

By post and by email

Arun District Council
Civic Centre
Maltravers Road
Littlehampton
BN17 5LF

Email: neil.crowther@arun.gov.uk

Your Ref: Neil Crowther
Our Ref: DGF/VCS/112081/2

12 December 2018

Dear Sirs,

Letter of Claim pursuant to Judicial Review Pre-Action Protocol (Annex A)
Re: Land south of Summer Lane & West of Pagham (Ref. P/140/16/OUT).

Proposed Defendant

The Proposed Defendant is Arun District Council, Civic Centre, Maltravers Road, Littlehampton, BN17 5LF.

Proposed Claimant

The Proposed Claimant is Pagham Parish Council, Village Hall, Pagham Road, Bognor Regis, PO21 4NJ.

Proposed Defendant's reference details

The Parish Council is contemplating challenging by way of judicial review the decision of the Proposed Defendant to grant planning permission in outline for up to 400 dwellings, a care home with up to 70 beds, a Local Centre comprising up to 2000sqm of A1/A2/A3/D1/sui-generis floorspace, provision of land for a 1FE primary school (with sufficient space to ensure that it is expandable to 2FE), provision of land for a scout hut, safeguarding of land to help link the site to Pagham Harbour Cycle Route & other community uses including public open space & allotments with some matters reserved.(All matters except for access were reserved)

The decision is contained within a Decision Notice dated 22 November 2018.

Barlow Robbins Solicitors
The Oriel
Sydenham Road
Guildford, Surrey
GU1 3SR

T: +44 (0)1483 543210
F: +44 (0)1483 464260
E: enquiries@barlowrobbins.com
DX 2407 GUILDFORD
www.barlowrobbins.com

Registered in England under number OC 339529
Registered Office: The Oriel, Sydenham Road, Guildford, Surrey GU1 3SR

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

Ground 1 – Failure to grapple with the requirements of Policy H SP2 and Policy H SP2a and/or failure to have any or adequate regard to the Parish Council's representations

Policy H SP2 (Strategic Site Allocations) provides that:

"Development proposals within the Strategic Site Allocations must be comprehensively planned and should have regard to a masterplan endorsed by the Council for the respective areas which incorporates high quality imaginative design giving a sense of place and a permeable layout ..."

The planning permission relates to a portion of land forming part of a strategic allocation for at least 1200 dwellings within Strategic Policy H SP2a Arun Local Plan (Greater Bognor Regis Urban Area), known as "Pagham (SD1 Pagham South and SD2 Pagham North)" "SD1 Pagham South and SD2 " which provides:

Both sites consist of a number of parcels of land, it is imperative that individual areas are aligned with neighbouring parcels of land. The sites lie in close proximity and are within the drainage catchment of the internationally designated Pagham Harbour site which has drainage and waste water implications. Development proposals will need to meet the following key design and infrastructure requirements:

There is no masterplan endorsed by the Council for the respective areas forming part of the Strategic allocations SD1 and SD2 against which the application for a portion of the land within the Allocations could have been assessed and since the application was made in outline with all matters except for access reserved no means by which the Council could properly satisfy itself that the proposals would result in a development which complied with Strategic Policy H SP2a "Pagham (SD1 Pagham South and SD2 Pagham North)". The officer's report to the Development Control Committee on 24 October 2018, fails to effectively grapple with how this one application for one scheme on part of the strategic allocation will deliver a *"comprehensively planned"* scheme for the whole allocation or how it is *"aligned with neighbouring parcels of land"* within the allocation for which there are separate and conflicting proposals under Council references, P/25/17/OUT, P/6/17 OUT and P/134/16 OUT.

Furthermore, the Parish Council via its planning consultant, made explicit representations by letters dated 27 September and 19 October 2018 setting out the basis on which it was said decision making should be delayed or permission should be withheld until, it had been demonstrated that the proposed development could be undertaken in a comprehensively planned manner in combination with the conflicting proposals under Council references P/25/17/OUT, P/6/17 OUT and P/134/16 OUT.

The Officer's Reports fail to grapple with these conflicts with the comprehensive delivery of the SD1/SD2 Strategic allocation. In so doing, the Council erred in law by:

- (i) Failing to discharge the duty upon them imposed by s.38(6) Planning and Compulsory Purchase Act 2004 by misunderstanding the relevant provisions of the development plan.

- (ii) Failing to take into account the representations of the Parish Council contrary to Article 18(7) & 25(1) Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) and s.70(2) Town and Country Planning Act 1990.

Ground 2 – Misdirection on the impact on heritage assets

In two important respects Members are misdirected as to the impact upon a Grade I listed church and other nearby Heritage assets and how that impact should be considered in the planning balance.

