Leigh Day

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Date: 12 May 2016

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BY POST & EMAIL
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URGENT – LETTER BEFORE CLAIM

Dear Sir,

Grant of planning permission for erection of 377 dwellings, including access and associated infrastructure on land to the west of Farm Lane, Shurdington. Reference 14/00838/FUL

The Proposed Claimant

The Proposed Claimant is Leckhampton Green Land Action Group Limited ("LEGLAG") which represents approximately 1100 residents living close to the Farm Lane site. LEGLAG took an active part in the determination of this planning application and in the examination of the A6 allocation within the emerging Joint Core Strategy. They were also a Rule 6 party during the public inquiry of the adjacent land at Farm Lane.

The Details of the Matters Being Challenged and Reference Details

The decision of the Council contained within a Decision Notice dated 26 April 2016 to grant planning permission for the above development at the above site under reference 14/00838/FUL.

Summary of the Proposed Claimant's Case

The above decision was unlawful for the following reasons:

Issue 1 – Breach of EIA Regulations

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Having resolved that the planning application amounted to "EIA development" within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, the Council were obliged to take into account "the environmental information" prior to granting consent, by Regulation 3(4) EIA Regulations. The "environmental information" is defined as "the environmental statement", and that in turn is defined by Reg.2(1) EIA Regulations as:

(a) *... such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but...*

(b) *... at least the information referred to in Part 2 of Schedule 4*

Within the mandatory Part 2 requirements, the Environmental Statement had to include *"the data required to identify and assess the main effects which the development is likely to have on the environment"* and *"a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects".* The scope of the assessment of that assessment was most recently summarized by Lang J in Larkfleet Ltd v South Kesteven DC [2014] EWHC 3760 (Admin.) at [54(ii)] (approved by Richards LJ on appeal [2015] EWCA Civ. 887 at [52]):

> *"... the starting point will always be the proposed development. However, the planning authority ought also to go on to consider whether there are other proposed developments in the vicinity and if so, whether they should be assessed jointly with the proposed development, as if they comprised a single Schedule 2 development. The test is whether they ought to be regarded "as part of the same substantial development" (per Davis LJ in Burridge[1]) or whether the proposed development is "an integral part of an inevitably more substantial development" (per Simon Brown J. in Swale[2])."*

An Environmental Statement in August 2014 by Origin3 on behalf of the Applicant ("the ES"). Within Chapter 5 of the ES, headed "setting the development parameters" which explains at paragraph 5.1.1. that:

> *"The Environmental Statement examines the plans and the associated description of development. The plans identify the extent of proposed built development and the component parts being tested".*

The Chapter goes on to make clear the principal focus of assessment is the planning application submitted by the Applicant. However, at Chapter 19 the Applicant has

[1] Burridge v Breckland DC [2013] EWCA Civ. 228.
[2] R v Swale Borough Council ex p. RSPB [1991] PLR 6.

assessed the cumulative effects of the scheme and identifies the planning application forms a part of a larger emerging site allocation. Whilst there is a summary evaluation of the likely adverse effects it is clear the application was not assessed with the rest of the South Cheltenham Urban Extension (emerging JCS policy SA1) as a single urban development project. It is plain that omission has resulted in significantly less environmental information being provided to the decision taker about the effects of the project as a whole than would be the case had it been so assessed, for example:

- A full LVIA was undertaken for the application site, that analysed, in accordance with GLVIA3, the significance by reference to defined criteria. The results of the LVIA are summarised within Chapter 9 of the ES. That is to be compared to a light touch assessment is undertaken of the landscape and visual effects of the entire allocation examining only potential for "combined or simultaneous visibility", "potential successive viewpoints" and "potential sequential visibility" without the detailed of analysis undertaken for the application site.

- The impacts on Leckhampton Farmhouse, the barn and Brizen Farmhouse are set out within Chapter 14. Within Chapter 19 it is simply asserted that the full allocation would have no greater than "moderate adverse" significance on heritage assets. However, Inspector Ord records within her interim report on the JCS (IR,53) a number of other heritage assets, including Church Farm, the Rectory, the Olde England Cottage and the Moat Cottage affected by the A6 allocation. None of which are mentioned within the cumulative impact section of the ES, but yet the evidence base before the JCS Inspector recorded *"there are major heritage concerns to development".*

- The ecology and nature conservation effects of developing the application site are set out at Chapter 11. The ecological survey undertaken in March 2014 only considered the application site. The ES relies upon a survey undertaken in 2012 to support an outline planning application for a neighbouring site, which is said to also consider the application site. The results or detail of that survey are however not explained within the ES, and certainly no assessment of the like done of the application site is set out within the ES for the broader A6 allocation, such as would justify the conclusion in Chapter 19 that the nature conservation effects would be "negligible".

