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PRE-ACTION PROTOCOL LETTER BEFORE ACTION.

Ms J Shadbolt
Head of Legal Services,
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County Hall
Topsham Road
Exeter
EX2 4QD
cc:
Josephine Ernestina Discretionary Settlement
c/o Mr Richard Drew
Carter Jonas LLP
Mayfield House
256 Banbury Road
Oxford
OX2 7DE

30 January 2015

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By email and post

Dear Sirs,

Proposed claim for judicial review of Devon County Council's ("the Council") decision to grant planning permission for the importation of inert waste for the purpose of filling the void as part of the restoration of Steer Point Quarry at Steer Point Quarry, Steer Point Road, Brixton, PL8 2DQ (respectively, "the Development" and "the Quarry")

This letter is written to you in accordance with the Pre-Action Protocol for Judicial Review claims. I am instructed by Brixton Parish Council, the proposed Claimant, c/o the Clerk, MJ Strickland, 2 Meadfoot, Thurlestone, Devon TQ7 3TD.

Reference details
Ours: BPC/001
Yours: DCC/3638/2014

Background
On 19 January 2015 the Council granted planning permission for the Development ("the Planning Permission"). The Planning Permission is subject to a number of conditions which include: condition 4 which limits the permission to a period of four years; and condition 13 which provides that a maximum of 50,000 cubic metres of inert waste shall be brought into the site during any one calendar year.

The grant of planning permission followed an earlier Council resolution to grant subject to *inter alia* the provision of a legal agreement, dated 19 September 2014.

A completed agreement under section 106 of the Town and Country Planning Act 1990 was provided to the Council on 19 January 2014. Paragraph 6 of the schedule limits the number of vehicle movements to 140 per week and 36 per day.

The Council's professional officer produced a report to Committee ("the OR") which informed the Council's resolution to grant planning permission. The OR was dated 17 September 2014. As I understand it no addendum report was subsequently produced prior to the grant of planning permission.

At the date of the Committee resolution to grant, the development plan comprised the Devon County Minerals Local Plan (2004) and the Devon County Waste Local Plan (2006). The

emerging Devon Waste Plan ("DWP") was out to consultation. It was adopted and became part of the development plan on 15 December 2014.

Policy W12 of the DWP provides that waste management will only be permitted within the AONB (as here applies) where it can be demonstrated that there are no deliverable alternative sites outside the AONB and its setting and, in the case of major development, exceptional circumstances have been demonstrated.

The following points from the OR are relevant:

- The brickworks factory (a) is outside the scope of the application and the minerals planning permission area and (b) has been demolished (paragraph 2.4);

- The application site is (largely) co-extensive with a ROMP consent (ref.: 09/07/002/98) (paragraph 2.8). The ROMP consent carries restoration and aftercare requirements which still have effect and which, plainly, the Council regarded as acceptable (paragraphs 2.7 and 2.8).

- Permission was granted in 2000 for an extension to the quarry. The consent was not implemented and is now time expired (paragraph 2.6). However, the application included a comprehensive restoration and aftercare scheme for the entire site that included the provision of pasture, woodland and bodies of freshwater.

- The Development requires some 180,000m3 of material. 40,000m3 is already available on site. As a result 140,000m3 of inert waste will be imported onto the site over the time of the permission (i.e. 35,000m3 per year (or at a conversion factor of 1.5x, 52,500 tonnes per year) (paragraph 2.9).

- The OR appears to accept a need to restore the Quarry (see paragraphs 6.5-6.7). However, without that need, the site would be inappropriate for an inert waste landfill facility (paragraph 6.8).

- In terms of waste policy the critical question is whether or not the operations would comprise the disposal or recovery of waste (paragraph 6.9). Paragraphs 6.10-6.12 then provide:

  "*6.10 In order to determine if the proposal amounts to a recovery operation, the MPA needs to be satisfied that the waste would serve a useful purpose by replacing material that would have otherwise been used, in order to achieve an effective and lasting beneficial use. In this case there is a requirement to restore Steer point quarry as part of a planning permission this could be achieved using the 40,000 tonnes of material within the site, but it is evident that due to the large size of the site this is very unlikely to be sufficient material to achieve landforms that would reflect or enhance the local landscape. Instead the quarry would remain as a void, with scope only for a less integrated and smaller water management system. Instead the proposal put forward would infill the main quarry void following existing contour lines within the site; it would create additional shrub and woodland, fields for future grazing all reflecting the landscape character of the wider area. The proposed extensive and integrated pond system would provide beneficial wildlife and landscape enhancement following completion, as well access for enjoyment by the public would not be achievable with the amount of material.*

  6.11 In order to achieve the proposed scheme the alternative to bringing in inert waste would be using imported soils and non-waste materials to achieve the final landforms. In this case using inert waste may help to reduce road miles as well as helping prevent extraction of a finite resource.

