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Fews Lane Consortium Limited

Date:14th May 2021

Dear Sirs

Proposed claim for judicial review in relation to prospective planning permission 20/02453/s73 and 20/05101/FUL

We write in relation to your pre-action protocol letter dated 30th April 2021 in which you indicate your intention to challenge by way of judicial review the Council's decision to entertain planning applications under ref 20/02453/s73 and 20/05101/FUL

The Prospective Claimant

1 The Prospective Claimant would be Fews Lane Consortium Limited.

The Prospective Defendant

2 The Prospective Defendant is South Cambridgeshire District Council.

Correspondence should be addressed to:
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The Solicitor dealing with the conduct of this matter is Stephen Reid.

Response to the claim

3 The first matter that I would draw to your attention is that the application under reference 20/05101/FUL is now the subject of an appeal (for non-determination) and whilst the Council is waiting to be advised as to the allocation of an Appeal Inspector the Council's position is that this application is no longer within its jurisdiction as Local Planning

Authority and therefore it is intended that this response letter will only address matters in relation to the application under planning reference 20/02453/s73.

4. You will recall that Fews Lane Consortium Limited had previously issued a Pre Action Protocol letter dated 27th July 2020 in relation to the application under 20/02453/s73 and where a response was sent dated 18th August 2020 and therefore in the first part of this response I intend to again address a number of points as set out in that response.

5 In the second part of this response I intend to then seek to address matters which have arisen post 18th August where I believe them to be relevant.

6 However, before moving to the first part of the response there is an initial point that I would like to highlight namely that the Council received an email from Mr Caddoo dated 21st August 2020 in which he asked the Council to accept the email as "..confirmation on behalf of the applicant, Landbrook Homes Ltd, that the S.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL…"

FIRST PART

7 Your claim challenges a section 73 application under planning reference 20/02453/s73 (the "s.73 Application") in relation to the grant of planning permission for the erection of 2 dwellings with parking.

8 The principles on which a claim for judicial review of a decision to grant planning permission may be brought have been shortly stated by Lord Justice Lindblom in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314 at paragraph 42. We do not set out these fundamental principles in full in this letter but they are referred to where appropriate below.

9 While your letter of 30th April 2021 makes various assertions by way of complaint about the omission of visibility splays it is felt the Consortium has failed to substantiate how an alleged error of law will arise.

10 The Council has noted earlier complaints on a similar matter in relation to a planning application for development in Waterbeach. In response to that complaint, the Council sought advice from Counsel and responded to the consortium. The Council's advice from Charles Streeton of Counsel on that matter was provided to the Consortium.

11 Turning to the points made at paragraph 10 of your letter dated 27th July 2020, and which is set out below for ease of reference.

"..(10) The question of whether or not visibility splays are required in order for the proposed development to be acceptable in planning terms is a matter of planning judgment that is within the purview of the decision maker. However, pursuant to section 327A of the 1990 Act, the Council does not have the discretion to decide that it will entertain an application that fails to comply with a requirement as to the form or content of any document which accompanies the application…"

12 The basis of the Consortium's proposed claim is an allegation that any decision to grant planning permission for the Development pursuant to the S.73 Application would not accord with the requirements imposed by the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the **2015 Order**") and thus would also be in breach of section 327A of the Town and Country Planning Act 1990 ("the **1990 Act**"). It appears alleged that the land outlined in red on the location plan for

S/0277/19/FL does not include all of the land necessary to carry out the proposed development as it does not include all of the land required for visibility splays.

13 In relation to a similar point raised by the Consortium albeit on a completely different site and in a completely different location Charles Streeten of FTB has advised that for the reasons set out further below he was of the opinion that:

a The Council granting planning permission for development which relies on adopted highway land outside the red line site boundary as part of the visibility splays is not in breach of the requirements of the 2015 Order.

b Provided land on which any operational development will take place is within the red line boundary, and the remaining land is adopted highway, Mr Streeten is of the view that the requirements of the 2015 Order will be complied with and it is not necessary to include in the red line boundary all of the land required as visibility splay where such land is part of the adopted highway.

c Even if he is wrong in relation to the above, the prospect of a claim for judicial review succeeding in the case where he was asked to advise was low. Given the similarities of that matter and the current complaint, the Council is of a similar opinion in relation to the S.73 Application not least having regard to the confirmation referred to at paragraph numbered 6 above.

14 **LAW**

The Statutory Scheme

14.1 The 2015 Order is made, inter alia, pursuant to section 59 of the 1990 Act. It dictates the procedure by which planning applications must be determined.

14.2 Section 327A of the 1990 Act states:

"(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—(a) the form or manner in which the application must be made; (b) the form or content of any document or other matter which accompanies the application.

(2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

14.3 A local planning authority should not entertain an application for planning permission unless it complies with the requirements of the 2015 Order but please note the comments under paragraphs numbered 12 and 22 below.

