



Mr R Eaton, Partner
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Your ref: RE/NJD/325206.003
Our ref: MC/CB/ES0009.570
Date: 26 May 2021
Please ask for: Martin Clarke
Customer Services: 03330 162 000
Direct dial: 07442 412422
Email: martin.clarke@eastsuffolk.gov.uk

Dear Mr Eaton,

**PRE-ACTION PROTOCOL LETTER
APPLICATION DC/20/1831/OUT**

1. We write in response to your letter submitted in accordance with the pre-action protocol for judicial review.

The Claimants

2. The proposed Claimants are Mr Richard Chalmers and Mrs Sabine Chalmers of Wilford Lodge

From

3. East Suffolk Council, Riverside, 4 Canning Road, Lowestoft, Suffolk, NR33 0EQ

Reference details

4. ES9/570 Martin Clarke, Acting Legal and Licensing Services Manager.

Details of the matter being challenged

5. This proposed challenge relates to the resolution of the Planning Committee South ("**the Committee**") dated 30 March 2021 ("**the Resolution**") to grant outline planning permission with some matters reserved for residential development of up to 55 dwellings, with access off St Andrews Place ("**the Proposed Development**") at land off St Andrews Place and Waterhead Land, St Andrews Place, Melton, Suffolk ("**the Site**").

LEGAL ADDRESS East Suffolk House, Station Road, Melton, Woodbridge IP12 1RT

POSTAL ADDRESS Riverside, 4 Canning Road, Lowestoft NR33 0EQ

Response to the proposed claim

Summary of the proposed claim

6. As you are aware, the Resolution was made subject to completion of a s.106 agreement. No grant of planning permission has yet been made. You consider that the Council should remit the matter to the Committee for further consideration of the matters which you raise in your letter. These are as follows:
 - a. **Ground 1:** Failure to have regard to material considerations (irrationality/procedural impropriety). You allege that the Committee was misled into believing that the Highways Authority ("**HA**") had raised concerns rather than formal objections to the Proposed Development;
 - b. **Ground 2:** The Planning Officer advised members on an inaccurate assessment of adverse appeal costs (irrationality/procedural impropriety). You allege that the Committee was provided with misleading information regarding Appeal Ref: APP/E2734/W/20/3260624 ("**the Harrogate case**").
7. Your summary of the factual and policy background is noted. A full recording of the Committee meeting of 30 March 2021 ("**the Recording**"), to which your letter relates, has been placed online: https://www.youtube.com/watch?v=3G_BZhN9KIQ.

Relevant legal principles

8. It is the Council's view, overall, that your proposed claim amounts to nothing more than an attack on the planning judgment of the Council and, as a result, is doomed to fail. The courts have repeatedly confirmed that such claims face a "*high hurdle*" and a "*particularly daunting task*": *Obar Camden Limited v Vidacraft Limited* [2015] EWHC 2475 (Admin), per Stewart J at §42.
9. The principles upon which the court will act when faced with an allegation that a planning committee has been misled by advice provided by officers were summarised by Lindblom LJ in *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452 at §42:

(2) *The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in R (Morge) v Hampshire County Council [2011] PTSR 337, para 36 and the judgment of Sullivan J in R v Mendip District Council, Ex p Fabre [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in R (Palmer) v Herefordshire Council [2017] 1 WLR 411, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.*

(3) *Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R (Loader) v Rother District Council [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, R (Watermead Parish Council) v Aylesbury Vale District Council [2018] PTSR 43. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, R (Williams) v Powys County Council [2018] 1 WLR 439. But unless there is some distinct and material defect in the officer's advice, the court will not interfere.*

10. Further, in *R v Mendip DC ex p Fabre* (2000) 80 P & CR, Sullivan J explained that advice provided by officers is:

not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail.

11. Any claim that a planning authority has failed to have regard to a material consideration will fail unless, on the facts of the specific case, it was “so obviously material” as to require direct consideration: *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 per Lord Carnwath JSC at §32.

12. Once a planning committee has resolved to grant a planning permission, the matter need only be referred back to the committee if the Council becomes aware of a material consideration which it had not previously considered: *Kides v South Cambridgeshire DC* [2002] 1 P & CR 19. However, “reminding the Council of a material consideration it had already taken into account [is] not the same thing as generating a new one”: *R (CBRE) v Rugby BC* [2014] EWHC 6476 (admin).

