RICHARD BUXTON
solicitors
environmental • planning • public law

01223 328933
sgandy@richardbuxton.co.uk
pwyard@ richardbuxton.co.uk

Isle of Wight Council
FAO. Legal Services
County Hall
High Street
Newport
Isle of Wight
PO30 1UD

Our ref: GRE4/1
Your ref: 20/01061/FUL

29 August 2023

BY RECORDED DELIVERY

URGENT PRE-ACTION PROTOCOL LETTER

Dear Sirs

20/01061/FUL - Demolition of agricultural buildings and the garage to No 125 Marlborough Road; Proposed development consisting of 473 new dwellings etc.

1. We previously wrote to you regarding the above-numbered application for planning permission ("the **Application**") on 9 December 2021, to which no substantive reply was forthcoming, in particular, to our request for documents. Now that the Council, on 4 August 2023, has issued the planning permission, we write to you once again pursuant to the Pre-action Protocol for Judicial Review Claims to give you notice of our client's intention to seek judicial review of the grant of planning permission.

Details of proposed parties

1. The proposed claimant is Greenfields (IOW) Ltd, of 231 Vauxhall Bridge Road, London, SW1V 1AD ("our **Client**").

2. The proposed Defendant is Isle of Wight Council, County Hall, High Street, Newport, Isle of Wight, PO30 1UD ("the **Council**").

3. We consider that the applicant would be an interested party in any proposed proceedings: Westridge Village Ltd, c/o Mr D Long, Red Barn, Cheeks Farm, Merstone Lane, Merstone, Isle of Wight, PO30 3DE.

Details of decision under challenge

4. As above, our client challenges the Council's decision to grant planning permission on 4 August 2023 for development which was assigned the reference 20/01061/FUL.

Brief factual context

5. The Application sought permission for development at Land South of Appley Road North of Bullen Road and East of Hope Road (West Acre Park), Ryde, Isle of Wight ("the **Site**") in the following terms:

> *"Demolition of agricultural buildings and the garage to No 125 Marlborough Road; Proposed development consisting of 473 new dwellings (single and two storey dwellings (inclusive of 35% affordable housing) and inclusive of the conversion of the Coach House into pair of semi-detached dwellings; (leading to a net gain of 472 dwellings),*

Authorised and regulated by the Solicitors Regulation Authority No. 74899. Details of staff and partners are on our website.

single storey café and two storey doctors surgery and B1 office space with associated site infrastructure (inclusive of roads, parking, photovoltaic pergolas, garages, bin and bikes stores, below ground foul waste pump, electric substations, surface water detention basins and swales, landscape and ecological mitigations and net biodiversity enhancements); Proposed vehicular accesses off Bullen Road and Appley Road; Proposed public open spaces, Suitable Alternative Natural Greenspace and Allotments; Proposed three public rights of way; Proposed access, parking and turning for No 125 Marlborough Road and associated highways improvements (Revised plans, revised drainage strategy and flood risk, additional highway technical note and updated appendix S to highway chapter of environmental statement)(readvertised application)."

6. The Application was validated on 28 July 2020. It was considered by the Council's Planning Committee at a meeting on 27 July 2021, with a recommendation from officers that it be resolved to grant planning permission, principally in reliance upon the application of paragraph 11(d) NPPF. A motion to approve the Application in accordance with the recommendation was defeated; a motion to reject the Application for specific reasons was also defeated; a further motion to approve the Application in accordance with the recommendation was then passed, under the auspices of the acting chairman, Cllr Geoff Brodie.

7. We first wrote to the Council on 3 August 2021 expressing our client's concerns about the conduct of this meeting and the lawfulness of its proceedings. Our pre-action letter of 9 November 2021 followed.

8. On 29 March 2022, at a meeting called for the purpose, a motion to recall the Application for reconsideration in the light of the errors in the lawfulness of the July meeting's proceedings was defeated.

