

Your ref: A/23/15/OUT
Our ref: 014073/014650/A8036860-48/16631856-1

BY E-MAIL AND BY POST

Ms Liz Futchter
Group Head of Council Advice & Monitoring Officer
Arun District Council
Arun Civic Centre
Maltravers Road
LITTLEHAMPTON
BN17 5LF

James Pavey

12 November 2018

Dear Madam

**STORE PROPERTY INVESTMENTS LIMITED
JUDICIAL REVIEW CLAIMS AGAINST ARUN DISTRICT COUNCIL
JUDICIAL REVIEW PRE-ACTION PROTOCOL LETTER**

**Planning application (ref: A/23/15/OUT) in respect of proposed development on land to the south of New Road and to the east of Brook Lane
Application by SDB Investments Limited, Commercial Development Projects Limited and Marks & Spencer Plc ("the Applicants")**

We act for the above named client and write with regard to the decision of Arun District Council ("the Council") to grant planning permission for the development of the above land subject to conditions.

This letter should be treated as a letter before claim written under the Judicial Review Pre-action Protocol.

1. The Claimant

Store Property Investments Limited ("the Proposed Claimant").

2. Reference details

Planning Permission A/23/15/OUT.

3. Details of proposed Claimant's legal advisors

Irwin Mitchell LLP
Belmont House
Station Way

For a full list of offices visit www.irwinmitchell.com

Belmont House
Station Way, Crawley
West Sussex RH10 1JA

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Crawley
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Counsel

Mr Peter Goatley
No5 Chambers
Fountain Court
Birmingham B4 6DR

4. The details of the matter being challenged

- 4.1. The decision of the Council on 17 October 2018 to grant to the Applicants full planning permission upon its planning application ("the Application") for a retail unit (Class A1) comprising 1,487sqm (1,022sqm ground floor and 465sqm mezzanine) with associated access, car parking, servicing, landscaping & associated works; and outline planning permission for a public house (Class A4) comprising 581sqm at ground floor level - (ref: A/23/15/OUT) ("the Proposed Development").
- 4.2. The Proposed Claimant seeks to challenge the grant of planning permission for the Proposed Development.

5. The Claimant's Interest in the matter

The Proposed Claimant is the owner of a number of properties within neighbouring designated town centres. The Proposed Claimant also owns the site adjacent to the Application site, which benefits from outline planning permission for residential development and a care-home (ref: A/44/17/OUT, approved on appeal on 5 April 2018). Reserved matter approval for means of access pursuant to that outline planning permission was granted by Arun District Council on 4 October 2018 (ref: A/83/18/RES).

6. The Background

- 6.1. The Application was originally submitted by the Applicants to the Council on 27 February 2015. It was initially considered by the Council's Planning Committee on 25 November 2015. A section 106 Obligation was subsequently completed on 27 June 2016 ("the s.106 Obligation") and on the same date, the Council granted planning permission to the Applicants.
- 6.2. Subsequently, the Proposed Claimant successfully challenged that grant of planning permission on grounds that included the Council's failure to have regard to the sequential test. The Council consented to judgment in the litigation and the Application was remitted to the Council for further consideration.
- 6.3. The Application was reconsidered by the Council at its Committee on 9 May 2018 where the Council's members resolved to grant Permission subject to completion of a satisfactory s.106 Obligation. However, for a number of reasons the application was returned to planning committee for a decision, including the submission of new plans by the applicant, the adoption of the Local Plan and the publication of the NPPF (published 24 July 2018).
- 6.4. The Application came before the Council's committee for a third time on 3 October 2018. An Officer's report was produced for the Council Committee, which recommended the Application be

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refused on sequential test grounds, on the basis that there was a sequentially preferable site available in the town centre, and also because the development would constitute unacceptable development in the countryside.

- 6.5. The Chairman undertook a vote of Councillors who supported the Officer's recommendation, seven hands were raised. The Chairman repeated the same vote, highlighting that the Officer's recommendation was to refuse permission, as witnessed by our professional consultant team and at least one other third party, seven hands were again raised. The Chairman undertook the vote for a third time, whereupon six hands only were raised. Six hands were then subsequently raised in opposition to Officer's recommendation, whereupon the Chairman used his casting vote to overturn the Officer's recommendation. There was no subsequent resolution passed in order to grant planning permission for the Proposed Development.

