

Date: 13/07/06

Ref: 45/4/29

Note: This letter has had personal details edited out.

BERKSHIRE ACT 1986: APPEAL UNDER SECTION 37(6) (FIRE PRECAUTIONS IN LARGE STORAGE BUILDINGS) IN RELATION TO THE BOROUGH COUNCIL'S DECISION TO REJECT PLANS IN RESPECT OF THE CONSTRUCTION OF A WAREHOUSE BUILDING

The appeal

1. Section 37 of the 1986 Act (Fire precautions in large storage buildings) applies to any building where more than 7,000 m³ of the building will be used for the purpose of storing or depositing goods or materials. In summary, section 37(2) provides (relevantly) that where plans are deposited in accordance with the Building Regulations and those plans show that the proposed work will consist of the construction, extension, alteration or change of use of such a building, then the Council in question shall reject the plans unless they are satisfied, having consulted the fire authority, that they may properly give consent either unconditionally, or conditionally in respect of the matters contained in section 37(3) for preventing the outbreak or spread of fire in or from the building or reducing danger from fire in the building.

2. The conditions that may be imposed include conditions with respect to compartmentalisation of the building (s37(3)(a)), the kind of goods that may be stored in the building (s37(3)(d)), and the provision of automatic fire alarms, fire extinguishing systems and effective means of removing smoke in case of fire (s37(3)(f)).

3. Section 37(6) of the 1986 Act provides that a person who is aggrieved by the action of a Council which has rejected plans, or imposed conditions, may appeal to the appropriate Secretary of State. On appeal, the Secretary of State may dismiss or allow the appeal, or may vary the decision of the Council against which the appeal is made.

The building work which is the subject of the appeal

4. The papers submitted by the appellant indicate that the building work consisted of the construction of a new single storey warehouse, which was completed in 2001. The building is a single bay portal-framed, construction with profiled steel cladding. It is approximately 96m long, 30m wide with an eaves height of 12.5m and ridge height of 16m. The volume of the building is approximately 37,000m³ with a floor area of 2888m².

5. The building has been designed to meet the logistical requirements of the appellant as the building owner, i.e. a short term / fast track, overnight storage / delivery distribution warehouse where stored goods are loaded and offloaded to flatbed articulated lorries for nationwide distribution. The goods, consisting of computer and electrical products, books, clothes and chemical products, are stored in the building using a racking system to eaves height. The goods are mainly packed in cardboard cartons on wooden pallets wrapped in plastic. Approximately 75 per cent of the floor area of the building constitutes pallet stacking with the remainder being vehicular circulation for loading / offloading. It is considered unlikely that the building's personnel occupation will exceed more than 4-5 persons at any one time throughout a 24 hour period.

6. The building has been fitted with a L2 automatic smoke detection and fire alarm system, in compliance with British Standard BS 5839: Part 1: 1988.

7. The above building work was the subject of two full plans applications. The initial application was rejected by the Council on the grounds that insufficient information had been supplied to ascertain compliance with the Building Regulations. The second application was similarly rejected, but the additional grounds of non-compliance with section 37 of the 1986 Act was also referred to. The Council subsequently indicated that the only outstanding issue relates to the requirements of the 1986 Act.

8. The appellant submitted an appeal to the Secretary of State in relation to the Council's decision under section 37(6) of the 1986 Act, for the reasons explained below.

The appellant's and Council's cases

9. The papers submitted indicate that the issue in this case is whether the plans for the building work can properly be consented to pursuant to section 37 of the 1986 Act without the imposition of conditions. The parties' submissions fall into three general categories:

(a) whether the terms of the 1986 Act alone require the imposition of conditions in this case

(b) what effect, if any, does the publication of *Approved Document B (Fire safety- 2000 edition)* have on the interpretation and application of the 1986 Act; and

(c) what effect, if any, does the Human Rights Act 1998 have on the interpretation and application of the Berkshire Act (the human rights point).