A fair reading of the treatment of the issue of "master-planning" in the officer's report to Committee reveals that the planning application was being considered as a smaller part of a larger, single urban development project, namely the emerging South Cheltenham Urban Extension (known as the "A6 allocation"). For example:

- At paragraphs 5.4-5.8 of the officer's report to Committee the emerging allocation is set out.
- At paragraph 5.13 one of the two key issues identified is whether *"it would be premature to grant permission given the site's allocation as part of the wider strategic allocation (A6) in the emerging JCS"*.
- At paragraph 18.3 an analysis is undertaken of the masterplan submitted by the applicant of the wider urban extension. That masterplan set out community facilities, local centre, new educational provision and play areas.
- At paragraph 20.4 Members are told to take into account the contribution to educational facilities, open space and playing pitches, health and community facilities and improvements to public transport as benefits of the scheme. A fair reading of the Report would lead Members to conclude these benefits were the same benefits which were outlined at paragraph 18.3 as being delivered as part of this A6 allocation.
- At paragraph 20.7 it is concluded that the planning application would complement the emerging A6 allocation.

It is therefore clear that planning permission was granted of the basis of the application forming an integral part of a broader urban development project, namely the A6 allocation. The wider social and economic benefits of that boarder development project formed a key part of the reasoning to grant permission. However, the full environmental effects of that broader project were not taken into account.

There is therefore no doubt the planning application before the Council and the remainder of the A6 allocation formed part of the *"same substantial development"* and was *"an integral part of an inevitably more substantial development"*, but the environmental effects of that wider project were not assessed or taken into account by the decision taker. The grant of permission was therefore in breach of Regulation 3(4) EIA Regulations and should be quashed.

Issue 2 – Failed to refer the determination of the application back to the Planning Committee

After the Planning Committee had resolved to grant planning permission but prior to the grant of planning permission, the Inspector examining the Joint Core Strategy delivered a set of preliminary findings. The document was titled "Inspector's Preliminary Findings on Green Belt Release, Spatial Strategy and Strategic Allocations" [EXAM146] and was dated 16 December 2015.

Inspector Ord's report made a number of material findings for the "Leckhampton site" a part of which formed the scheme under challenge:

(i) The Inspector expressed her "reservations" about developing the site within Tewksbury's boundaries (broadly the application site) [IR,57]:

"I have reservations about developing this area of high landscape and visual sensitivity, adjacent to the AONB and GB."

(ii) The Inspector found the Tewksbury side not "sound" at [IR,60]:

"On the other hand, for reasons of landscape sensitivity, I am not minded to find the Tewkesbury part of the allocation sound."

(iii) The proposed local green space ("LGS") designation would be "sound" at [IR,66]:

"In my judgement, the evidence suggests that the NPPF criteria are met and LGS designation is justified."

In R(Kides) v South Cambridgeshire DC [2002] 1 P & CR 19 Jonathan Parker LJ held at [126] that:

> *"In practical terms ... where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2) , it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision."*

Jonathan Parker LJ held at [121] that "material" in this context meant a factor that "when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other", and that "has some weight in the decision-making process, although plainly it may not be determinative".

It is quite clear that Inspector Ord's conclusion would have had a significant bearing on the decision in two important respects and, had they been taking into account, it cannot be said that Members would have reached the same decision. The first respect being the soundness of the emerging A6 allocation with regard to the Tewksbury portion. It is quite clear throughout the officer's report that regard is had to the emerging allocation at paragraphs 5.4-5.8. The second respect is the consideration of the local green space proposal. At paragraph 19.4-19.5 Members are told that, in short, the LGS application is doomed to fail as it does not meet the NPPF criteria. That prophesy turned out to be incorrect.

Had the Committee had both these conclusions of Inspector Ord before them, given their centrality to the reasoning to grant permission, it cannot be said Members would have come to the same decision. As such, the Council erred in law by failing to refer the application back to its Planning Committee prior to issuing a decision so as to allow consideration of the implications of Inspector Ord's interim report.

