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Attn: Mr Andrew Hunter
Director, Planning Place and Regeneration
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URGENT

By email only

14 May 2020

PRE-ACTION PROTOCOL LETTER REQUIRES YOUR URGENT ATTENTION

Dear Mr Hunter

Land North of Herschel Grange Warfield Street Warfield Bracknell Berkshire (the Site) Planning Application Reference 19/00497/FUL (the Second Application)

1. I am writing on behalf of the Warfield Village Action Group and refer to the resolution by the Bracknell Forest Council (the Council)'s planning committee made at its meeting held on 16 December 2019 to approve the above Second Application.
2. The Second Application follows the refusal seven months earlier, on 1 May 2019, under delegated powers of application reference 18/00650/FUL (the First Application) which as I will explain, was for substantially the same form and quantum of development, in the same location. The officer reports which underly the two decisions were written by the same officer, Mr Matthew Miller, but inexplicably take fundamentally different approaches to the two applications.
3. Ignoring the detailed differences in the findings (which in any event are summarized below), in his delegated report on the First Application, Mr Miller concludes that the development comprises a substantial and uncharacteristic urban extension to the existing settlement in an area that demands a 'semi-rural' scale and form of development with resulting unacceptable adverse impacts.
4. In the committee report for the Second Application, Mr Miller again finds that the development comprises a substantial urban extension to the existing settlement, but this

time considers that it complements the existing form of the surrounding development. This is a very significant 'U-turn' in the assessment which goes to the heart of the eventual recommendation.

5. Inexplicably, the second report wholly fails to either acknowledge that there has been such a 180 degree change in the assessment of the development, or explain why there is such a change (notwithstanding that the physical and policy context is precisely the same).
6. Please note, that my client understands perfectly well that the Council is entitled to change its mind. However, as I will explain and as is made very clear in the case of *North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P. & C.R. 137*, before it can do so, it must firstly realise that it is changing its mind, and secondly, it must explain why it is doing so. As I will explain, the committee report wholly fails to explain both that there has been a *volte-face* in the assessment of the development, and why there has been that *volte-face*.
7. The above summary describes a clear procedural error. As a result of that error (and as explained in greater detail below), in resolving to approve the Second Application, the Council failed to have regard to a very significant material consideration, and failed to provide adequate reasons for the 'U-turn'. It follows that any planning permission issued pursuant to the resolution will be unlawful and open to a successful legal challenge with costs awarded against the Council.
8. To avoid the unnecessary costs involved in a legal challenge, I urge the Council to take the Application back to committee and redetermine it.

Claimant

9. Should it prove necessary to issue a claim, the claimant will be a member of the Warfield Village Action Group (WVAG). The members of WVAG have been active in opposing the Second Application and we consider that they have standing to bring the claim in judicial review.

Defendant

10. The proposed defendant is Bracknell Forest Council (the Council).

Decision to be challenged

11. Any decision to issue planning permission for the Second Application pursuant to the Council's resolution of 16 December 2019.

Order Sought

12. The Claimant will seek the following orders:
 - a. Quashing of the permission;
 - b. Costs.

Aarhus Convention Claim

13. Should it prove necessary to issue a claim, this is an Aarhus Convention claim as per CPR 45.41(2)(a)(ii), namely a claim in judicial review "which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention".
14. An Aarhus Convention claim must be brought by one or more "members of the public", which is defined by reference to the Aarhus Convention. Article 2(4) of the Aarhus Convention defines 'the public' as including "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups". The Claimant therefore falls within the definition of 'member of the public' in the context of an Aarhus Convention claim.
15. Should it prove necessary to issue a claim, the Claimant will seek confirmation from the Court that the costs cap as set out in CPR 45.43(2)(b) applies, limiting his liability for adverse costs to £5,000. The Claimant will also seek confirmation that the Defendant's liability for adverse costs is likewise limited to £35,000 plus VAT.