10. The parties agree that question (c) does not arise if it is determined that the plans can be consented to unconditionally. Accordingly, the parties' submissions on the human rights point are dealt with separately below.

11. The following paragraphs summarise the key points in the lengthy and numerous submissions made by the parties with respect to questions (a) and (b) above.

Appellant's letters of 8 March, 9 and 30 May 2001

12. These letters made the following points to support the appellant's case that the additional requirements requested by the Council are unnecessary and unacceptable:

(a) investigation into the options for fire extinguishing systems has been undertaken. Wet systems have been deemed impractical in terms of installation relative to performance, i.e. the nature of the pallet stacking would effectively constitute the need for sprinkler runs / heads to be located at every level of the vertical stack. This design requirement, when it was evaluated in conjunction with the implications of accidental failure, negated the practicality of its incorporation both in terms of cost and limitations on storage flexibility. It is also submitted that alternative sprinkler / extinguishing systems to suit a building of this volume have proved impractical for similar reasons, particularly in terms of installation cost

(b) the appellant meets the storage and distribution needs of a considerable number of "high tech" commodity manufacturers and suppliers. In the event of an accidental failure of the sprinkler system the damage and insurance implications could prove "catastrophic" to the appellant's business and customers. Copies of correspondence were enclosed with this submission confirming that the appellant's insurer does not require a sprinkler system and that their customers would terminate the use of their services should a sprinkler system be installed

(c) the building is freestanding and isolated and would not constitute a high risk relative to fire spread in the event of fire

(d) the 1986 Act is specific to the locality and, as such, would appear to impose unfair legislation on the appellant, which is additional to the Building Regulations. The Council has advised that it is likely it will soon be rescinded as it is obsolete and out of date. Furthermore, the building does not readily fall within the categories of building for which the 1986 Act was implemented

13. The appellant also referred to other similar buildings within the same area where sprinklers have allegedly not been provided.

The Council's letter of 25 June 2001

14. The Council provided the Secretary of State with a copy of previous correspondence between the parties in this case with its letter, including a copy of the response the Council had received from the Fire and Rescue Service dated 19 June 2001 in relation to the appellant's case. The Council indicated that it was in agreement with the following points made by the Fire Service "in order to achieve compliance" with the 1986 Act:

(a) in the Fire Service's view the building falls within the scope of section 37 of the 1986 Act, which imposes requirements for the protection of firefighters in the event of a fire

(b) accidental failure of a sprinkler head is a rare occurrence affecting only the area immediately below the sprinkler concerned. The appellant stated during discussions that, without sprinklers, any fire would probably cause a total loss of the building and its contents, and that, even with sprinklers, the smoke from the smaller controlled fire would cause a loss of 100 per cent of the contents. Sprinklers would therefore prevent loss of the building and provide firefighter safety. Furthermore, an effective means for removing smoke in case of fire as required under section 37(f)(iii) of the 1986 Act could prevent the loss of contents

(c) no details of the fire resistance of the external walls of the building were given during consultation. Plans show the building to be 1.2m from the site boundary

(d) The 1986 Act is one of many local Acts and the Fire Service has received no formal indication of its repeal

(e) areas of the building may also be considered as a factory under the Fire Precautions Act 1971 and the nature of the goods involved would be likely to be assessed as high fire risk. The building may therefore require compensatory features, such as sprinklers, to comply with travel distances applicable to a factory categorised as high fire risk

(f) The Fire Service is not aware of any buildings in Berkshire which fall within the scope of section 37 of the 1986 Act and are not sprinklered.

Appellant's letter and submissions of 8 July 2002

The appellant submitted that the sole outstanding ground for rejection of the plans relates to failure to comply with section 37 of the 1986 Act by providing an automatic sprinkler system. A copy of a fire engineering strategy report, prepared by a Fire Engineering Consultancy on behalf of the appellant, was also provided.

