From: **Village Concerns** villageconcerns2016@gmail.com
Subject: Update 117 Judicial Review process Our Barrister's Pre-Action Protocol letter
Date: 6 July 2021 at 18:41
To: Village Concerns villageconcerns2016@gmail.com

Apologies for the quick succession of two updates in one day but there is a lot of information to give to you all. There will also be an update 118 in the next day or two.

Village Concerns Steering Committee

Dear Supporter,

This Update is for those of you who wish to delve deeper into the process of challenging the Hesmond's Decision. It covers the Process of the Judicial Review (JR) including Costs and Timeframe and then our Case.

Judicial Review

The process of pursuing a JR against the Outline Planning Consent for the Hesmond's Stud application contains many stages. It is possible that Wealden District Council could reconsider their position at any point in the process, but we feel that this is unlikely given their normal intransigence in these matters. The key stages of the process are:

Advice

This is where we ask a barrister to review the decision-making process and provide advice on whether there are legal errors that would support a case in JR to quash the decision. Includes a meeting with the barrister in conference (via Zoom) to discuss the case prospects.

Judicial Review is not a review of the merits (i.e. whether the development should go ahead); it is a look at whether the Local Planning Authority (LPA) acted lawfully in the handling of the application and is an opportunity to consider whether the LPA applied the correct local and national framework policies as interpreted, where applicable, by the Courts, whether it dealt with the material information before it or left matters out of account (e.g. failed to apply a policy or have regard to material information) and whether it acted rationally. Rationality is a very high bar and does not mean just because the council disagreed with our representations that it acted irrationally.

Pre-Action Protocol (PAP) Letter

The next stage is the PAP letter**.** This is drafted with input by the barrister on grounds of the claim. The LPA has 14 days to respond. We also must copy the letter to the Interested Party (IP). This is the developer and they too have 14 days to respond. The responses set out the grounds the LPA and IP intend to rely on to defend the claim. It includes time to discuss the response to the PAP letter before we decide to continue to the next stage and lodge a claim.

The PAP stage is an opportunity for the LPA to concede the case and consent to a judgment to quash the planning consent.

If the LPA concedes the case, we must also obtain the IP's agreement to a quashing order, as the Court cannot make the order to quash a planning consent without all parties' agreement.

This can sometimes be a protracted process as the IP will be reluctant to sign a quashing order which kills off its consent. However, because the LPA will have conceded the case, the IP then becomes at risk for our costs if we win and that risk is big incentive for the IP to agree to a quashing order. It will be aware that the LPA's formal position is that it erred as a matter of law and the Court will have regard to that in deciding the merits of the case.

Lodging the Claim

The next step in the JR process is to **lodge the claim** by the 6-week deadline. This would be done electronically at present. It involves instructions to the barrister to draft detailed grounds of claim and the preparation of the claim documents. Supporting information in the form of a claim bundle would also be lodged with the court. The court documents are then **served on the Council and the IP**.

As the claimant we would have to lodge a **statement of financial resources**. This is a requirement to apply for **costs protection** (known as a **Protective Costs Order or PCO**) to limit the risk of adverse costs. The normal rule for cost protection is that the Court will limit the claimant's liability to £5,000 (no VAT) with a reciprocal cap of £35,000. These caps limit our exposure to adverse costs if we lose and limit our recovery if we win.

Acknowledgment of Service

21 days after service of the court documents, the Defendant and IP have to lodge a response. This is known as the **Acknowledgment of Service**. If the Council contests the case, it will lodge **summary grounds of resistance** (**SGR**). We can reply to these if necessary, including submitting any evidence if appropriate. This is a second opportunity for the LPA and IP to concede the case and consent to a judgment to quash the planning consent.

After this round of submissions to the Court, the papers are passed to a judge for a decision on the papers – known as a **paper permission order**. The Order can grant

permission for the case to proceed to a substantive hearing or it can refuse permission.