9. In June 2022, Natural England brought to the Council's attention that the applicant had failed to identify that some 11.7ha of the site was identified as land functionally linked to the Solent and Southampton SPA as providing habitat for migrating birds, and in particular curlews.

10. On 21 March 2023, the Application was referred back to the Committee for consideration of the variation of the heads of terms of the proposed section 106 agreement to make provision for mitigation measures. This was deferred until a meeting on 25 April 2023, at which it was resolved that the curlew issue had been appropriately mitigated and that the decision notice could be issued.

11. The notice granting permission was issued on 4 August 2023 ("the Decision").

Proposed grounds of challenge

12. Our client proposes to challenge the grant of planning permission on the following grounds.

<u>Ground 1: The conduct of the meeting of the Planning Committee on 21 July 2021 was unlawful, vitiating the purported resolution to grant planning permission</u>

13. The meeting of the Planning Committee at which it was purportedly resolved to grant planning permission was conducted in an unlawful manner.

14. First, a member of the Committee, Cllr Price, who was entitled to attend was unlawfully prohibited from attending or participating in the meeting on the grounds that he had not attended the whole of the site visit.

15. The decision in *R (Ware) v Neath Port Talbot Council* [2007] EWHC 913 (Admin) at para. 38 is absolutely clear "it must be for the individual member to decide whether, on the facts, the fact that he has not been to the site should disqualify him." This principle was not disputed by Mummery LJ when it came before him on appeal. The decision to exclude Cllr Price on the basis that he had not visited the site was unlawful. It prevented a member from considering and voting on the application. How Cllr Price might have voted cannot be known, but its significance is indisputable in circumstances where at the Committee Meeting a resolution to refuse to grant planning permission was originally passed, a second motion, to refuse for a specific reason did not pass only by virtue of Cllr Brodie's casting vote. This is a clear legal error. It is in and of itself sufficient to require the matter to be returned to the Council's Planning Committee for reconsideration.

16. It now appears that the Council accepts that this was unlawful. Please confirm this position by return.

17. Secondly, Cllr Michael Lilly, then ward councillor for the ward in which the Site is located, was prohibited by the monitoring officer, Mr Potter, from attending the meeting as ward councillor to make representations. Mr Potter's decision to exclude Cllr Lilley appears to have been based upon his (obviously incorrect) view that Cllr Lilly had a personal interest in the decision. This is confirmed by an email of 6 November, in which the Chief Executive seeks to defend this decision with reference to the decision in *Richardson v North Yorkshire CC* [2003] EWCA Civ 1860 and the Appendix 1 to the Local Government Association's Probity in Planning document. Both *Richardson* and the part of Appendix 1 referred to concern in circumstances where a member has a personal (and therefore prejudicial) interest in the outcome of a planning application, i.e. an interest affecting his/her personal or financial position (or that of a relative or friend) to a greater extent than other inhabitants of the authority's area. In *Richardson* the point was that the member in question (and his property) were going to be directly affected by the development proposed (see para. 55). That has nothing to do with circumstances where a member wishes to represent his constituents as Ward Councillor before the Committee.

18. The Council therefore misdirected itself in law when deciding to exclude Cllr Lilley from the meeting. Indeed, we can see no legal basis for having entirely excluded Cllr Lilley from speaking at the meeting as Ward Councillor. The decision to do so was procedurally unfair, and that unfairness was exacerbated by the lateness with which that decision was taken. The Council is asked to confirm its acceptance of this position by return.

19. Thirdly, the resolution now relied upon by the Council was only passed after the meeting had been running for more than three hours, and there had not been any extension of time of the meeting as required by the Council's constitution. The Council can only act as empowered to do so. Rule 22.1 of the Constitution of the Council as in force stated:

> *"Any meeting of the Cabinet, Committee, Sub Committee, Panel or Board will end after three hours of the advertised start time unless half of the members in attendance vote to extend the meeting by up to one hour."*

20. This rule plainly required that a vote be taken of members in attendance. Rule 18.5 of the Constitution required that "Votes on all matters … will be by show of hands unless four members demand. A demand for a named vote shall not be made on procedural decisions". Accordingly, any vote to extend time must be taken by show of hands.