15. The appellant made the following submissions:

(a) that the Fire Service's concern is for the safety of firefighters and that other matters are not further particularised. *Paragraphs 7.1 to 7.4 in the Fire Engineering Consultancy report* indicate that firefighters will have suitable and sufficient access and facilities on site. The objective of installing a sprinkler system is to help control a fire and prevent further conflagration. The expectation is not necessarily that it will always extinguish a fire

(b) the appellant accepts that the Secretary of State has previously taken the view that under the provisions of the 1986 Act, it can on occasions be reasonable, and therefore lawful, to ask for measures which are in excess of those in *Approved Document B*, and that Berkshire is not unique in having a local Act that contains similar provisions. However, despite what was stated in previous appeals, the appellant does not accept that the Secretary of State did not receive very firm consultation responses and recommendations that sprinkler systems should be mandatory in high-bay warehouses, prior to the re-issue of *Approved Document B* from 1 July 2000. It is therefore submitted that the Secretary of State must have deliberately decided not to include this requirement within *Approved Document B*.

(c) It is further submitted that it cannot rationally have been in the Secretary of State's mind, in failing to do so, that he decided to leave such decisions to the provisions of local Acts, such as the 1986 Act, as they do not cover the whole country. Further it is submitted that there is no rational basis for concluding that a building in Berkshire should need to be fitted with sprinklers when an identical building, in identical use, in another part of England - not covered by a local Act - would not be. On that basis, the submission concludes is that it is neither reasonable nor proportionate to require sprinklers in Berkshire and in the building in question in particular, in circumstances where the requirements of *Approved Document B* are met.

The Fire Engineering Consultancy report

16. The report presents a fire safety strategy for the new building. It describes the building, explains the rationale behind the fire engineering solution and assumes a "high" hazard classification of materials stored therein. The report also advises of modifications to the design of the building as originally conceived and submitted. The report contains what is described as a "*comprehensive package of measures that affords a high level of safety for the occupants of the building and people in the neighbourhood of the building*". The Fire Engineering Consultancy states that the proposals set out in the report are considered to satisfy the requirements falling within Part B (Fire Safety) of Schedule 1 to the Building Regulations 2000.

The Council's letter and submissions of 29 August 2002

17. The Council's submissions referred to the Fire Service's letter of 19 June 2001 which indicated that the Fire Service's objections were that sprinklers would prevent loss of the building and provide firefighter safety, and that an effective means for removing smoke in case of fire could prevent the loss of contents. The non-provision of a sprinkler system and an effective system for removing smoke is submitted by the Council and the Fire Service to compromise the protection of firefighters and the prevention of the spread of fire.

18. The basis upon which the Council submits that an automated sprinkler system and / or an effective means for removing smoke is required under the 1986 Act is set out in the enclosed proof of evidence submitted by the Principal Building Control Surveyor at the Council (dated 27 August 2002).

19. The proof sets out the timeline events in this case, including details of the consultation with the Fire Service and the Council's rejection of the plans. He states that the Council's concern is for fire fighting personnel and the public due to fire spread, with the building being situated close to the highway and neighbouring boundaries. He adds that, in addition to sprinklers, compliance with section 37 of the 1986 Act would also require a smoke ventilation system to assist fire fighters and reduce the effect of radiation on the highway and neighbouring boundaries.

20. With respect to the effect of *Approved Document B* on the interpretation and application of section 37, the Council submits that the appellant's submission is entirely misconceived and should be rejected. The Council made a number of detailed points to support this view, which include:

(a) the requirements laid down in local Acts are separate and additional to the requirements of building regulations

(b) Berkshire is not unique in having a local Act that contains similar provisions

(c) It is legitimate and proper for local Acts to make provisions in respect of fire safety / building regulations and that the content of such Acts is a matter for Parliament. Local Acts can make provision which is different from, or in any way additional to, that indicated by the Secretary of State in *Approved Document B*. Otherwise, if a matter is provided for in *Approved Document B* it would be unnecessary to also make provision for it in a local Act

(d) Approved Documents are no more than guidance and it cannot be lawful or constitutionally proper to limit the scope and content of local Acts by reference to what is included in guidance issued by the Secretary of State

(e) The Secretary of State's previous and consistent approach is the correct one and there would have to be a substantial reason to depart from it

(f) in response to the appellant's comments about the consultation responses received by the Secretary of State on the re-issue of *Approved Document B*, in relation to the requirement for sprinkler systems in high-bay warehouses, it is submitted that the Secretary of State is best placed to judge (i) what representations he received; (ii) the strength of those representations; and (iii) what he did or did not decide consequent upon those representations.