  6.12 Taking into account the above, it is considered that the proposed scheme would satisfy the criteria to be defined as a recovery operation and so accord with national sustainable waste management policy and Adopted Waste Local Plan policy WPP4 (Consideration of Proposals not allocated in the plan) and emerging policy W2 (Sustainable Waste Management)."

- The Council accept that the Development is 'major development' for the purposes of paragraph 116 of the NPPF (paragraph 6.23). Paragraphs 6.24-6.27 purports to apply the paragraph 116 test but does not conclude on whether exceptional circumstances have been made out. Only that "*it is considered the application provides evidence of long term environmental and social benefits with some economic benefits during the operational period. It is considered that these outweigh the moderate/ slight adverse temporary impacts upon the AONB in the short to medium term.*"

- The OR states that there will be 21 daily lorry movements (paragraph 6.30). This correlates with the Applicant's own assessment (see Hydrock, Transport Note, July 2014, Table 4.1, p.9). However, the OR, bizarrely goes onto say at paragraph 6.32 that

there will be 10-11 vehicle movements a day which is inconsistent with paragraph 6.30 and the Applicant's position.

On 6 January 2015 the proposed Claimant submitted a document entitled "*Review of the 2014 Restoration Proposals*" ("the Report"). The Report demonstrates that the import of inert waste or other materials is not required. The Council did not comment on this Report prior to the issue of the Planning Permission. The Committee were not consulted upon it. After the grant of planning permission, the Council wrote to the proposed Claimant saying that the application was treated as an application to import waste that would also satisfy the requirement to restore the quarry and not as an application to under the subsisting ROMP condition relating to restoration. It continued, having noted where the waste disposal aspects of the development were considered in the OR and that the application was judged to be acceptable in its own right in terms of environmental impacts, "*It is of course entirely possible that an alternative restoration scheme could be achieved as set out in the report you have submitted, but that was not the application that was submitted to this authority and which was considered and approved by members.*"

This is not entirely consistent with the Applicant's positions which stated: "*a restoration scheme is now proposed as required by the existing ROMP notice 9/07/2002/98*" (page 36, Planning Policy & Benefits Statement (Revised July 2014).

Details of the matter being challenged

The decision of the Council on 19 January 2015 to grant planning permission for the Development at the Quarry.

The issue

The Council erred in law in grant planning permission in that it failed:

(i) Properly to consider whether or not the Development comprised the recovery of disposal of waste and/ or alternative restoration schemes;

(ii) To apply properly paragraph 116 of the NPPF and policy W12 of the DWP;

(iii) To have regard to the full extent of the traffic impacts of the scheme;

(iv) To impose a limitation on the quantum and type of waste imported contrary to the assessment of the proposal by the Council which assumed a limitation on both; and

(v) To have regard to the development plan at the time of grant.

Particulars

Ground 1 – recovery or disposal and alternatives

The OR describes, at paragraph 6.9, the question of whether or not the operations proposed would comprise the recovery or disposal of waste as "*critical*".

At paragraph 6.10, the OR then states: "*in order to determine if the proposal amounts to a recovery operation, the MPA needs to be satisfied that waste would serve a useful purpose by replacing material that would have otherwise been used, in order to achieve an effective and lasting beneficial use.*"

The OR goes on to conclude that the requirement to restore the quarry could be achieved using the 40,000 tonnes of material on site but that such an approach would not "*achieve landforms that would reflect or enhance the local landscape*" and would involve "*a less integrated and small water management system*."

The Council approved a restoration scheme in 2000 which included the provision of pasture, woodland which the OR now identifies as "*reflecting the landscape character of the wider area*."

The Report confirms that an alternative scheme, without the need for the import of additional material, would achieve "*an acceptable landform that would fulfil the approved 2000 scheme and provide a restoration proposal that meets the visual hydrological and ecological management needs required by the statutory bodies*."

It follows:

First, that the Council itself accept that the restoration of the quarry can be achieved without the import of waste (it is the landscape and hydrological benefits that it says necessitates the importation, not the restoration).