21. The July meeting lasted longer than three hours, but no vote was ever taken on whether or not time should be extended. The votes on the second two motions (the third motion being the motion to approve) took place after the three hour period had elapsed. Cllr Brodie suggested an extension of 30 minutes, before saying "is that – is everybody okay, all right/ Thank you." There is no vote but the transcript suggests one councillor, at least, requested to leave but was told she could not.

22. These three flaws vitiate the purported resolution of the Planning Committee to resolve to grant planning permission on the Application.

23. It is of no avail to the Council in the face of these errors (some of which we understand to be admitted) that in the meeting on 23 April 2023 (some two years later), a further resolution purporting to authorise the issuing of the permission was passed.

    a. First, that meeting did not entail any substantive reconsideration of the Application. The debate was solely focussed on the issue of curlew mitigation. This is all the more surprising since there were some new members on the Committee by then.

    b. Secondly, the members of the Committee were expressly instructed that the existence of the previous resolution (July 2021) to grant permission was a material consideration which they needed to take into account. If the foregoing is correct, then that was a material misdirection, essentially inviting members to rely upon a previous resolution which was (and it would appear was known to be) unlawful. This has the effect of tainting the decision taken at the 23 April 2023 meeting.

24. For these reasons, the Council acted beyond its powers in granting planning permission, as the underlying resolution of the Committee was invalid.

<u>Ground 2: The conduct of Councillor Geoff Brodie in his involvement in the decision-making process was tainted by apparent bias or by an improper motive</u>

25. The test for apparent bias is well established. In short, it concerns whether the relevant circumstances "would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased" (*R (United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* [2019] EWHC 409 (Admin) per Lord Burnett CJ at para. 36).

26. This involves a two staged process: (1) ascertaining all the circumstances that pertain; and (2) asking whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility of bias (see *Bubbles & Wine v Lusha* [2018] EWCA Civ 468 at para. 17 per Legatt LJ (as he then was)).

The relevant circumstances

27. There is compelling evidence, from a number of sources, that Cllr Brodie sought actively to exclude or to encourage others whom he regarded as likely to be predisposed against the application to exclude themselves from the Committee meeting in July 2021, and to prevent them speaking at it. This was on occasion done in concert with Mr Chris Potter (the Council's Head of Legal and Monitoring Officer). Viewed together and in the round, a clear picture emerges of a concerted attempt to prevent Members regarded as predisposed against the application from attending the Committee meeting in July 2021 or voting at that meeting on the application.

28. The evidence in support of this comes from a number of members who have expressed their position in writing. Those members will provide witness statements which we would propose to place before the Court if it becomes necessary to litigate. For present purposes, however, it is sufficient to say that the matters identified below are drawn from written correspondence with the individual in questions, quoted directly in inverted commas where appropriate. That evidence includes:

29. Cllr Matthew Price being excluded by Cllr Brodie who said he "cannot permit [him] to participate" because he left the Site visit early. That is a clear breach of the established legal position. In *R (Ware) v Neath Port Talbot Council* [2007] EWHC 913 (Admin) at para. 38 is absolutely clear "it must be for the individual member to decide whether, on the facts, the fact that he has not been to the site should disqualify him." This is a matter relevant to procedural irregularity also.

30. One member, Cllr Christopher Jarman who speaks of being "under considerable pressure not to attend" and being asked repeatedly by Cllr Brodie how he would vote.

31. Cllr Chris Jarman being contacted by Cllr Brodie who said he was "concerned that he (Cllr Jarman) was "predetermined" and sought to encourage Cllr Jarman to indicate that he had decided which way to vote, such that it could be said he had predetermined his position, the effect of which would be to exclude him from attending the Committee meeting.