Background

16. As you will be aware, the Site lies outside the settlement boundary to Warfield, and hence in designated countryside. The 1990s development of Toogood Place lies to the immediate south of the Site, and the Hermitage caravan park lies between the western side of the Site and Gibbins Lane. There is open countryside to the north of the Site.
17. The land to the east of the Site (land north of Newhurst Gardens) benefits from an outline planning permission for up to 50 dwellings which was approved at a date when the Council could not demonstrate an adequate 5 year housing land supply. The delegated report relating to the First Application (see below) (the DR) records that this neighbouring site is physically and visually separated from the Site "by a tall, dense strip of planting on the shared boundary, much of which lies outside the application site" (DR pg. 6).
18. The Site is also located within the C1: Binfield Warfield Clay Farmland Landscape Area, as defined in the LUC Bracknell Forest Borough Landscape Character Assessment (2015). As recorded in the delegated officer's report to the First Refusal (the DR), the southern part of the study area (which includes the application site) provides an important green space function between the urban edge of Bracknell to the south and the more fully rural area to the north" (DR, page 6).

The First Application

19. Application reference 19/00497/FUL is the second planning application on this Site (the Second Application). The first (reference 18/00650/FUL) (the First Application) sought planning permission for 34 dwellings (of which 8 were affordable) and was refused under delegated powers on Wednesday 1 May 2019. The proposed layout is shown on the attached masterplan for the First Application.

20. There were five reasons for the refusal, the first of which reads:

“1. The proposed development would have a harmful urbanising impact on the character and appearance of the countryside. The proposal is therefore contrary to 'Saved' Policies EN8, EN20 and H5 of the Bracknell Forest Borough Local Plan and Policies CS1, CS2, CS7 and CS9 of the Core Strategy Development Plan Document, the Design Supplementary Planning Document and the NPPF”.

21. The policy and factual context for the first reason for refusal is set out in the delegated report prepared by Matthew Miller (the DR) as follows:

Policy Findings

- The Council had a 6.04 year housing land supply. As a result, the ‘tilted balance’ recommended in paragraph 11 of the NPPF did not apply.
- Policies CS1 and CS2 were considered “fully consistent” with the Government’s National Planning Policy Framework (the NPPF) (DR pg5). Policy CS2 imports a sequential test (DR pg. 7).
- Policies CS9 and saved policies EN8 and H5 were partially consistent with the NPPF and their weight would therefore be reduced. The partial consistency was a result of the fact that the development plan policies and the relevant policies in the NPPF require development to protect the character of land and its function (including the function of preserving the visual separation of settlements) [DR, pg. 5].
- Policies CS7, CS9, saved policies EN8, EN1 and EN20 all require (as an aspect of good design) development not to adversely affect the character of an area. These policies were consistent with the objectives of the NPPF (and paragraph 124 in particular) and should be afforded full weight [DR, pg. 7].
- the Site is allocated for housing development in the draft Bracknell Forest Local Plan (the dBFLP). However, as the dBFLP is in draft form only, it carried minimal weight (DR, pg 7).

Factual Findings relating to the Site

- “[T]he Site as a whole makes a significant contribution to the character of the countryside by providing an open, unmanaged area of greenery, which also forms a visual connection to the wider countryside to the north through its absence of dense planting on its northern boundary, which provide across-site views” (emphasis added) (DR, pg. 6)¹.
- The character of the cul-de-sac and particularly Toogood Place is suburban within a wider semi-rural character area as identified in the SPD [DR pg. 8]. This suburban character “quickly gives way to a rural character development pattern and setting to the immediate north of [Herschel Grange and Toogood Place], and this is also apparent within the more sparsely developed and heavily planted highway of Gibbins Lane to the west” (DR, pg. 6);

¹ Notably, the Council’s own Landscape Officer was consulted on the application and this assessment appears to reflect those comments (see comment in the table on page 2 of the DR). The Council’s planning portal also records that the consultation response was provided to the case office on 3 September 2019.

- Given the characteristics of the Site, and wider semi-rural character of the area within which the Site sits as identified in the SPD, “further development should have a village feel with substantial green elements and a variety of dwelling types” [DR, pg. 8].