(g) In response to the appellant's comments that it is irrational for the Secretary of State not to include a particular requirement in the Approved Documents (ie sprinklers), but to hold that such a requirement is necessary under the provisions of a local Act, the Council considers that this involves a fundamental misunderstanding of both the statutory regime and the nature of public law concept of irrationality and makes the following three points to support its view:

- (i) it is not correct that the content of local Acts can be dictated by the guidance set out in the Approved Documents
- (ii) there is a concurrent jurisdiction to provide for such matters through guidance in the form of Approved Documents and in local Acts
- (iii) the nature of the public law concept of irrationality or 'Wednesbury' unreasonableness is that two different public authorities can on the same facts reach a different conclusion neither of which is wrong in law. There is only irrationality if a public authority reaches a decision that no reasonable authority could reach.

Appellant's letter and submissions of 6 November 2002

21. The appellant made the following additional submissions:

(a) It has been the Secretary of State's policy that matters such as the survival of buildings and their contents are matters for the owners and their insurers, and that a recent iteration of this policy can be found in *paragraph 0.18 on page 8 of Approved Document B*, and it is in this context that the "safety of firefighters" remains properly to be considered

(b) The Fire Service's actual concerns about the safety of firefighters have not been further particularised in the Council's subsequent submissions

(c) That the Council's approach has been to require sprinklers and smoke ventilation simply because the 1986 Act refers to them, without properly considering the central question of whether they are necessary in this case.

22. The submissions include photographs giving examples of buildings in Reading or nearby (including the building in this case), and submit that each of the buildings is a high bay storage warehouse yet none are fitted with sprinklers. The point is made that the building in this case is typical of its type and that there is nothing to distinguish it from the sampled warehouses which would justify a request for sprinklers to be fitted.

23. With respect to the effect of *Approved Document B* the appellant further submitted that:

(a) *Approved Document B* provides practical guidance on meeting the requirements of Schedule 1 to the regulations, including Requirement B5 (Access and facilities for the fire service). The Approved Document indicates which buildings the Secretary of State considers should be fitted with a sprinkler system and also gives guidance as to what requirements can be

relaxed where a sprinkler system is fitted. The guidance does not recommend fitting sprinklers to storage buildings whatever their size.

(b) The 1986 Act predates the Building Regulations 1991 and 2000 and Approved Document B 1992 and 2000. It is submitted that insofar as Parliament intended to "confer" in Berkshire "further powers" in respect of "fire precautions" under Part IV and section 37 of the 1986 Act, these matters have been considered subsequently by Parliament and provided for in the Building Regulations and by the Secretary of State in his guidance in *Approved Document(s) B*.

(c) The 1986 Act provides for an appeal to the Secretary of State. It would be irrational for the Secretary of State in considering an appeal to apply a different standard or requirement in Berkshire that he would under the Building Regulations 2000 or his guidance in *Approved Document B* unless there was some particular "Berkshire problem" identified in this application which does not apply elsewhere in the country. The Council has not identified any such issue.

(d) the Council's approach seems to be that because the 1986 Act provides for "further powers" it can insist on a "higher standard" of fire safety, which is tantamount to saying that the Secretary of State in issuing *Approved Document B* failed to provide for sufficiently high standards. Although the fire services nationally lobbied at the consultation stage for Approved Document B to recommend that high bay storage buildings should include sprinkler systems, the Secretary of State did not provide for this

(e) this is the latest attempt by a fire service to require sprinkler systems in high bay storage warehouses, following the failure of a recent attempt to do so under the Fire Precautions Act 1971.