If permission is refused, normally we can renew the case to an **oral permission hearing**. This is an hour-long hearing in front of a single judge and these are presently taking place virtually.

If permission is granted at the hearing, the case proceeds to a **substantive hearing**.

As above, if the LPA concedes the case, we must also obtain the IP's agreement to a quashing order as the Court cannot make the order to quash without all parties' agreement.

If a quashing order is agreed at any stage in the process, once this is sealed by the Court the application is **remitted back** to the Council for a fresh determination. Whether there will be changes to the application or it will "go away" depends on the basis for the Court to quash the consent.

Substantive Hearing Preparation

Once permission is granted, the LPA and IP have a second opportunity to lodge **detailed ground of resistance and evidence** (35 days from the date of the permission order) and we have a chance to lodge a **reply** to this 21 days thereafter.

After permission is granted, the listing office at the Court contacts the parties for a convenient date to list the case for a substantive hearing. We will liaise with the claimant to ensure availability. These are also taking place virtually (although could change) and would be likely to be listed within 4-6 months of the permission order.

Substantive hearing

The hearing is likely to take place in London if the Courts are operating normally. Otherwise it will be a virtual hearing. Typically, the hearing takes one day. This would involve preparation by the legal team, including compiling a trial bundle, which is done by agreement with the parties and the barrister drafts what is known as a **skeleton argument**.

We lodge the bundle and skeleton argument about 3 weeks before the listing date for the substantive hearing. We get the LPA's and IP's skeleton a week later and then we prepare for the hearing. Parties also exchange costs information where the hearing is listed for one day or less. That enables a court to make a costs decision if judgment is issued on the day.

The Judicial Review timetable and its costs are *attached* to this email.

Below is the letter from our Barrister, through our Solicitor's offices sent to Wealden District Council last Friday. This is the Pre-Action Protocol Letter.

Our Case - Now Submitted to Wealden District Council

[LETTERHEAD]

Wealden District Council

Vicarage Lane

Hailsham

East Sussex BN27 2AX

BY EMAIL

Your ref WD/2016/2796/MA

2 July 2021

PRE-ACTION PROTOCOL LETTER

REQUIRES YOUR URGENT ATTENTION

Dear Sirs

Outline application for demolition of equestrian worker's dwelling, stables and horse walker, change of use of equestrian land to provide up to 205 no. C3 dwellings (including 35% affordable provision), access, landscaping and other associated infrastructure, Helmond's Stud, Waldron Road, East Hoathly, BN8 6QH ("the Site')

1. This is a pre-action protocol letter under the Judicial Review Pre-Action Protocol in support of a claim for judicial review against the decision to grant the Planning Permission for the above development under your reference WD/2016/2796/MAO

Claimant

2. We are instructed by Village Concerns, an unincorporated residents association. Please confirm that if the claim proceeds you accept Village Concerns has capacity to act as the named claimant following the decision of Lieven J in Aireborough Neighbourhood Development Forum v Leeds City Council [2020] EWHC 45 (Admin). If you disagree please give your reasons why.

Proposed Defendant

3. Wealden District Council.

Decision to be challenged

4. The decision of Wealden District Council ("the Council") to grant outline planning permission for demolition of equestrian worker's dwelling, stables and horse walker, change of use of equestrian land to provide up to 205 no. C3 dwellings (including 35% affordable provision), access, landscaping and other associated infrastructure

Date of Decision

5. 11 June 2021

Factual Background

6. The general factual background is well known to you and therefore we do not repeat it here. We refer to the relevant facts as they relate to our proposed ground of challenge below.