Factual Findings regarding the Development

- “[T]he proposal would [not] form an infill of the existing settlement pattern, but rather a distinct northwards extension of it” (DR, pg. 6).
- The proposal constitutes “a substantial backland development” and represents “a significant increase in the built footprint of the settlement along Warfield Street, within a semi-rural setting. (emphasis added) [DR, pg. 8].
- “the layout and density of the proposal lends itself to an urban character and does not make attempts to achieve a more semi-rural feel” [DR, pg. 6].
- “The proposed development does not achieve a semi-rural character due to the formal layout, and the relative lack of variety in building form and layout” (emphasis added) [DR, pg. 8].
- “While the proposal would have limited visibility from public vantage points to the south and east, it would be distinctly visible both from the west and to the north. The proposed dwellings would likely be notably bulkier and visually urbanizing than the existing form present in the caravan park, and would also have visibility from Gibbins Lane to the north ... the proposal would appear as a clear enlargement of settlement and a significant increase in built form (emphasis added) [DR, pg. 8].
- “[I]t is not considered that the character of an area is defined only by its public visibility” (emphasis added) [DR, pg. 8].
- “there are clear differences in layouts between the Newhurst Gardens scheme and this proposal, notable by the lower overall housing density and the provision of large areas of soft landscaping and amenity space, which assist the Newhurst Gardens development to provide more of a semi-rural character, at least in comparison to the proposal” (DR page 6).

22. Against this background the DR makes the following planning assessment of the development proposed in the First Application:

- The sub-urban character of the layout and failure to achieve a more semi-rural character negatively affects the intrinsic character and beauty of the countryside [DR, pg. 6]
- With reference to the layout and design: “the design does not feature sufficient variety to create a semi-rural character ... the formality of the relationship between frontages, boundary treatments and hard standing prevents the design achieving the organic character expected of semi-rural developments” [DR, pg. 8].
- “Fundamentally, the development is considered to be excessively inwards-looking” [DR, pg. 8].
- conflicts with Policy CS1 as it would not protect or enhance the intrinsic character and quality of the wider countryside “in view of the amount of development proposed” [DR, pg. 7];
- conflicts with Policy CS2, in that when applying the sequential test, residential development would be more appropriate within current allocated sites and defined

settlements, “especially when the Council has a Five Year Supply of Housing” (DR, pg. 8);

- the creation of new dwellings in the countryside also conflicts with the objective in Saved Policies EN8 and H5 of protecting the intrinsic character and beauty of the countryside) [DR, pg. 7].

23. Taken together, the above led to a finding of clear, detrimental harm to the character of the area from the development (DR, page 9). It is this conclusion, in the context of the above detailed findings that underlies the first reason for refusal in the First Application.

The Second Application

24. The Second Application was considered at a committee meeting held on 16 December 2019, just seven months after the First Application had been refused under delegated powers. The minutes of the meeting record just that the Committee resolved to approve the Second Application, but provide no reasons for that decision.

25. The committee considered the Second Application on the basis of a committee report which was again authored by Mr Matthew Miller (the CR). Given the similarity between the two applications, and in the light of the findings and conclusions in the DR in respect of the First Application, it is surprising that the CR recommends that the Second Application for approval.

Background to the Second Application

26. The development proposed in the Second Application, the factual circumstances of the Site and the policy context against which the Second Application is assessed are essentially the same as for the First Application.

27. The Second Application proposes developing precisely the same Site. As is clear from the attached masterplan which formed part of the Second Application, the scheme itself is materially the same as the First Application:

- The road and plot layout is essentially identical;
- The unit types are identical.

28. The only physical difference between the two applications is a reduction by 1 (one) in the number of proposed units (giving a total of 33 units), and an apartment building has been relocated from the north western corner to the south eastern corner (with the original site now given over to a small area of open space). In addition, 10 units (as opposed to 8) are now proposed to be affordable.