Issue 3 – Took into account an immaterial consideration

Paragraph 20.3 directs Members as follows in the context of the three strands of sustainable development:

> *"In terms of the economic dimension, it is recognized that housing development contributes to economic growth both directly and indirectly. New employment would be created during construction and businesses connected with the construction industry would also benefit, some of which would likely be local suppliers and trades; all of which would boost the local economy. Residents of the development would also spend some of their income locally and these are benefits which weigh in favour of the proposal."*

However, the NPPF defines "economic development" as follows:

> *"Economic development: Development, including those within the B Use Classes, public and community uses and main town centre uses (but excluding housing development)."*

Accordingly, the Council took into account an immaterial consideration weighing in favour of the grant of permission. That error is quite different to the formulation by the Inspector in Cheshire East DC v SSCLG [2014] EWHC 3536 (Admin.). In which Lewis J rejected a challenge at [41] on the principle basis that the Inspector was taking into account the benefits of housing supply towards the economic dimension of sustainable development, as distinct from considering the development itself amounted to "economic development" delivering economic benefits. In this instance, it is clear the Council were considering the development an "economic development" delivering demonstrable economic benefits. That was in error and thus amounted to an immaterial consideration which should not have been put before Members.

Issue 4 – Breach of s.66 Planning (Listed Buildings and Conservation Areas) Act 1990

By s.66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 where development affects a listed building or its setting, the Council is obliged to pay "special regard" to "preserving the building or its setting ...".

The Applicant identified three listed buildings affected by the proposal, Leckhampton Farmhouse, its barn and Brizen Farmhouse (para.16.3 OR). Historic England within their consultation response indicated that the assessment within the ES was defective

as it failed to describe the significance of the assets or the impact of the proposed development upon them.

It is a requirement in circumstances where designated heritage assets are impacted by a proposal to assess their significance and the nature of the development upon that significance see: Obar Camden Ltd v Camden LBC [2015] EWHC 2475 (Admin.) at [14]-[15]. Furthermore, "significance" is to be considered in a structured manner, following the definition within the Glossary of the NPPF see: Suffolk Coastal DC v SSCLG [2016] EWCA Civ. 168 at [65].

The officer's report reports the views of the Council's heritage officer at paragraph 16.5. That paragraph fails to explain the significance of the listed buildings or their settings. It jumps, without properly equipping Members with an understanding of the significance of the heritage assets involved, to explain the impact of the development on the setting will amount to "less than substantial harm".

The officer's report then fails, at any point within the heritage section, to undertake the balancing exercise required by paragraph 134 NPPF to weigh the public benefits of the scheme against the less than substantial harm and come to a reasoned conclusion. Indeed, the phrase "less than substantial harm" and its implications are entirely unexplained to Members.

The only point where a balancing exercise is undertaken is at paragraph 20 in the overall planning balance. Members are told at paragraph 20.8 to grant permission unless the adverse impacts significantly and demonstrably outweigh the benefits. However, where paragraph 134 NPPF is engaged a straightforward, unweighted, planning balance needs to be struck prior to undertaking the weighted paragraph 14 NPPF balance. That is because of the operation of footnote 9 to paragraph 14 NPPF. That approach was confirmed by the High Court in Forest of Dean DC v SSCLG [2016] EWHC 421 (Admin.). It is therefore clear the Council, having failed to undertake an unweighted balance, fell into the same error as that identified by Coulson J at [47]:

> *"The last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134. Nowhere did the inspector carry out that exercise. He only undertook the weighted exercise in Limb 1. He therefore erred in law."*

Finally, and in any event, to the extent that the Council did weigh the benefits of the scheme against the less than substantial harm to heritage assets, at no point are Members directed to the statutory test at s.66(1) of the 1990 Act and that

"considerably importance and weight" was to be attached to the harm in the planning balance. Such a direction fails to follow the correct approach identified by the Court of Appeal in East Northamptonshire DC v SSCLG [2014] EWCA Civ. 137 where Sullivan LJ held at [22]:

> *".... In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. I accept that ... the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view ... a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight"".*

The failure to refer to the s.66(1) duty and the failure to refer to the policy objective of the Act and NPPF to preserve listed buildings and their settings are exacerbated by a direction at paragraph 16.1, which is relevant only to non-designated heritage assets. That had the highly misleading effect of telling Members when going on to consider the designated heritage assets to (i) only undertake a "balanced judgment", (ii) not against the public benefits and security of optimal viable use of the heritage asset and (iii) without affording considerable importance and weight, pursuant to the legislative duty, to the less than substantial harm to the heritage assets. Those directions, coupled with the omissions, amount to positive indications the decision taker was misled as to the nature and scope of the statutory duty see: Jones v Mordue [2015] EWCA Civ. 1243 per Sales LJ at [27].