Secondly, that the Council found a prior scheme acceptable in both landscape and hydrological terms. There has been no consideration of that earlier scheme nor any explanation as to why more is now required.

Thirdly, the Council did not, as a matter of fact, consider the Report which provided an alternative which did not require the import of materials and which would have delivered (a) similar landscape characteristics and (b) a hydrological solution.

Fourthly, did not otherwise consider alternatives.

Fifthly, had regard to an immaterial consideration in terms of landscape benefits: it is the beneficial end use that must be considered (see EA Guidance: Defining Waste Recover: Permanent Deposit of Waste on Land, page 13).

In all the circumstances, the Council fell into material error in concluding that the operations would amount to recovery or disposal and in failing to consider alternatives.

Ground 2 – AONB policy

Paragraph 116 of the NPPF provides that major development in the AONB should be refused except in exceptional circumstances. Policy W12 of the DWP is in like terms.

The Council accept that the Development comprises major development for the purposes of paragraph 116 of the NPPF (paragraph 6.23 of the OR). It also accepts that the AONB policy within the NPPF is "*of particular importance*" in this case (paragraph 6.3 of the OR)).

The OR considers the application of paragraph 116 at paragraphs 6.24 to 6.27. It did not consider the emerging policy W12 that was extant at the time of the report. Nor did an addendum report address this policy following adoption of the DWP and prior to the grant of the Planning Permission.

The OR concludes that *"the importation of appropriate waste material is reasonably required to restore Steer Point Quarry*" (paragraph 6.24) and that the long term environmental and social benefits with some economic benefits "*outweigh the moderate/ slight adverse temporary impacts.*"

Neither of these tests reflect national policy which is that applications for major development should be refused save in exceptional circumstances and where the development is in the public interest.

Ground 3 – traffic impacts

Condition 4 permits a maximum of 50,000 cubic metres of inert waste material to be brought into the site during any one calendar year. That amount is equivalent to 75,000 tonnes per year.

The section 106 agreement limits the number of daily lorry movements to 36.

The OR's assessment of impacts from vehicles on the highway is predicated on an average number of daily lorry movements of either 21 (paragraph 6.30 of the OR) or 10-11 (paragraph 6.32 of the OR). The later figure appears to be an error.

The figure of 21 daily lorry movements is derived from annual figures of 35,000 cubic metres/ 52,500 tonnes (see Table 4.1, p.9 of the Hydrock Transport Note).

Accordingly, the Planning Permission permits the import of 43 per cent more waste than that assessed by the OR and the section 106 agreement permits 71 per cent more vehicle movements on any day. As a consequence the officers failed to take proper account of traffic impacts by having regard to a number of vehicle movements substantially below that permitted by the Planning Permission.

Ground 4 – failure to limit quantum and type of waste

The Development for which the Planning Permission was granted is described as the "*importation of inert waste."*

Condition 13 limits the amount of inert waste to be brought onto the site in any calendar year. However, there is no condition which limits either the waste brought on site to inert waste or which limits the quantum of non-inert waste.

The description of development cannot act to impose a limitation of the development permitted. In this case planning permission was granted for a material change of use to the use of land for the deposit of waste.

The importation of non-inert waste would not necessarily comprise a change of use and, accordingly, the permission granted is not the limited in the way clearly intended and considered by the Council.

Ground 5 – the development plan

The DWP was adopted on 11 December 2014 between the Committee resolution to grant and the issue of the Planning Permission.

The Committee did not consider the matter again in light of the updated development plan position at the time of the grant of Planning Permission.

It is acknowledged that the OR address emerging policy, including the DWP.

However, it did not do so with regards policy W12 (which is addressed above) nor with regards to need.

The DWP is clear: there is no need for further disposal capacity for inert waste. The DWP requires 90% of CEDW to be recycled and the remaining 10% to be disposed of (see DWP Table 2.7). It identifies more than sufficient disposal capacity (Tables 2.8 and 2.9) such that there is no need in waste management terms for the Development.

In not grappling with these aspects of the development plan, the Council failed to apply properly section 38(6) of the 2004 Act.

Claimant's legal advisors

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Reply date
Please confirm receipt of this letter immediately. We would be grateful for your substantive reply within 10 days of the date of this letter given the short time period for planning claims.

Yours sincerely,

Charlie Hopkins

On behalf of Brixton Parish Council