Policy Findings (Second Application)

29. As the CR confirms, the policy context of the Second Application is also precisely the same as that of the First Application. The table at paragraph 8.1 of the CR confirms:

- Policies CS1 and CS2 are given full weight;

- Policy CS9 and saved policies EN8 are given moderate weight;
- Saved Policy H5 is given limited weight, but considered to be relevant; and
- Policies CS7, EN1, EN20 are given full weight.

30. Paragraph 9.2 confirms that the Council can demonstrate 6.09 year housing land supply and paragraph 9.10 confirms that the draft site allocation in the draft Bracknell and Forest Local Plan is given only minimal weight (CR para 9.10).

Factual Findings relating to the Site

31. The CR describes the Site in essentially the same terms as the DR, noting that:

- The area which includes the Site provides an important green space function between the urban edge of Bracknell to the south and the more fully rural area to the north (CR, para 9.13).
- The Site is predominantly undeveloped, and contains some valued landscape features (as listed in the Bracknell Forest Borough Landscape Character Assessment (CR para 9.18)².
- The Site is bordered to the south by a defined settlement and to the west by the Hermitage Caravan Park (CR, para 9.15).
- The approved but unbuilt Newhurst Gardens development is physically and visually separated from the application site by a tall dense strip of planting located on the shared boundary (CR, para 9.16).
- “The character of the cul-de-sac, and particularly of Herschel Grange and Toogood Place is suburban, the wider context is of a semi-rural character” (CR, para 9.24).
- The Site is ‘visually enclosed’ from the south and east, but “opens up to the north”³ with “limited public vantage points from this direction”. From the west the Site is largely screened, except for a visual gap when viewed from Gibbins Lane immediately north of the Hermitage caravan park.

32. Despite the fact that nothing has changed on or in the vicinity of the Site since the First Application, Mr Miller now concludes that the visual value of the contribution of the Site to the wider countryside is restricted (CR, paras 9.18 – 9.19) and that the Site has “low to medium landscape sensitivity due to its relationship with the existing settlement and the limited visibility of the site from public vantage points” (CR, para 9.20).

33. This in turn leads to the conclusion that, while the proposal would conflict with elements of policies CS9 and saved policies EN8 and H5, “in view of the weight to be attributed to these policies, the overall harm arising is considered to be no more than minor” (para 9.21). **Again, this is a conclusion that begs further explanation, given that nothing has changed in the policy context of the Site since the First Application.**

Factual Findings in relation to the Development

² Two consultation responses by the Council’s Landscape Officer are recorded on the Council’s Planning Portal, but neither are actually accessible. To the extent that those responses reached a different conclusion to Landscape Officer’s response to the First Application, that difference equally needs to be explained.

³ See comment at CR para 9.33 that “the site itself is mainly open pasture, and limited planting is present to the western and northern boundaries”.

34. In a very brief discussion of the proposed Development itself, the CR finds:

- The development “represents a significant increase in the built footprint of the settlement along Warfield Street, within a semi-rural setting”, but then states “[h]owever, it would form an extension to the existing 1990s suburban cul-de-sac developments of Herschel Grange and Toogood Place, which themselves ... do not follow the linear frontage development form of the original Forest Road (including Warfield Street) settlements. The site would continue this suburban pattern and harmonise with the existing built form forming a sympathetic continuation of the settlement” (para 9.25).
- The proposed layout and density of the development reflects a suburban form of development, which is also reflected in the standardized footprint of the proposed plots (CR, para 9.26).
- There is some degree of variety in building designs and external materials. The development seeks to provide a modern design style which would sit comfortably with the 1990s residential development to the immediate south (CR, para 9.27).

35. The conclusion to this section of the CR reads: “The proposal would be a clearly suburban form of development by virtue of its density, scale and design. As a result, the proposal would change the semi-rural character of the existing site. It would however accord with the character of Herschel Grange / Toogood Place to the immediate south” (para 9.36).