32. Cllr David Adams was contacted by Cllr Brodie who "kept telling him very forcefully that he believed that [he – Cllr Adams] was pre-determined". This mirrors the evidence of Cllr Jarman and suggests a concerted approach.

33. The Chairman of the Planning Committee (Cllr Michael Lilley), who had recused himself from sitting on the Planning Committee for the purpose of considering the application, was informed:

    c. In an email sent at 14.22 on 22 July 2021 that he should not 'attend' the meeting in person, but could attend remotely by Microsoft Teams.

    d. In an email sent at 12.40 on 27 July 2021 that he "cannot attend in person nor can [he] attend remotely the Planning Committee due to [his] acknowledged predetermination, and therefore [he] cannot participate". That email was signed off "solicitor", rather than" Chris P.", the latter style being Mr Potter's usual sign-off. Cllr Geoff Brodie (the Vice-Chair) of the Planning Committee who sat as chair on 27 July 2021) was aware of this decision by "after lunch" that day.

34. The Council's approach appears to have entirely ignored section 25 of the Localism Act 2011. It is clear from the documents we have seen that Cllr Brodie was, to some degree at least, involved in the taking of this decision (although precisely how or why is unclear). We note that he repeatedly wrote to Cllr Lilley and to officers at the Council indicating his "concern" about Cllr Lilley's ability to Chair the Committee Meeting and describing him as "not fit for the role of Planning Chair". Cllr Brodie appears to have escalated his desire to exclude Cllr Lilley internally when Cllr Lilley assured him he had "an open mind". What is clear is that the exclusion was unlawful (see further the points made above in the context of procedural impropriety).

35. In addition, we are advised by those who attended the meeting (in person or virtually) that Cllr Brodie was personally very forceful throughout the meeting. This is borne out by evidence of his general aggressive demeanour outside the meeting; for example, we have been provided with emails which suggest that Cllr Brodie has sent aggressive,

bullying, and in our view seriously inappropriate messages to Cllr Lilley (albeit after the meeting in question) calling him “pathetic” and a “coward”. This appears to have been politically motivated.

36. That this atmosphere had a serious impact on the outcome of the meeting can hardly be in question. There was a general sense of intimidation, chaos and some confusion. No fewer than three votes were taken on the application. The first was a resolution to refuse (which passed), the second was a resolution to refuse for a specific reason (which did not pass by virtue of the Cllr Brodie’s casting vote), and the final vote was taken following an unlawful extension of time (as to which again see further above). It was Cllr Brodie who took the decision to extend time in a manner which did not accord with the Council’s constitution then in force, and in the face of a request by one member of the Committee to leave. It was that last vote which resulted in a resolution to grant being carried.

37. Cllr Brodie’s conduct continued to be problematic subsequent to the July meeting:

    e. He refused Cllr Vanessa Churchman permission to speak from the floor at a subsequent meeting to approve the minutes of the main 27 July Committee Meeting, saying she could not speak “unless [she] could support the application”. It is difficult to think of a clearer example of apparent bias than this.

    f. When Cllr Adams sought to raise concerns about the process at the previous meeting, Cllr Brodie proposed a motion to expel him from the meeting altogether.

Real possibility of bias

38. Turning then to the second stage of the test; namely whether the circumstances identified above would lead a fair-minded and informed observer to conclude there was a real possibility of bias, the answer is clear. In circumstances where there is evidence from numerous credible sources to suggest that Cllr Brodie used his influence to: (1) exclude Cllr Price; (2) to contribute to the exclusion of Cllr Lilley, (3) to discourage other members he regarded as predisposed against the application to exclude themselves; and (4) prevented a member from speaking at the meeting “unless she could support the application” the appearance is of a systematic attempt to hamper the presentation of objections to the development. This alone, and certainly when taken together with the conduct of the meeting is more than sufficient to raise a “real possibility” of bias in the mind of the informed observer.