Legal Framework

7. The legal principles underlying our ground of challenge are well-established.

8. The general approach to challenges to decisions of local planning authorities to grant planning permission is well known, and recently summarised by Lindblom LJ in *Mansell v Tonbridge & Malling BC [2017] EWCA Civ 1314 at [42]-[43]/*

Proposed Ground One: Misleading advice about what could be controlled at reserved matters stage

9. At the Committee meeting, Members raised concerns about the quantum of the development proposed on the site (up to 205 units). In response, the following comments were made at the meeting (with emphasis added):

(1) Mr. Robins (the Case Officer) stated as follows:

"But then as we now know or we do know as the committee, it is an up to number, you know it's not fixed at 205.The reserved matters will inform that and it could be fewer units, er..once you take into account the constraints. I have to say I think it probably will because as the committee know there are other site

specific constraints, ancient Woodland buffers, upgrades to the public right of way, this business of er...er..er...the sustainable drainage which I've just talked about. When we glue those all together, including those natural features which I spoke to on the presentation, and you take those into account, I don't think it would be a 205 unit scheme um...it will be fewer but we will get into that. Councillor Watts' nitty gritty point as part of reserved matters, it ought not to necessarily inform the principle of development at this stage."

(2) Cllr Stedman (the Chair of the Committee) said as follows:

"Thank you..thank you I just like to come in here with regard to the up to 205 figure. It is very clearly an up to and Mr Robins you've already said that..um..there will be lots of constraints which will bring that number down the um..quite considerably and I note from Parker Dann, Hannah Ronan's submission that she talks in her 4th paragraph that there is significant scope for alternate layout to provide relief to the heritage matters..er..heritage matters..at reserved matters and indeed our own officer in her lengthy, lengthy report states fairly early on that she ..um..she states there is scope in investigating a smaller..far smaller development area and in her fifth paragraph states she would be pleased to work closely with the applicant and our officers to try and achieve the most appropriate layout. So we do have it from these other people that..um...they are aware that the 205 figure is something pluck...not quite plucked from the air but..um...that it is unlikely to be achievable and it is regrettable that the (coughs)the agents, having withdrawn part of the application did not see fit to come in and make it clearer for everybody but I think we're all clear that um..exactly what is proposed and we're all clear that 205 is unlikely to be ..um..achieved"

(3) Immediately prior to the vote on the recommendation to approve the application, the following exchange occurred between Mr. Robins and Cllr Snell (the Deputy Chair of the Committee):

"(Mr. Robins): Well…well Chairman. I think what..what the committee might do in these circumstances is ...is instruct me and our officers to explain in the decision notice that the layout is purely illustrative, is should not to be regarded as approved, that further work is required and that the reserved matters should be properly informed by all of the constraints,er..having regard to the setting of the listed buildings and the setting of the conservation area. So we're really laying down a marker that this, as you...as you said in the discussion Chair, the agents have said there is scope for a different layout. The scheme is up to. If we don't like a reserved matters, assuming outline is granted, then we can withhold a reserved matters if were unhappy with how that manifests itself on er..the ground and with all those reserved matters that come forward via another application

(Cllr Snell): Thank you Mr Robins, thank you Chair. So the proposal on the table is for approval in line with the opposite recommendation, bearing in mind what Mr Robins has just said, that the layout will be subject to discussion at reserved matters and that the number of houses is up to 205 and might also come into alteration at reserved matters. So, I will now go to the vote."

10. It is plain from the exchanges set out above that the Committee was advised that the 205 units proposed in the application were unlikely to be achievable or acceptable at the reserved matters stage due to the constraints of the Site, and that if a scheme for 205 units subsequently came forward the Council would have the power to refuse it on that basis.

11. Your letter of 11 September 2020 says that *"neither the Committee report/update or the Committee debate contained advice to the effect that either the maximum quantum of development (as referred to in the description) could not be achieved or that the Council would be able to refused Reserved Matters on the basis of quantum alone"* (emphasis added).

12. That is simply incorrect. Cllr Stedman (the Chair of the Committee) summarised the advice given that *"the 205 figure is something pluck...not quite plucked from the air but..um...that it is unlikely to be achievable".* The Case Officer said that what came forward at reserved matters stage "would [not] *be a 205 unit scheme um...it will be fewer"*.