Planning Assessment

36. The officer’s assessment is set out at section 10.3 of the CR:

“The proposal is considered to result in some harm to the intrinsic value and beauty of the countryside (para. 170b) of the NPPF), as well as to the semi-rural character of the site. However, for the reasons explained in the report, this harm is considered to be minor in the context of the overall modest landscape value of the site combined with the fact that the proposal would relate well to the existing settlement and the site’s limited inter-visibility with the wider landscape to the north”.

37. This overall conclusion at Paragraph 11.1 of the CR, is that:

“While the proposal would result in some harm to the intrinsic value and beauty of the countryside, and to the semi-rural character of the site, this harm is minor, and the weight to be applied to the Council’s countryside policies is reduced. The proposal offers benefits in the form of an above policy-compliant level of affordable housing, and the provision of housing generally.”

38. It is notable, that the CR fails to explain the planning assessment behind the Council’s decision to refuse the First Application or the reasons for departing from that assessment. As I will explain, that reasoning is a material consideration in determining the Second Application, and as a result of this omission, the Council’s planning committee failed to have regard to a material consideration.

39. The minutes of the planning committee meeting held on 16 December 2019 provide no further reasons for the Council's resolution to approve the Second Application. A court will therefore assume that the committee adopted the reasoning set out in the CR. As I will explain, that reasoning is inadequate, and renders the resolution unlawful.

Legal Background

40. It is a truism of planning law, that in determining a planning application, a local authority is required to determine the application in accordance with the development plan unless material considerations indicate otherwise (sections 70(2) of the Town and Country Planning Act 1990 and 38(6) of the Planning and compulsory Purchase Act 2004).

41. The material considerations that must be taken into account in reaching a decision include previous decisions on similar proposals. In the case of *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P. & C.R. 137 Mann LJ commented (at page 145):

“It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgement indisputable ... I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgement. He is therefore free upon consideration to disagree with the judgement of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision”. (emphasis added)

42. While there is no statutory duty to provide reasons for approving a planning application, the Courts have repeatedly held that the particular circumstances of a case may require reasons to be given (*Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71 at para 61, and *Dover District Council v CPRE Kent* [2017] UKSC 79 at para 57). Those circumstances include in particular (as Mann LJ suggests above) the situation where a local planning authority having already refused a planning application on a particular site, subsequently resolves to approve what is a substantially similar application.

Potential Grounds of Claim

43. As I will explain, the above factual scenario gives rise to two potential grounds of claim should the Council issue permission for the Second Application pursuant to its resolution of 16 December 2019:

- (a) failure to have regard to a material consideration; and
- (b) failure to provide adequate reasons for its decision.

44. For the reasons I have explained, there can be no dispute that the First and Second Applications envisage substantially the same development (albeit, the second Development is reduced by 1 unit, with an apartment block relocated, and just two additional affordable housing units), relate to precisely the same Site, and were considered against precisely the same policy background.

