be dealt with informally by planning officers; and principles of private law (such as estoppel) would be relied on to validate their representations (eg *Lever Finance Ltd v Westminster (City) London Borough* Council [1971] 1 QB 222). But that possibility was, for all practical purposes, brought to an end nearly 30 years later by the House of Lords (*R (Reprotech (Pebsham) Ltd) v East Sussex County* Council [2003] 1 WLR 348). So a statutory power to achieve the same results was needed; and in my judgment section 96A fills that gap."

37. Indeed, the current circumstances do not require a judgment to be made about the substance of what is proposed retrospectively, that judgment having already been made in LBH's decision to grant the New Permission.

38. As Lord Sales and Lord Leggatt made clear in ***Hillside*** at [69] and [70], quoted above, the use of s. 96A is one of the means available to resolve concerns with regard to incompatibilty. For the reasons I have explained, none of the changes here is anything not already considered in substance on the grant of the New Permission and I consider that LBH may lawfully proceed to grant the amendments sought.

39. I have nothing to add as currently instructed but would be pleased to advise further should it be necessary.

DAVID ELVIN K.C.

Landmark Chambers,
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11 November 2022