15 **Non-Compliance with the DMOP**

15.1 It should, however, be noted that notwithstanding the apparently strict wording of section 327A, the High Court has made clear that a breach of the requirements in the 2015 Order does not, necessarily, mean that a grant of planning permission will be quashed (see R (Bishop) v Westminster CC [2017] EWHC 3102 (Admin) at para. 23). Rather, the court retains its discretion regarding whether or not to quash a planning permission granted in breach of the 2015 Order. Indeed, in a case where it is 'highly likely' that the outcome would not have been substantially different absent the error, the court is under a duty pursuant to section 31 of the Senior Courts Act 1981 (as amended) to refuse both permission for judicial review and relief.

16 **Article 7 of the 2015 Order**

16.1 Article 7 of the 2015 Order is entitled "General requirements: applications for planning permission including outline planning permission". Article 7(1)(b) requires that an application for planning permission must "include the particulars specified or referred to in the form". It should also be noted that Article 7(1)(c) requires the application be accompanied inter alia by (i) a plan which identifies the land to which the application relates; (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application.

16.2 The section of the application form to which the Consortium referred to in the letter of 27th July 2020 reads as follows:

"The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

17 This is also reflected in the Government's Planning Practice Guidance ("**PPG**") which says at reference ID 14-024-20140306:

"The application site should be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (eg land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around buildings). A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site."

18 In interpreting these words Mr Streeten has advised that it is important not to lose sight of their context. They have not been drafted as would a policy, still less with the care given to the drafting of legislation. In both cases are intended as practical guidance to those completing an application for planning permission. They should therefore be read with a considerable degree of common sense and not subjected to exegetical legal analysis. If authority is required for this proposition, it is to be found in R (Solo Retail Limited) v Torridge DC [2019] EWHC 489 (Admin) at para. 33.

ANALYSIS

19 The particular point at issue is the location of any visibility splays required to ensure the access to the Development is safe. In relation to the visibility splays for the junction of Fews Lane and High Street Longstanton all the land outside the red line boundary covered by those visibility splays is within the existing adopted highway. The Highway Authority officers have confirmed their view that no other land is required to secure the necessary visibility for this development.

20 The issue, therefore, is whether planning permission for the Development can be granted pursuant to the S.73 Application, notwithstanding that an area included within the visibility splay is on adopted highway outside the red line boundary. The view of the Council is that it can:

20.1 Firstly, the text of both the application form and the guidance refers to "all land necessary to carry out the proposed development". Mr Streeten's has expressed a view that the word "development" is of central importance. If land is not being developed, it does not need to be included within the red line boundary. Thus, although land that is not adopted highway such that its use needs to be changed to be used as a visibility splay may need to be shown within the red line

boundary. Where, however, the land used for the visibility splay is already adopted highway, and no operational development is required, it does not need to be included within the red line.

20.2 Secondly, Mr Streeten has advised that an over literal reading of the application form and PPG would create absurd results. As I have pointed out to you in the past, both refer to car parking and open areas around buildings. If, however, the development proposed does not include any car parking it plainly would not be invalid if the red line on the location plan did not show land for car parking which is not being provided or required. Similarly, if the application was such that the footprint of a proposed building meant there were to be no open areas around it, the effect of the application form is clearly not intended to be that the application is invalid because it fails to show any open areas. On the contrary, as both the form and the PPG make clear, the references given are mere examples, and are not intended to be prescriptive or exhaustive. Ultimately, what land is necessary to carry out the proposed development will be a matter of judgement for the local planning authority to determine on the facts of any given case.

21 Mr Streeten, as a caveat to the above (and leaving aside the questions which arise where works are carried out pursuant to an agreement under section 278 of the Highways Act 1980), advised in relation to the other matter that if operational development such as engineering works are required to provide or alter an access, this may amount to development and should, therefore, be included within the red line boundary.

22 Applying these principles, Mr Streeten expressed an opinion as set out below (in the case where he was asked to advise) :

22.1 Provided that all of the relevant land upon which works to create the access for the Development fall within the red line boundary, the Council would be entitled to conclude that the land necessary to carry out the proposed development does not include land falling within the visibility splays but outwith the red line boundary, which is adopted highway.

22.2 Provided that the red line boundary includes the land upon which operational development is required to provide the access, it is not necessary to include within the red line boundary other land which is adopted highway and forms part of the relevant visibility splay.

23 In the other case, Mr Streeten advised that even if he is wrong, he is of the view that the prospects of bringing a successful claim for judicial review in that case would be low and he cannot see what prejudice could be said to result from not including adopted highway land forming part of the visibility splay within the red line boundary for the development. His view was that he felt a claim for judicial review would be likely to be refused permission and/or relief pursuant to section 31 of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different absent any error of law identified. The same point is considered by the Council to apply here.

24 In any event, even if (which is denied) there was some error in the validation process, the Court has a discretion whether or not to quash a grant of planning permission, depending on a variety of factors, including:

- the consequences of non-compliance,
- the nature of the failure,
- the identity of the applicant for relief,

- the lapse of time ,and
- the effect on other parties

25 The Consortium have (in the other case where Mr Streeten has advised) suggested that:

"… It is difficult to see how anyone's interests could be prejudiced by the Council insisting that the entire 43 metre x 2.4 metre visibility splays are included within the red line boundaries of the application site, the appropriate notices being served upon the owners of land within the application site, and the appropriate ownership certificate being filed by the applicant…."
It is the Council's view that this suggestion as to extent of the red line boundaries is not the relevant legal test as to whether an application is valid

SECOND PART

26 Officers are of the view that the change sought under the s.73 Application makes no material changes to the actual development proposed and the purpose of the new condition is solely to make detailed provision for construction traffic.