By s.66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 the Council was under a statutory obligation to have *"special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses"*.

Within the officer's report, Members are told of the presence of the Grade I listed St Thomas a Becket church and that the rural character of Church Lane and the open fields to the north contribute to the historic significance of the Church.

The Council's Conservation Officer did not consider the impact on the listed Church within his response of 8 June 2017, but rather confines his comments to the impact on the Area of Special Character. Historic England advise within their consultation response of 8 February 2017, that the application site makes a positive contribution to the significance of the Church. The officer presents a highly partial quotation of Historic England's advice as follows:

"Historic England agrees with the heritage statement that direct views of the development from the church and churchyard are largely contained by the modern bungalows opposite."

The officer inexplicably fails to quote the rest of that paragraph which provides:

"However, I also walked across footpath 101 that crosses the application site, and where there are views to the church tower, providing a local landmark within the open farmland."

That was a serious failure. Members were presented with the misleading impression that the statutory consultee agreed entirely with the Applicant's heritage assessment, which was not the case. The officer failed to draw to Members' attention the importance of the open farmland to the significance of the Church tower. The views of the statutory consultee are of great importance, as Beatson J held in *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin.) at [72]:

"... a decision-maker should give the views of statutory consultees ... "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons"."

That was approved by Lindblom LJ in *R(Loader) v Rother District Council* [2016] EWCA Civ. 795 in relation to Historic England, adding at [40] that:

"... [Historic England] are "the government's expert advisor on England's heritage and ... have a statutory role in the planning system", and "[central] to [their] role is the advice [they] give to local planning authorities, government departments, developers and owners on development proposals affecting the historic environment".

In any event, the Officer's advice as to how to weigh the harm identified by the Applicant in the balance was defective. Members are told:

"It is acknowledged that the proposed development will impact upon views of the Grade I listed building from footpath 101 to the north but it is considered that whilst, the development will have an impact upon the setting of the Grade I listed church that this impact is not substantial or significant"

That advice re-iterated the conclusion of the Applicant's Heritage Impact Assessment (December 2016), that there was less than substantial harm to the Church.¹ That evidence engaged the duty at s.66(1) of the 1990 Act. However, Members are not told of the s.66(1) duty and are seriously misled by the following advice:

"Therefore it is considered that the proposed development will preserve the setting of listed buildings ..."

That was simply not correct. The Applicant's heritage evidence, summarised by the officer earlier in the report, was that there was harm to the significance of the Grade I listed St Thomas a Becket Church. The Officer has fallen into the trap identified by Sullivan LJ in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45 at [29] by treating less than substantial harm to a heritage asset as a less than substantial objection to the grant of planning permission.

That error had the unfortunate effect of leading Members to fail to apply the s.66(1) duty as they were obliged to do.

Whilst Members are subsequently advised that *"the public benefits of the development would outweigh any harm to the setting or significance of heritage assets"*, that exercise could not have been properly performed without understanding that the s.66(1) was engaged so to require the Council to give *"the desirability of preserving the building or its setting"* not merely careful consideration in deciding whether there would be harm to the building or its setting, but *"considerable importance and weight"* when balancing the advantages of the proposed development against any such harm, see: *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45 per Sullivan LJ at [22]-[24].

The Council has therefore fallen into the same error as identified by the Court of Appeal in *R(Williams) v Powys County Council* [2018] 1 WLR 439 per Lindblom LJ at [58]. There was harm to the listed building, as identified in the heritage evidence. The duty under s.66(1) was therefore engaged however the officer's report is silent on the duty and, in fact, tells Members incorrectly that the development will *"preserve the setting of the listed buildings"* whereas in fact it would not.

Had Members been given an accurate and fair summary of the views of the statutory consultee, or provided with a lawful direction on the law, it cannot be said the decision to grant outline permission would have highly likely been the same.

¹ See p.43.

Ground 3 – Failure to consider alternatives and satisfy itself that all adverse impacts on the Pagham Harbour Ramsar/SPA could be mitigated

Paragraph 175(a) NPPF provides:

"... if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused".

The habitats assessment undertaken by the Council on 18 October 2018 found the likelihood of significant effects, either alone or in combination with other developments, in relation to disturbance of birds, supporting habitat and water pollution.

At no point however does the Council move to consider alternative sites which would avoid the impact as required by paragraph 175(a) NPPF.