Improper motive

39. Further, or alternatively, the inference to be drawn from the above is that Cllr Brodie and/or others were influenced by an improper motive; namely political gain, damage to the reputation of other councillors and/or the prevention of those predisposed not to grant planning permission from attending or voting at the meeting.

40. Following a formal complaint by Cllr Lilley regarding the bullying behaviour of Cllr Brodie, we note that the Council’s monitoring officer (Chris Potter) refused to investigate on the grounds that “it is not in the public interest to spend further public money to look into this matter”. Given the clear prima facie evidence of bullying, that is a seriously concerning stance.

41. Cllr Brodie had a casting vote on the purported resolution to grant which was carried in July 2021, and chaired a number of meetings. This taints all of the decisions taken by the Council and renders the planning permission unlawful.

Ground 3: The Council's approach to the section 106 Planning Obligation was unlawful

42. The Council was under a duty to publicise the section 106 Planning Obligation (for the purposes of permitting public comment) under Article 40(3)(b) of the DMPO.

43. As Ouseley J made clear in *Midcounties Co-operative* at para. 87, the purpose of the duty under what is now Article 40(3)(b) is to enable meaningful public consultation to take place on the terms of a proposed section 106 planning obligation. This requires that the final draft be placed on the register for a proper period (which is at least a few days) before planning permission is issued (see para. 92). That did not happen in this case and (so far as we can tell) even now the completed planning obligation remains unavailable. The Council's approach runs directly contrary to its statutory duty under Article 40(3)(b).

44. As a result, members of the public, including our client, were materially prejudiced. They were unable to comment on the terms of the planning obligation, which they would have wished to do.

45. Indeed, on the basis of this advice from officers, it is doubtful whether it could reasonably be considered that such an obligation would secure the compensation land so as to be capable of being relied upon in concluding beyond reasonable scientific doubt that there would be no adverse effects upon the SPA.

46. Secondly, the Council appears to have dealt with the significant concerns expressed by Island Roads about the impact of traffic movements resulting from the development on two particular junctions: at Westridge Cross and at the junction of Smallbrook Lane/Great Preston Road. Traffic modelling shows both of those junctions above capacity in various scenarios in the applicant's Transport Assessment. That Assessment proposed discrete works be undertaken to mitigate those impacts. Officers considered however that the developer should rather make a financial contribution towards the costs of unspecified works which may be identified by an unpublished "review of junction improvement options for junctions within the Ryde East area".

47. Neither the fruit of any such review (if indeed it is complete) nor the section 106 agreement is publicly available, nor is there any schedule setting out how the section 106 planning obligations comply with section 122 of the Community Infrastructure Levy Regulations 2010. From the officer's report alone, it appears doubtful whether the Council can lawfully rely on such a financial contribution towards an inchoate scheme as mitigating an impact which will certainly arise from the development, in circumstances in which policy SP7 requires that:

> *"Development proposals should not negatively impact on the Island's Strategic Road Network (as shown on the Key Diagram), nor on the capacity of lower level roads to support the proposed development. If negative impacts are identified, appropriate mitigation measures are expected."*

48. Without sight of the planning obligation as entered into and relied upon, it is impossible for our client to identify precisely what comments would have been made. For present purposes it is sufficient to identify that given the approach in the officer's report, our client would undoubtedly have had comments to make, the nature of which will be

identified once the final planning obligation is provided (in accordance with the Council's statutory duty).

Additional ground

49. Our client is also considering the following additional matter, which may give rise to further grounds for challenge.

50. The Council's assessment that the development would not have an adverse effect on the integrity of the Solent and Southampton SPA by reason of the loss of functionally-linked land uses by curlews is predicated on the provision of 6.4 hectares of compensatory habitat.