27 Officers are mindful that an approval of a s.73 application results in a new planning permission and not an amendment of the original. Further, whilst the guidance quoted in paragraph 21 of the Officer's Report presented to Planning Committee in [January 2021] is correct to limit attention to conditions that are the subject of the application, officers are also mindful of the need to consider whether any material change of policy or other circumstances which might require a re-assessment of other conditions or, indeed, the development as a whole, see R v Stefanou v Westminster City Council & Ano [2107] EWHC 908 (Admin) at [90].

28 Officers are mindful of the complaints which refer to the inadequacies of the site plan supplied with the original application – but it is submitted it is too late to challenge the validity of the permission pursuant to that original application. Fews Lane Consortium Limited at least at one stage sought to suggest a plan is required by reference to the article 7(1)(b) – which requires particulars to be included as specified in the application form but as a simple matter of statutory interpretation the Council's position is that cannot include a plan which is dealt with separately and expressly by (c).

29 It follows that officers do not consider it is necessary to request a further plan, as indicated in paragraph 3 of the response dated 18th August 2020 but please note reference to confirmation under paragraph numbered 6 above

30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

32 Please correct me if I am wrong but isn't it the contention of Fews Lane Consortium Limited that such land should still have been shown as included within the application site by reference to the statutory provision for operational development on highway land. If that is the contention, then it is the Council's position that any such contention misses

the point as there is no operational development proposed for these visibility splay areas and as it is highway land its use as visibility splays involves no change of use.

33 In his letter Mr Streeten dated 20th July 2020 covered this particular point at paragraph 16(c). With respect to subsequent arguments made by Fews Lane Consortium (e.g. as developed at paragraphs 33-34 of your letter of 8th September 2020) it is the Council's position that these ignore the distinction between operational development on highway land and change of use.

34 Given, as noted above, there is no express requirement for a site location plan (identifying the land to which section 73 application relates) and the proposed change of one condition does not relate to visibility splays, it is the Council's position that any challenge in relation to the s.73 Application is one which is unlikely to succeed

35 Notwithstanding what Fews Lane say as to the apparent stringent terms of section 327A of the 1990 Act, the Court will still have a discretion as to whether or not to quash. Mr Streeten deals with this in his Advice (at paragraph 7), and I would add to the case references made by Mr Streeten reference to the case of Maximus Networks Ltd v SSCLG and Southwark LBC and LH Hammersmith and Fulham [2018] EWHC 1933 (Admin) at [24-26]

36 Whilst in paragraph (18) of your letter dated 30th April 2021 you have said as set out below it is the Council's position that when a fresh report is taken to Planning Committee as to the sS.73 Application it will address the extent of the red line for the purposes of the s.73 Application and the need for any visibility splays and where they are located if outside of the red line

"(18) However, in this case, the prospective defendant has decided to entertain purported planning applications where that land necessary for visibility splays has been specifically excluded from the application site in contravention of the requirements of the 2015 Order. This effectively prevents a condition for adequate visibility splays from being attached to any permission granted…"

37 Officers are satisfied that the Application under reference S/0277/19/FL and the associated committee report considered representations concerning the adequacy of the access to the plot, proposed improvements including the widening of the Fews Lane access, visibility splays and the extent of the red line. Fews Lane Consortium are asked to acknowledge that the permission granted pursuant to that application can no longer be judicially challenged.

38 Notwithstanding that the s.73 Application seeks to amend only the Traffic Management Plan, the officer report to be presented to Planning Committee before determination of the S.73 Application will consider the representations of Fews Lane Consortium Limited , the necessity and reasonableness of requiring upgrades to Fews Lane through the S73 Application including the provision of visibility splays.

39 Officers of the Council are satisfied that as the local Planning Authority it does have jurisdiction to entertain the S73 Application and for all of the reasons set out or referred to above, the Council will resist any application for judicial review.

40 The Council has noted that the Consortium has not indicated if it would prefer to resolve the dispute without the need for legal proceedings or whether the Consortium would agree to participate in an appropriate form of ADR. In the other case referred to above, the Consortium were sent a copy of the advice from Mr Streeten and the Consortium were invited to take their own advice from counsel so that any points in such an advice could be put to Mr Streeten for him to review. It is not clear if such advice has been

sought by the Consortium, notwithstanding the Council's invitation and in these circumstances the Council reserves the right to bring to the Court's attention the invitation which was made in such regard . The Council is also mindful that in a conversation on 20th April 2021 Mr Fulton said that he had received written "legal advice" and which "legal advice" he said he would share it with Council the same day but a copy of that "legal advice" has never been forthcoming.

41 Finally, the Council agrees that the applicant for the S.73 Application , Landbrook Homes Ltd , would be an interested party in respect of any claim.

Yours faithfully

Stephen Reid
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