7. The Issues

The grant of permission on the application is legally flawed for a number of reasons as set out below.

(1) Failure to apply properly or at all, national planning policy and guidance

a) Sequential test

The Council in its decision making failed to have regard either adequately or at all to the sequential test, as set out in paragraph 86 of the 2018 NPPF (paragraph 24 of the 2012 NPPF).

The Officer's report for the October 2018 Committee meeting highlighted that the proposal (which was a hybrid full and outline application) failed to meet the sequential test requirements for convenience, retail proposals in an out of centre location, contrary to the revised NPPF. The Officer's report made clear that the revised NPPF (2018), paragraphs 85-90 had replaced those in NPPF (2012) paragraphs 23-27 and the application proposal remained contrary to national policy. In addition, there were no or no adequate reasons given by the Council for their departure in this regard from Officer's recommendations and from national planning policy. The NPPF is a material consideration in planning decisions of the Council, as confirmed by NPPF 2018 paragraph 2, and it is a critical failing on the part of the Council in reaching its decision in failing to have any or any proper regard to this material consideration and/or those of the retail impact or viability of the town centre. In consequence the decision by members to grant permission gives rise to the necessary implication that the sequential test had been passed. Such a decision is fundamentally flawed.

Recent authority, in **Aldergate Properties Ltd v Mansfield District Council and Regal Sherwood Oaks Ltd [2016] EWHC 1670 (Admin)** confirms the priority to be accorded to properly understanding, interpreting and applying the sequential test in making decisions in respect of retail proposals outside of existing town centres.

Furthermore, in **R. (on the application of The Midcounties Co-operative Ltd) v Forest of Dean DC [2017] EWHC 2056 (Admin)** confirms that the presence of the retail impact test should, in circumstances such as these and a departure from an Officer's recommendation, be set out. The authority confirms that where the Council fails in this regard to do the minimum it was required, its decision is therefore flawed.

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b) Development plan

The 2018 Arun Local Plan 2011-2031 was adopted by resolution of Full Council on 18 July 2018 and as such forms part of the Council's Development Plan.

In accordance with s.70(2) of the Town and Country Planning Act 1990, in dealing with an application for planning permission the Council shall have regard to the provisions of the development plan, so far as they are material to the application.

In accordance with s.38(6) of the Planning and Compulsory Purchase Act 2004, the Council in determining the Application, must make that determination in accordance with the plan unless material considerations indicate otherwise. This is reinforced in national policy by the NPPF 2018 at paragraph 2.

The Officer's report to the Committee in October 2018 confirmed the Application to be contrary to policies in the local plan (RET SP1 and RET DM1). Furthermore, the report highlighted the proposal would also constitute unacceptable development in the countryside, contrary to policy HD1 of the Angmering Neighbourhood Plan and Policies SD SP2 and C SP1 of the Arun local plan 2018.

Permission should not have been granted for this Application by the Council and contrary to the development plan unless material considerations indicated otherwise. There is no evidence of the Council having considered this, either adequately or at all. In addition, there is an absence of any, or any adequate, consideration or explanation for their taking a decision contrary to the development plan and contrary to the Officer's clear recommendation of refusal.

This failure by the Council to take into account a material consideration in the form of paragraph 2 of the 2018 NPPF renders flawed their decision to grant permission, as does its failure to carry out any proper consideration of the benefits and harms of the proposal, contrary to the authority of the High Court in **R. (on the application of Midcounties Co-operative Ltd) v Forest of Dean DC [2015] EWHC 1251 (Admin); [2014] EWHC 3059 (Admin); [2013] EWHC 1908 (Admin).**

(2) Failure to give reasons

The Council in reaching its decision to grant the Planning Permission failed to provide any or adequate reasons for doing so.