51. At the Committee meeting on 25 April 2023, it was suggested by officers that Councillors could rely on this habitat as the developer would be bound by an obligation:

> *"To use reasonable endeavours to agree the transfer of the bird conservation area to the Hampshire and Isle of Wight Wildlife Trust or the RSPB or any other party, as may be agreed with the Council, that is suitable for the management and maintenance of the bird conservation area and thereafter complete the bird conservation area transfer as soon as practical – as soon as reasonably practical. That is then linked to a monitoring fee which would be given to that party to monitor and maintain that land in perpetuity."*

52. On its face, this does not meet the test for being relied upon in concluding beyond reasonable scientific doubt that there would be no adverse effects upon the SPA. Unless or until it is demonstrated that the correct approach in law was applied, and that the mechanism securing the compensation meets the test of being beyond reasonable scientific doubt, our client will challenge the Decision on this (fourth) ground also.

Requests for information

53. We refer to paragraphs 30-34 of our letter of 9 November 2021 regarding the applicable legal principles relating to the duty of candour and disclosure.

54. In that letter we requested the provision of any and all documents (including (without prejudice to the foregoing), letters, faxes, emails, memos, and file notes) pertaining:

    a. To Cllr Lilley's involvement in determining the application.

    b. To Cllr Price's involvement in determining the application.

    c. To the procedure to be adopted at the Committee Meeting.

    d. To Cllr Brodie's involvement (in any way) with the application, including (without prejudice to the generality of the foregoing) any communications between Cllr Brodie and the Applicant for planning permission and/or Chris Potter.

    e. Mr Chris Potter's involvement (in any way) with the application including any correspondence between Cllr Brodie and Chris Potter.

    f. To the determination of the application in any way.

55. This request is repeated to include all relevant documents up until the present date, and you are requested to provide these documents (which you have ample opportunity to gather) not later than 4pm on 11 September 2023.

56. Moreover, in the light of the foregoing, you are requested to provide not later than 48 hours from the date of this letter; that is by 4pm on 31 August 2023:

    a. The completed section 106 agreement relied upon by the Council in granting permission; and

    b. Any report or work product arising from the alleged "review of junction improvement options for junctions within the Ryde East area".

Action the Council is expected to take

57. The Council is requested to consent to judgment and agree to the decision being quashed. The Council is also requested to pay our Client's costs relating to making the application for judicial review.

ADR proposals

58. Although we are open to discussions that may narrow the issues and/or avert a legal claim, we do not consider this is a case that is suitable for ADR.

Aarhus Convention claim

59. The proposed claim is an environmental claim that falls within the scope of the Aarhus Convention. The case law is clear that "environment" should be given as broad a definition as possible and that article 9(3) of the Aarhus Convention includes challenges to planning decisions: see *Venn v SSCLG* [2014] EWCA Civ 1539.

Address for reply and service of documents

60. Richard Buxton Solicitors, FAO. Susy Gandy and Paul Wyard, Dale's Brewery, Gwydir Street, Cambridge, CB1 2LJ.

61. Email addresses: sgandy@richardbuxton.co.uk and pwyard@richardbuxton.co.uk.

62. We accept service to the postal address at para. 60 above, and to the email addresses at para 61 above. Service by email is conditional on both email addresses being used.

Date for reply

63. You are requested to reply to the substance of our client's proposed claim as set out at paragraph 5-52 above not later than fourteen days from the date of this letter, that is, by 4pm on 12 September 2023, indicating that you will consent to judgment should our client issue proceedings.

Yours faithfully

RICHARD BUXTON SOLICITORS

cc. Westridge Village Ltd (by recorded delivery to (**i**) c/o Mr D Long, Red Barn, Cheeks Farm, Merstone Lane, Merstone, Isle of Wight, PO30 3DE, **and** (**ii**) 37 Commercial Road, Poole, Dorset, United Kingdom, BH14 0HU)