13. There can be no doubt that the Committee proceeded on the basis that there would be an ability to control the number of units that came forward at reserved matters stage. The repeated references to "up to" 205 units reinforced this.

14. The Committee voted in favour of the recommendation to approve in light of this advice.

15. The advice that the Committee was given was wrong, and seriously misleading. As is well established from Proberun Ltd v Secretary of State for the Environment [1990] 3 P.L.R. 79 (and the subsequent case-law on this point):

(1) The Council is not entitled to refuse to approve reserved matters on grounds

(1) The Council is not entitled to refuse to approve reserved matters on grounds going to the principle of the development itself and which are therefore already implicit in the grant of the outline permission.

(2) Rather, at reserved matters stage the Council's consideration of the application should focus only on the acceptability of the matters that have been reserved for consideration.

(3) Implicit in the grant of outline planning permission for up to 205 units is the fact that there is at least one form of reserved matters application that can acceptably accommodate that quantum of development.

(4) Therefore, the Council is not lawfully entitled to refuse a reserved matters application on the grounds that the quantum of development proposed is too high to permit a satisfactory design, layout etc.

(5) Indeed, even if the reserved matters applications that come forward are not satisfactory, they must be permitted if they are the best that can come forward on the site.

(6) As such, contrary to the advice given, reserved matters approval cannot be refused on the grounds that the quantum of development proposed is too high. The Council is bound to approve a reserved matters application for 205 units. Even if such an application is not satisfactory, it can only be refused if it is not the best that can be achieved on the site.

16. Members should have been told that by granting permission they needed to be satisfied that 205 units on the site would be acceptable in planning terms, and that they would have no ability at reserved matters stage to refuse an application for 205 units on the grounds that the constraints of the site meant that this could not acceptably be delivered.

17. There is no suggestion that the Council would *"look to use the Reserved Matters process as a way of reneging on the original grant"* (as put in your letter of 11th September 2020). The whole point is that the Council cannot lawfully do that, and Members should have been advised of this, rather than proceeding on the basis that the number of dwellings could potentially be limited at reserved matters stage.

18. The reference to “up to 205” dwellings is also misleading. Granting planning permission for up to 205 dwellings simply means that less than 205 dwellings in the site would be acceptable in principle. However, it also means that up to and including 205 dwellings would be acceptable. The reference to “up to” does not enable the Council to control the exact number of units that comes forward at reserved matters stage.

19. Given this, if the Case Officer did not consider that up to 205 units could be acceptably accommodated on the site, outline permission should have been refused. The advice given to Members was significantly misleading.

Details of Legal Advisors Dealing with this Claim

20. Richard Buxton Environmental & Public Law

Details of Interested Party

21. Mr. Nurlan Bizakov, C/O Parker Dann

Details of Information Sought

22. You are required to make full and frank disclosure in judicial review proceedings.

23. We therefore require full information on how the authority has dealt with each of the points raised above.

24. In addition, please confirm that the permission does not approve access into the Site from Waldron Road. This had been indicated on the submitted plans, but was not assessed by the highway authority and nor was the acceptability of this access addressed in the Officers Report. Should you consider that the permission does approve this access, we reserve the right to add an additional ground to address this.

What the Council is requested to do

(i) Consent to the Proposed Claimant's application for Judicial Review; and

(ii) Pay the Claimant's costs of and relating to this prospective claim

Costs

25. If the claim proceeds the claimant will apply for a protective costs order pursuant to CPR 45.43 on the basis that the claim is an environmental matter. Venn v Sec State CLG [2015] 1 WLR 2328. If you disagree this is an Aarhus matter or the making of a PCO please give your reasons.

Address for Reply and Service of Court Documents

26. Richard Buxton Environmental & Public Law

Proposed reply date

27. We request a response to this letter by 4pm on 16 July 2021.

Yours faithfully

Richard Buxton Solicitors

Environmental & Public Law

cc Mr. Nurlan Bizakov, c/o Parker Dann

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JR time and Cost table.docx