(f) there is no basis for determining that the Building Regulations 2000 and Approved Document B cannot ensure the appropriate standard of safety for firefighters and therefore any further requirement cannot, by definition, be "reasonably necessary". It is noted that the Council accepts the point made in an earlier submission that if the plans of the building in this case were to be considered only against the requirements of the Buildings Regulations and *Approved Document B*, there would be no case for the plans to be rejected.

The Council's email of 28 March 2003 and letter of 2 April 2003 and submissions

24. The Council submitted that the copies of the photographs provided of allegedly similar buildings are of a poor quality and it is not evident that they show what the appellant says they do. In any event, this is not an answer to the Council's case on the necessity of sprinklers or smoke removal as set out in proof of evidence.

Appellant's letter of 26 August 2004

25. The appellant's further letter referred to "other evidence" that had come to light relating to a similar warehouse building in Reading which was built five years ago and has been occupied without a sprinkler system. Some detail was provided by the appellant on this building and its similarity with the warehouse under consideration in this case.

Application for hearing

26. In the appellant's letter of 7 March 2002 it was formally requested "that the Secretary of State exercise his discretion in favour of a hearing of this matter before a person appointed by him for such purpose, on the grounds that the same is required in order to achieve a fair disposal of the issues between the parties". This request is also reiterated in subsequent submissions by the appellant, although the Council indicated in response that it did not consider that this would be the correct procedure for determination of the appeal.

27. Both parties were advised in a letter of 5 August 2004 that, having carefully reviewed all the documentation submitted by both the appellant and the Council in this case, the Secretary of State had reached the view that the issues arising could be determined from the papers without the need to hear submissions orally on these matters.

The Secretary of State's consideration

28. As stated in paragraph 5 above, section 37(6) of the 1986 Act provides that on appeal to the Secretary of State, she may dismiss or allow an appeal made by a person aggrieved, or may vary the decision of a Council.

29. As the Council rejected the plans in this case, the Secretary of State considers that the question for determination is whether the plans for the work can properly be consented to, either unconditionally, or subject to compliance with any conditions with respect to the matters mentioned in section 37(3) for preventing the outbreak or spread of fire in or from the building, or reducing danger from fire in the building. The Secretary of State considers that the plans cannot be properly consented to without conditions if those conditions are reasonably necessary. The issue, therefore, is whether the provision of fire extinguishing systems, and / or an effective means of removing smoke in case of fire and / or any of the other matters covered by section 37(3) is reasonably necessary in this particular case. The Secretary of State notes that the parties have referred to other similar buildings in the same area, but she is required to consider each case on its own individual merits.

The effect of *Approved Document B* on the interpretation and application of the 1986 Act

30. The Secretary of State has noted the arguments raised by the parties with respect to the effect of *Approved Document B*.

31. Part B of Schedule 1 to the Building Regulations 2000 (as amended) contains the legal requirements relating to fire safety with which all controlled building work must comply. The extent of the fire safety requirements in the Building Regulations is restricted by regulation 8 to securing reasonable standards of safety for persons in and about buildings; this includes firefighters who may need to enter the building for the purposes of search and rescue.

32. *Approved Document B* is a document approved by the Secretary of State pursuant to section 6 of the Building Act 1984 for the purpose of providing practical guidance with respect to the requirements of Part B. With reference to section 7 of the 1984 Act, a failure to comply with an Approved Document does not of itself render a person liable to any civil or criminal proceedings, but proof of compliance with such a document may be relied upon as tending to negative liability in any proceedings in which it is alleged that the person contravened the Building Regulations.

33. *Approved Document B* therefore sets out guidance on ways in which the requirements of Part B may be met in some of the more common building situations. There is no obligation to adopt any particular solution if a builder prefers to meet the relevant requirements in another way. The Approved Document does not provide guidance on ways in which the requirements of local Acts may be met, nor does it provide guidance on every possible type of building situation.