As such the advice to Members on heritage matters was misleading on a highly material matter because:

(i) It failed to explain the significance of the heritage assets by reference to the NPPF definition of significance.
(ii) It failed to set out and then perform the balance required by paragraph 134 NPPF.
(iii) It failed to undertake that balancing exercise in an unweighted manner prior to performing the paragraph 14 NPPF weighted balance.
(iv) It failed to advise Members to place considerable importance and weight on the less than substantial harm to the heritage assets.

It is well established that where members have voted in accordance with their officer's recommendation, it can be reasonably inferred that, absent reasons to the contrary, they voted for the reasons set out within the officer's report: R(Siraj) v Kirklees Metropolitan Council [2010] EWCA Civ. 1286 per Sullivan LJ at [16]-[17]. As such, the decision was in breach of s.66 of the 1990 Act and should accordingly be quashed.

Leigh Day

Aarhus Convention Claim

The substance of the Proposed Claimant's complaint, if litigated, will amount to an "Aarhus Convention Claim" within the meaning of CPR r.45.41(2), and accordingly the costs cap at CPR r.45.43 would apply. The Proposed Claimant relies upon the following matters which place the claim within the scope of the Convention:

(a) The decision under prospective challenge, granted consent for which was "EIA Development" and accordingly falls within Article 6(1)(b) Aarhus Convention.

(b) The Proposed Claimant is contemplating judicial review on the grounds that the Council breached its statutory duties under the Town and Country Planning (Environment Impact Assessment) Regulations 2011, Town and Country Planning Act and Planning (Listed Buildings and Conservation Areas) Act 1990. These are provisions of the national law relating to the environment and accordingly fall within the scope of Article 9(3) Aarhus Convention. That was the conclusion of the Court of Appeal in Venn v Secretary of State for the Environment [2014] EWCA Civ. 1539.

(c) As such, the claim engages a core policy objective of the Convention, set out at the Recital being to *"ensure sustainable and environmentally sound development"*.

Accordingly, the claim would be "*a claim in whole or part, for judicial review of a decision subject to the provisions of the Aarhus Convention*" and would fall squarely within CPR r.45.41(2). As such, the Proposed Claimant's liability to other parties in the event it was to be unsuccessful would not exceed **£10,000** and its limit on recovery of its legal costs in the event it was to be successful would not exceed **£35,000.**

In accordance with paragraph 16(e) Practice Direction on Judicial Review we therefore invite you to agree in writing that the complaints as outlined in this letter of claim would amount to an Aarhus Convention claim.

We would draw your attention to the cost consequences of unsuccessfully challenging whether the claim is an Aarhus Convention claim at CPR r.45.44.

Action Expected from the Defendant and the Date of Reply

The Council is invited to confirm in writing that:

1. It will consent to the quashing of the grant of planning permission and paying the Proposed Claimant's costs in making that application.

Leigh Day

2. Agree that the claim made in the above terms amounts to an Aarhus Convention Claim for the purposes of CPR r.45.41(2).

The Council is expected to reply within 14 days of the date of this letter being the **27 May 2016 by 1600**. In default of a satisfactory response within this timeframe the Proposed Claimant will unfortunately have to issue an application for judicial review.

Legal Advisers

1. Richard Stein, Partner, Leigh Day, Priory House, 25 St John's Lane, London, EC1M 4LB

2. David Wolfe QC, Matrix Chambers, Griffin Building, Gray's Inn, London, WC1R 5LN

3. Ashley Bowes, Cornerstone Barristers, 2-3 Gray's Inn Square, London, WC1R 5JH

Details of Interested Parties

A copy of this letter is being sent to:

1. Redrow Homes Limited, Redrow House, St David's Park, Flintshire, CH5 3RX being the registered proprietor of the freehold interest of the site.

2. Martin Dawn (Leckhampton) Limited, Roots Hall Stadium, Victoria Avenue, Southend-on-Sea, Essex, SS2 6NQ being the registered proprietor of a registered charge over the freehold title.

We should however, be happy to provide copies of this letter to any other person which the Council or other parties are of the view would be an interested party were the matter to be litigated.

Address for Reply and Service of Court Documents

Replies and service of court documents to be sent for the attention of: Richard Stein, Partner, Leigh Day, Priory House, 25 St John's Lane, London, EC1M 4LB

Yours faithfully,

Leigh Day