Response to specific allegations

Ground 1: Failure to have regard to material considerations (irrationality/procedural impropriety)

13. It is clear from any reasonable analysis of the Recording that there is no merit whatsoever in this ground.
14. Contrary to what is said in your letter, officers informed the Committee, on multiple occasions, that the HA had raised a formal objection to the Proposed Development. Although it is correct that Philip Ridley, the Council’s Head of Planning and Coastal Management, stated at 54:38 that the HA had raised “concerns” rather than “formal objections” he also stated, at the same time, that he would hand over to the Planning Officer, Rachel Smith, to provide further detail. Subsequently at 56:55 Ms Smith confirmed that the HA had raised an objection. She went on to explain that this objection did not relate to the use of St Andrews Lane for residential access, but to three other concerns, namely (i) the use of St Andrews Lane for construction access; (ii) a requirement to mitigate impact on the Melton signalised crossroads (junction of the A1152 and B1438); and (iii) the absence of a direct link from the Site to Melton Railways Station.
15. The explanation was entirely correct and on all fours with the committee report (§§8.12-8.16) and the most recent consultation response from the HA, dated 1 November 2020. Committee members had access to both of these documents. We note that you have made no criticism of the committee report, and in light of the facts set out above, there can be no suggestion that the Committee was misled, let alone seriously misled.
16. The simple fact is that, however it was described, the Committee was advised that the issues raised by the HA did not, in the view of officers, amount to sufficient reasons for refusing permission for the Proposed Development. The reasons for this were clearly set out in the committee report (§§8.13-8.16) and – as the Recording demonstrates – explained orally to the

Committee. Councillors were entitled to disagree with that advice, but that was a matter of planning judgment for them, beyond the scope of any judicial review.

Ground 2: The Planning Officer advised members on an inaccurate assessment of adverse appeal costs (irrationality/procedural impropriety)

17. This ground is also without merit. According to the Recording, at 1:00, Mr Ridley stated:

Recent case law in planning terms (one case in particular in Harrogate) where app was refused by council against allocation in local plan and there were no substantive grounds for resisting and the council faced quite a significant costs application against it for unreasonable behaviour at the inquiry. From what I have heard there are no substantive grounds here (unless there is something I'm missing on highways ground) to warrant a strong objection to the scheme. I think you have everything you need before you to grant outline permission

18. As you note in your letter, this was a reference to the Harrogate case, where, as Mr Ridley correctly explained to the Committee, the local planning authority had a costs order made against it for unreasonably refusing permission for development on an allocated site where there were no sustainable grounds for doing so. In that sense it was clearly appropriate for officers to invite a comparison with the Proposed Development, particularly given their advice described above. Appeal decisions are capable of being relevant planning considerations and, given the similarities, there can be no argument that the Council acted irrationally in taking it into account.

19. The fact that there was not a highways objection in the Harrogate case was of no consequence. As the above extract from the Recording clearly shows, officers did not suggest that the relevance of the case lay in its treatment of highways issues. On the contrary, Mr Ridley expressly caveated his statement with the words “*unless I am missing something on the highways ground*”.

20. Finally, your suggestion that the Committee was misled into believing that the Harrogate case was a “*binding authority*” has no basis in anything said during the meeting and ignores the obvious fact that Committee members are an informed audience who would be sufficiently familiar with the planning system to understand the status of planning appeal decisions, with which they are required to engage on a very regular basis (see *Fabre* above).

Response to your request for action

21. As explained above, the effect of the Proposed Development on St Andrews Lane was fully considered and officers were properly advised. It follows that your letter does not raise any grounds which would indicate unlawfulness on the part of the Council. However because of the issues raised since the decision complained of, in particular the further representations made by the local community, and that the required S106 Agreement has yet to be concluded, the Council is prepared to remit the matter to the Planning Committee South for their re-consideration.
22. The Council confirms that the documents attached to your Pre Action Protocol letter, as well as the agreed draft S106 Agreement will be placed before the Committee, please confirm whether your client wishes to make any further representations.

Details of any other interested parties

23. Warburg Dawson Partnership, Stone Cottage, Lowdham hall Road, Pettistree, Woodbridge IP13 0NQ

ADR Proposals

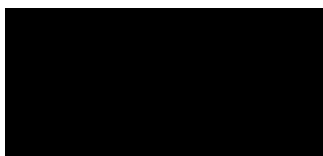
24. We note that you have not made any specific proposals for ADR. Whilst the Council would be willing to entertain any reasonable proposal, for the reasons given above, it is not prepared to consent to judgment in this matter.

Information sought and request for documents

25. We consider that the detail above is sufficient to explain how the Council has dealt with each of the points that your client has raised. We have already set out (above) how the Recording can be accessed.
26. Your request for copies of emails and communications is noted, but we do not consider that further disclosure at this stage would be proportionate or necessary pursuant to the duty of candour.

Address for further correspondence and service of court documents

27. East Suffolk Council, Riverside, 4 Canning Road, Lowestoft, Suffolk, NR33 0EQ FAO Martin Clarke, Acting Legal and Licensing Services Manager.



Martin Clarke | Acting Legal and Licensing Services Manager

East Suffolk Council