34. As indicated in paragraph 3 above, section 37 of the 1986 Act applies only to large storage buildings, and requires Councils to reject the plans unless they are satisfied, after consultation with the fire authority, that they properly consent to the construction, extension, alteration or change of use of the building, either unconditionally or subject to compliance with any conditions, specified in their consent, with respect to matters mentioned in subsection (3) for reducing the outbreak or spread of fire in or from the building or reducing danger from fire in the building.

35. The scope of section 37 of the 1986 Act is therefore very specific. It is not dependent upon the scope of any Building Regulations made with respect to fire safety, and it applies in addition to the requirements imposed in Part B. The Secretary of State considers that the existence and content of statutory guidance issued for the purposes of providing practical guidance on the requirements of Part B does not restrict the operation of section 37.

Is the provision of fire extinguishing systems, and / or an effective means of removing smoke in case of fire, and / or any of the other matters covered by section 37(3), reasonably necessary?

36. The Secretary of State notes that there appears to have been some confusion in this case as to what conditions the Council sought to impose upon the appellant. From the papers provided this confusion appears to be as a result of the Council's failure to either issue a conditional approval or to clearly state its views.

37. It is, however, clear from the papers that the Council considers the installation of an automatic sprinkler system necessary in this case. It is less clear whether it requires provision of an effective means of removing smoke. In the circumstances, the Secretary of State has considered the necessity of both conditions.

38. The appellant has argued that the installation of a wet fire suppression system is unnecessary because: the fire precautions already taken are sufficient; fire fighters have suitable and sufficient access and facilities on site; and the building is free standing and isolated and therefore does not constitute a high risk relative to fire spread in the event of fire. The appellant also submits that the installation of a wet fire suppression system is unacceptable both in terms of cost and the limitations it creates for storage flexibility.

39. The Council has argued that additional protection is required to protect the safety of both the public and fire fighters from a fire in the building. The parties are, however, in agreement that the building complies with the relevant requirements of Part B of the Building Regulations, as indicated in the report provided by the Fire Engineering Consultancy.

40. The building contains an extensive fire load arranged in high-bay racks comprising not only the stored goods but also the packaging materials and pallets. It is the Secretary of State's view, therefore, that there is potential for a large and fast growing fire. In this case, however, the probability of such a fire occurring is not considered to be in any way unusual.

41. The Secretary of State takes the view on the papers submitted by the parties that there is nothing about the nature, location or use of this particular building or surrounding buildings that gives rise to any special considerations which support the Council's submission that fire safety requirements above those in the Building Regulations, relating to the installation of sprinklers and/or smoke ventilation, are necessary in this case to prevent the outbreak or spread of fire in or from the building, or reducing danger from fire in the building.

42. The building is occupied by a small number of staff and the facilities it offers its customers are by no means unique. As such it is unlikely that even a complete loss of this building would have a significant impact on the local economy. Nor is there anything in relation to the contents or use of the building that would suggest that a fire or the loss of the building or its contents would result in an unacceptable or disproportionate impact on the surrounding area. The appellant's insurer and its clients who store products in the building, appear, on the evidence provided, content with the level of fire protection as it stands.

43. On balance, in respect of this building, the Secretary of State takes the view that it would not be reasonable to impose conditions with respect to any of the matters covered by section 37(3) of the 1986 Act beyond the provision for fire safety which has already been made. While the potential for a fire in this building does exist, the Secretary of State considers it would be disproportionate, given the risks and the potential impact that may result from such a fire, to require any additional protection. Accordingly, the Secretary of State considers that the plans for the construction of this building may properly be consented to without the imposition of any conditions under section 37 of the 1986 Act.

44. Given this conclusion, it is not necessary to address the human rights point raised by the appellant.

The Secretary of State's decision

45. In coming to her decision, the Secretary of State has given careful consideration to the particular circumstances of this case and the arguments presented by and on behalf of both the parties. As indicated above, she is satisfied that the plans may properly be consented to in accordance with section 37 without the imposition of any conditions.

46. The Secretary of State therefore allows the appeal.