45. Nonetheless, the same officer who wrote both reports reached diametrically opposing conclusions. In particular, in respect of the First Application, Mr Miller found that:
1. The proposal would be distinctly visible from both the west and north of the Site.
 2. In any event, the character of an area is not solely defined by its public visibility.
 3. Given the characteristics of the site, and wider semi-rural character of the area within which the site sits as identified in the SPD, “further development should have a village feel with substantial green elements and a variety of dwelling types”.
 4. “[T]he layout and density of the proposal lends itself to an urban character and does not make attempts to achieve a more semi-rural feel.
 5. The failure to achieve a semi-rural character was a result of the formal layout and the relative lack of variety in building form.
 6. The proposal was excessively inward looking.
46. This led to the understandable conclusion that the proposal represented a clear, detrimental harm to the character of the area, that such harm conflicted with adopted policies (many of which attracted full weight), and that, particularly in the light of the adequate housing land supply, that harm justified refusal of the First Application.
47. By contrast, the CR reaches different conclusions on significant points, but without any explanation at all as to why it has done so. In particular, there is absolutely no acknowledgement or attempt to address the strong view expressed in the DR that “further development should have a village feel with substantial green elements and a variety of dwelling types”.
48. On the contrary, the CR finds quite the opposite:
- Instead of the proposal promoting a more appropriate semi-rural / village feel, the CR almost revels in its recognition that the development proposed in the Second Application constitutes “ a significant increase in the built footprint of the settlement along Warfield Street” and would form an extension to the existing 1990s developments of Herschel Grange and Toogood Place continuing their “suburban” pattern.
 - Instead of addressing the “lack of variety in building form and layout”, the CR merely comments that there is “some degree of variety in building designs and external materials” and notes that the proposal is of a modern design that “would sit comfortably with the 1990s residential development to the immediate south”.
 - Instead of there being a ‘clear’ detrimental harm to the character of the area, that harm is now characterized as ‘minor’.
 - It is implied that the development will be well screened. No mention at all is made of the finding in the DR that public visibility is not the sole defining element of an areas character.
49. To be clear, the complaint here is not that the Council has reached a different decision on the second Application. As Mann LJ made clear in *North Wiltshire*, the Council is entitled to do so.
50. However, where the facts are essentially the same (i.e. the Site, the scale of the development, and the policy context), as *North Wiltshire* makes clear, the fact that there

has been a change in the analysis is a material consideration that should be brought to the attention of the decision maker, and that change itself requires reasons to be given.

51. In this case, the change in the analysis (which amounts to a 180 degree 'U'-turn) was not explained to the committee, and no reasons at all for it were given. Hence, if a planning permission is issued pursuant to the 16 December 2019 resolution, that permission will be unlawful and open to a successful judicial review, with costs awarded against the Council.

Summary

52. It will be common ground that for the purposes of the complaints in this letter, the relevant factual and policy matrix of the First and Second Applications are materially the same.

53. The officer reports underlying the two applications were written by the same officer, but reached different conclusions on material and key planning issues, resulting in a very different approach to the two developments (the first advocating a semi-rural development to minimise harm to the character of the area as the proper approach to policy, the second advocating a sub-urban development in the same location to complement the development form in Herschel Grange and Toogood Place).

54. The CR (which is the report on the Second Application) (a) fails to explain the very fact of contrary material findings and approach in the DR, and (b) fails to explain why it proposes to depart from those findings and approach, notwithstanding the absence of any fundamental change in either the relevant factual or policy background to the two applications.

55. As a result of the first of these two failures, in reaching its resolution to approve the Second Application on 16 December 2016, the Council's planning committee failed to have regard to a material consideration. The second failure engages the principle identified by Mann LJ in *North Wiltshire DC*. The failure to provide adequate reasons for departing from an earlier decision also renders unlawful the resolution to approve the Second Application.

56. It follows that any attempt to issue a planning permission pursuant to the resolution of 16 December 2019 will be unlawful and open to a successful judicial review, with costs awarded against the Council.

Details of Legal Advisors Dealing with the Claim

57. The Claimant's solicitors are Richard Buxton Solicitors, the details are as per the heading of this letter. The solicitor with responsibility for the case is Simon Kelly.

Details of Interested Party

58. Mr Peter Reed, Hobsons Developments Ltd, Office 9, 55 Park Lane, London, W1K 1NA

What the Council is requested to do

59. The Council is invited to agree:

- a. not to issue any planning permission for the Second Application pursuant to the resolution of its planning committee dated 16 December 2019; and
- b. to return the Second Application to the committee for redetermination, having corrected the errors in the officer's report identified above.

Timing of Response

60. We understand that a planning permission for the Second Application is imminent. We therefore request that the Council confirms point (a) above by return and confirms within five working days that it will agree to point (b).

I look forward to your urgent response.

Yours sincerely,



Simon Kelly

Richard Buxton Solicitors

Encl: Masterplans of First and Second Applications

cc. Timothy Wheadon, Chief Executive (timothy.wheadon@bracknell-forest.gov.uk)

Jo Male, Planning Officer (jo.male@bracknell-forest.gov.uk)

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