Furthermore, the Council also failed to satisfy itself that the acknowledged significant effects of the development on water quality and pollution could be adequately mitigated by way of on-site surface water management measures or by way of off-site sewerage infrastructure provision prior to determining that the principle of development on this site was acceptable as this was left to be demonstrated and controlled by way of unspecified measures in conditions.

That amounted to a failure to have regard to relevant considerations material to determining the principle of allowing development on this site contrary to s.70(2) Town and Country Planning Act 1990.

Ground 4 – Breach of legitimate expectation

By a resolution of the Council's cabinet dated 16 October 2017, the Council resolved to establish the Aldwick & Pagham Advisory Group. The terms of reference of the Group were described as follows:

"To discuss the implementation of development plan allocations and residential permissions in the Aldwick & Pagham area and accompanying section 106 agreements including longer term operation and management responsibilities; such discussions to give informal advice and guidance to the responsible planning and highway authorities when carrying out their functions"

The membership of the Advisory Group is described as including three parish councillors, at least 1 of whom is to be from Pagham Parish Council and was to meet 4 – 6 times a year with minutes being kept by Officers.

That amounted to a clear and unambiguous promise to involve the Parish Council in the determination of the then current Planning applications of which the subject application is one and related draft s.106 agreements seeking to implement the Strategic Allocation and upon which it was reasonable for the Parish Council to rely.

The Advisory Group never met in the form envisaged prior to the determination of the subject application and the heads of terms for the S106 were not made available for review or comment on the application file until the Officer reports for the DCC on 24/10/18 were published.

On 31 October 2018 Mr Paul Collins (on behalf of the Parish Council) sent an email to the Council's Group of Head of Planning, Mr Neil Crowther asking whether the Council would consult upon the draft s.106 legal agreement prior to permission being granted. Mr Collins repeated that request within an email dated 6 November 2018. In a separate email dated 6 November 2018, Mr Collins also requested sight of the revised Southern site access plan which was not on the file.

Mr Crowther replied on 8 November 2018 that "... *no draft of that document* [the s.106 agreement] *will be publicly consulted upon*". Mr Crowther also promised to place a copy of the access plan on the file but did not do so.

The failure to establish and hold the Advisory Group meetings and these responses amounted to a breach of the Parish Council's legitimate expectations that it would have been involved in the formulation of the draft S106 and consulted on same and the revised access plans prior to a decision being issued.

There were no reasons supplied by Mr Crowther to resile from the Council's earlier promises accordingly the Council acted in breach of the Parish Council's legitimate expectation to be consulted on key steps in the application process.

That was especially unfortunate given that the Parish Council's concerns regarding the lack of comprehensive planned development and the failure of the now completed s.106 agreement to contain obligations upon the developer which address the Parish Council's concerns regarding the delivery of key supporting infrastructure to mitigate the impact of the development within the Parish for which they are responsible and which greatly exercised their residents.

Details of the Action the Defendant is expected to take

The Proposed Claimant requests the Proposed Defendant:

1. Agree to consent to judgment for any or all of the above grounds; and
2. Pay the Proposed Claimant's costs in those proceedings.

Interested Parties

A copy of this letter of claim is being sent to:

1. West Sussex County Council of County Hall, West Street, Chichester, West Sussex, PO19 1RQ
2. Claudia Langmead; Olivia Langmead; Melanie Jenkins; Victoria Langmead; Leslie James Langmead and Patricia Langmead of Basing Park, Privett, Alton, Hampshire
3. Hanbury (PM) Limited of 17 Northgate, Chichester, West Sussex, PO19 1BE
4. Ashmarden Limited of Basing Park, Privett, Alton, Hampshire, GU34 3NS

Should the Proposed Defendant be aware of any further Interested Parties the Proposed Claimant should be happy to dispatch a copy of this letter to them accordingly.

ADR Proposals

Given the Proposed Defendant is now *functus officio* in respect of this application, the Proposed Claimant is of the view the decision under challenge is no longer amenable to ADR.

Costs

The Proposed Claimant is of the view the claim, if litigated, would amount to an Aarhus Convention Claim and benefits from the costs protection regime at CPR r.45.41 to 45.43. As a consequence, and in accordance with PD45 therefore, the Claimant's liability for the costs of the other parties should be limited to £10,000 and its recovery of costs should be limited to £35,000.

In accordance with the pre-action protocol for Judicial Review we request you confirm that costs position is agreed.

Address for the supply and service of court documents

Barlow Robbins Solicitors LLP, The Oriel, Sydenham Road, Guildford, Surrey, GU1 3SR. FAO: David Foster.

Proposed reply date

Given the holiday period, the Parish Council requests a substantive response by 18 December 2018.

We look forward to hearing from you.

Yours faithfully

Barl