There was a failure to provide any or adequate reasons for its decision contrary to the development plan, contrary to national policy contained within the NPPF and contrary to Officer's recommendations to refuse permission. In the circumstances where an Officer's report recommends refusal having identified harm and Council minutes fail to explain why members had concluded that there would be no harm, as here, substantial doubt can be found as to whether the Council Committee erred in law by misunderstanding relevant policy or some other important matter, or by failing to reach a rational decision. See, among other authorities, Lang J in **R (Steer) v Shepway DC [2018] EWHC 238 (Admin).**

This was a situation where the Council departed from the Development Plan to grant Permission and disagreed with the Officers' recommendation, making it impossible to infer the reasons from the Officer's report. As such these circumstances require reasons to be given by the Council in the interests of upholding openness and fairness to the proposed Claimant and objectors, **R (Campaign to protect Rural England) v Dover DC [2018] 1 WLR 108.**

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(3) Failure to take into account material planning considerations

The Council's Committee of 3 October 2018 based its decision on consideration of retail assessments referred to in the Committee Reports that were prepared in advance of the first planning Application. This was subsequently quashed and the retail reports were originally drafted in February 2015 under materially different circumstances to those that existed at the time of the Committee consideration of and reliance upon them in October 2018, namely that the retail reports were drafted:

- i) Before Waitrose relocated away from Littlehampton town centre, and
- ii) Before an Aldi store was opened on the proposed Claimant's retail park to the East of the application site.

These changes to the retail landscape have weakened the town centre and strengthened the out-of-centre retail picture, shifting the balance adversely away from the town centre.

As such these changes are material and are not considered within the retail report before the Committee in October 2018 and as such were not considered by the Council in arriving at its decision.

Upon any basis, the material before the Council was outdated, inaccurate and as such the Council failed to have proper regard to a material consideration.

As a result, the Council has proceeded to grant planning permission based upon failure to consider material considerations and taking account of immaterial considerations by virtue of the outdatedness of material it considered.

(4) Absence of any proper authority to issue the Planning Permission

The voting process undertaken by the Chairman on 3 October 2016 (and as set out, in summary, at paragraph 6.5 above) gave rise, ultimately, to a recorded decision that the members of the Planning Committee rejected the recommendation of officers that planning permission be refused.

There was no resolution passed by the planning committee to grant planning permission. In consequence, there was no authority for the Council to issue the planning permission dated 17 October 2018.

As a result, decision notice falls to be quashed as having been issued without any proper authority.

(5) Procedural Impropriety – failure to provide a fair hearing

The nature of the voting process undertaken by the Chairman on 3 October 2018 (and as set out in summary at paragraph 6.5 above) demonstrates an evident procedural impropriety on the part of the Council and was contrary to the common law requirement that their decision be made without an appearance of bias.

The facts regarding the manner of how the vote was undertaken would lead any fair minded and informed observer, having considered the facts, to conclude that there was a real possibility that the Chairman for the Council was biased.

The vote was undertaken three times. There was no explanation given by the Chairman between retaking the second and third votes as why this was being done. The vote was retaken on the two (both) occasions that would have resulted in permission being refused, and the Officer's recommendations being followed. During the course of that meeting the Chairman gave no reasons or explanation for refusing to record the two votes taken to uphold the officer recommendation (and refused permission upon the Application) the retaking of the vote.

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The conduct of the Chairman gives rise to the real possibility that he had pre-determined the matter and was operating with a closed mind to the Application. As result of the Chairman's conduct, the Application was denied a fair hearing and determination.

8. The details of the action that the Council is expected to take

By reason of each and all of the reasons set out above the decision to approve the Application was unlawful. The Council is asked to revoke the grant of planning permission or to submit to judgment.

9. The details of any interested parties

SDB Investments Limited, Commercial Development Projects Limited and Marks & Spencer Plc.

10. The address for reply and service of court documents

Mr James Pavey
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Belmont House
Station Way
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[REDACTED]

11. Proposed reply date

In light of the six week period for judicial review, the Council is asked to respond by close of business (5pm) on 19 November 2018.

Please acknowledge receipt.

We look forward to receiving your substantive reply.

Yours faithfully

[REDACTED]

IRWIN MITCHELL LLP