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27 May 2016

Dear Sir

URGENT – RESPONSE TO LETTER BEFORE CLAIM

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

I write further to your letter dated 12 May 2016.

The Proposed Claimant

Leckhampton Green Land Action Group Limited ("LEGLAG") c/o Richard Stein, Leigh Day, Priory House, 25 St John's Lane, London, EC1M 4LB.

The Proposed Defendant

Tewkesbury Borough Council, Council Offices, Gloucester Road, Tewkesbury, Gloucestershire, GL20 5TT

The Details of the Matters Being Challenge 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.

Response to the Proposed Claim

The Council contests the proposed claim in full. Briefly, the Council's response to each issue raised is set out in turn:-

Issue 1 – Alleged Breach of EIA Regulations

This potential ground of challenge is entirely misconceived. The Courts have repeatedly made clear that the scope of EIA assessment is a matter for the decision maker, challengeable only on public law, *Wednesbury,* grounds (see *Bowen-West v. SSCLG* [2012] EWCA Civ 321, *R v. Swale BC ex p. RSPB* [1991] 1 PLR 6, *R (Linda Davies) v. SSCLG* [2008] EWHC 2223 Admin, at [48]).

The adequacy of environmental information contained in an environmental statement is a matter for the judgement of the local planning authority, with which the court will only interfere if it has been exercised irrationally (see *R (oao PPG1 Ltd) v. Dorset CC* [2004] 1 P & CR 16 and *R (Blewett) v. Derbyshire CC* [2003] EWHC 2775 (Admin) at paras 32-33 and 68.

In this case, the environmental information contained full details of potential impacts from the planning application and included the cumulative effects of the scheme with the larger emerging site allocation.

The Claimant does not, nor could it, claim that focussing the environmental assessment on the proposed development was irrational. Nor does the Claimant allege that any material matter was left out of the cumulative assessment element of the environmental statement. Instead the proposed challenge on this issue is a straight attack on matters of planning judgement and matters of degree, neither of which are issues for the Court. It is also noted that the Claimant appears to ignore the fact that a supplementary heritage report was submitted as part of the environmental statement and that assessed all the heritage assets referred to in the second bullet point on page 3.

Issue 2 – Alleged Failure to refer the determination of the application back to the planning committee

In the circumstances of this case the document entitled "Inspector's Preliminary Findings on Green Belt Release, Spatial Strategy and Strategic Allocations" ("IPF") was not a factor capable of having any material weight in the decision-making process. As the Inspector made clear, those "findings" were "preliminary" and "subject to determination of the objectively assessed need (OAN) and to "any relevant evidence submitted for the Stage 3 hearings".

The finding on the soundness of the relevant allocation was made expressly on the basis of landscape sensitivity (IPF para 60) and consisted of high level observations made in the absence of any conclusion on housing need and in the absence of any detailed landscape assessment or input from statutory consultees. By contrast, the resolution to grant planning permission was informed by a lack of five year' housing land supply and, importantly, a full and detailed Landscape and Visual Impact Assessment and advice from the Council's Landscape Consultant. Further, the planning application had been amended in response to concerns raised by the Cotswolds Conservation Board and Natural England. Both those latter bodies have statutory duties relating to landscape protection and the AONB and both confirmed that they had no objection to the revised application which was the subject of the grant of planning permission.

In those circumstances, it is inconceivable that the Inspector's high level preliminary observations on this site specific matter would have disturbed any of the conclusions made on the detailed consideration of landscape impact during the determination of the application and, for this reason, it is inconceivable that the findings would have had any effect in "tipping the scales" (being the test in *Kides*). It is well known that the consideration of such site specific matters as landscape is much more detailed at the planning application stage than at the plan making stage and, in the face of such detail that had already been considered, officers were entitled to decide not to refer the matter back to Committee for re-consideration.
The same can be said about the Inspector's comments relating to heritage assets (IPF para 53). These were made in the absence of the heritage assessment information submitted and supplemented as part of the environmental statement for this application. Similarly, her comments on master-planning (IPF para 55) were made in the absence of the illustrative masterplan submitted and considered as part of the planning application.

Should a Claim be brought on this ground, the Council will also rely on the more recent decisions in *Wakil (t/a Orya Textiles) v. Hammersmith and Fulham LBC* [2014] Env. LR 14, *R (oao Hinds) v. Blackpool BC* [2012] EWCA Civ 466 and *R (oao Dry v. West Oxfordshire DC* [2010] EWCA Civ 1143. In none of those cases was the local planning authority found to be at fault for deciding not to refer back the application to Committee and all of those cases illustrate the relatively high hurdle of materiality in these circumstances and the need to consider whether the new factor would, in reality, have made any difference to the decision. In particular, in relation to the decision in *Kides* relied on by the Claimant, it is worth noting the words of LJ Carnwath (as he then was) in *Dry* (at para 16):-

> "*16 Without seeking to detract from the authority of the guidance in Kides , I would emphasise that it is only guidance as to what is advisable, "erring on the side of caution". Furthermore, in that case there had been a gap of five years between the resolution and the issue of the permission. The guidance must be applied with common sense, and with regard to the facts of the particular case."*

Issue 3 – Alleged taking into account an immaterial consideration

There is nothing whatsoever in this ground. It is plain on the face of the extract from the officer's report that is relied upon and quoted by the Claimant (para 20.3) that the Council was legitimately taking into account the economic benefits of housing supply and development and was not considering the development to be an "economic development" within the definition in the NPPF.

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

The Council paid careful and special regard to the impact on listed buildings. In response to comments from Historic England on the Cultural Heritage and Landscape and Visual Impact Assessments forming part of the ES, a further Built Heritage Assessment was required from the applicant. That assessment concluded that the site is not a critical element of setting or significance for any listed buildings and that "some low level of less than substantial harm may arise as a result of the proposed development" on the three Grade II listed buildings in close proximity to the site. Historic England and the Council's Conservation Officer expressly agreed with the conclusions of that assessment. This was all reported to Committee.

The Claimant itself did not raise any objection to the planning application on heritage grounds. Similarly, despite detailed objections raised on behalf of three Parish Councils, the CPRE and 806 individuals, not one included any concern about impact on heritage assets.

Whilst the officer's report did not expressly emphasise the considerable importance and weight to be attributed to that "low level of less than substantial harm" it is inconceivable that, had she done so, the outcome of the determination of the planning application would have been any different. Whilst special regard is required to be paid to heritage harm even if "less than substantial harm", it is clear that the weight to be accorded to low level harm would be rationally less than that accorded to greater harm, and, in any case the officer had advised that at least "moderate scheme benefits" would be required to outweigh such harm.

Even if the Court were to find a legal error in the approach of the officer's report, in circumstances where the agreed harm was expressed to be so low level, and in light of the lack of objection from either the council's conservation officer or the statutory consultee (or indeed any concern raised on heritage grounds from anyone else at all), it is highly likely that the outcome would have been the same had any error not

occurred. Accordingly, should a Claim be brought on this ground, the defendant will submit that the Court is bound to refuse permission under s. 31(3C)(b) and (3D) of the Senior Courts Act 1981.

Aarhus Convention Claim

The Council agrees that the proposed claim amounts to an Aarhus Convention Claim for the purposes of CPR r.45.41(2).

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.

Address for Reply and Service of Court Documents

Replies and service of court documents to be sent for the attention of Sara Freckleton, Borough Solicitor, Tewkesbury Borough Council, Council Offices, Gloucester Road, Tewkesbury, Gloucestershire, GL20 5TT

Yours faithfully

Tessa Yates
Planning Solicitor