
South Oxfordshire District Council
135 Eastern Avenue
Milton Park
Milton
OX14 4S

Attn.: Head of Legal Services (copy by email legal@southandvale.gov.uk)
(Copy to Head of Planning A Duffield)

Your ref: P15/S2946/FUL

4 April 2016

**PRE-ACTION PROTOCOL LETTER
THIS LETTER REQUIRES YOUR URGENT ATTENTION**

Dear Sirs

1. This is a letter before action sent in accordance with the pre-action protocol for judicial review.

Claimant

2. We are instructed by Goring-on-Thames Parish Council.

Proposed Defendant

3. South Oxfordshire District Council.

Decision to be Challenged

4. The decision of South Oxfordshire Council ("the Council") to grant planning permission for a hydroelectricity plant comprising partial demolition of the existing weir at Goring Lock for a distance of approximately 18m, and the replacement of the weir with three Archimedes screws and associated housing for generators, controls equipment and 2.1m wide fish pass, eel pass and 3m wide flood control gate ("the Decision") (application ref: P15/S2946/FUL).

Details of the Matter Being Challenged

5. The application was granted on 9 March 2016.

Factual Background

6. Goring Weir is located on the River Thames situated between the historic villages of Goring-on-Thames and Streatley. The development site is located in the Thames river corridor along the route of the Thames footpath, which runs along the eastern bank of the river from the south up to the bridge (adjacent to the weir and the lock) and then along the western bank of the river to the north of the Lock House. Both the Goring Bank and the Streatley Bank are within Conservation Areas. The weir falls within the boundary of the Chiltern Hills AONB and is adjacent and has visual intervisibility with and North Wessex Downs AONB.
7. An initial planning application was made in 2012 but was withdrawn on 25 February 2012 following objection from the Environment Agency on the basis, *inter alia*, that the Flood Risk Assessment was inadequate.
8. A fresh application was made on 22nd September 2015 and was subsequently amended to address concerns raised by the Environment Agency in relation, for example, to the specifics of the proposed fish and eel passes.
9. The proposal as approved consists of the demolition of 18m of the weir at Goring Lock and its replacement with three Archimedes screws, each of which is 3.5m in diameter along with a 2.1m wide fish pass a new eel pass and a new 3m wide flood gate. A control hut housing generating and other associated equipment will also be constructed next to the existing Lock House. Concrete works are to be left exposed and all metalwork will be painted 'Environment Agency' Grey.
10. The applicant submitted a noise impact assessment dated 2012 with the proposal which accepted that mechanical noise is substantially different from the noise of running water and therefore suggested the positioning of acoustic covers over all of the drive chains so as to reduce the audibility of the development to acceptable levels at surrounding residential developments.
11. A number of objections were made to the proposal including by the Claimant and by the Streatley Flood Forum which was set up following serious flooding in the area in 2012, 2013 and 2014. The Environment Agency responded to the consultation but confirmed they were content with the supposed update (consisting of a letter explaining that the repositioning of the control hut did not affect its validity to the 2010 Flood Impact Assessment). No reference was made by either the EA or the Defendant to the serious flooding in 2012, 2013 and 2014.
12. On 9 March 2016 The Defendant's Planning Committee considered the application and granted planning permission.

Ground 1

13. The Defendant has confirmed that it did not adopt a screening opinion in relation to the Development.
14. Regulation 7 of the EIA regulations states that where an application for planning permission for development falling within Schedule 1 or Schedule 2 to the

regulations is before a local planning authority, but has not been the subject of a screening opinion, the authority shall, in accordance with Regulation 5(5), adopt a screening opinion.

15. Regulation 2(1) defines Schedule 2 development, under (a), as development of a description mentioned in Column 1 of Schedule 2 where any part of that development is to be carried out in a sensitive area. Column 1 includes under 3(h) installations for hydroelectric energy production. Although the application states the installation will generate 170kw of power and this falls below the 0.5megawatt threshold found in schedule II to the regulation. The Council officer confirms she did not screen the application because she considered it fell below this threshold. However 0.5mw threshold is not the full test for determining if the application needed to be screened. A sensitive area is defined as including—under (f)—an area of outstanding natural beauty designated as such by an order made by Natural England under section 82(1) of CROW and all applications in a sensitive area regardless of threshold need to be screened. The development falls within the two AONBs referred above.
16. Consequently the decision to grant planning permission without adopting a screening opinion was therefore in breach of the regulations and unlawful.

Ground 2

17. Ground two rests on two errors. The first is that the conclusions that the hydropower scheme would cause visual harm to the Goring and Streatley Conservation areas but have no negative impact on the AONB are irreconcilable. The decision was therefore irrational. The second is that the decision fails to have regard to the visual harm to the AONBs.

Visual Harm to the AONB

18. The Officer's Report ("OR") concludes that the hydropower scheme "is not considered to be harmful to the special landscape character of the Area of Outstanding Natural Beauty or the river corridor". This is adopted in the reasons for the decision at page 7. This accords with the statement at OR 6.3vi that "notwithstanding the landscape importance of the AONB the special landscape character of the river corridor, the proposed development... is not considered to have an adverse effect on its visual appearance over and above that of the existing weir." Nevertheless, paragraph 6.5ii makes clear that the site is visible from the Streatley and Goring Bridge from on the river and from the riverside areas to the north in neighbouring Streatley which "does not easily lend itself to discreetly housing the generators, as this part of the river is open in character and prominent in views from the river crossing". OR 6.5iii therefore states that, "ultimately there will be some alteration to the character of this part of the river and the contribution it makes to the Conservation Area". The report concludes that the impact on the visual amenity of the Conservation Areas constitutes "less than substantial harm".
19. It is, to say the least, extremely surprising that the report should find harm to the character of the historic area protected by the conservation area designation but not to the character of the landscape AONB.

20. There does not appear to be a formal conservation area appraisal for the designated Goring-on-Thames Conservation Area, but the Council is asked to confirm this (see request for further information below). However, the recently adopted Streatley Conservation Area Appraisal explicitly states at page 41 that “the conservation area makes an important contribution to the cultural and historic aspects of the natural beauty of the [North Wessex Downs] AONB and as such should be conserved and enhanced”. In the absence of a formal conservation area appraisal for the Goring-on-Thames CA, it is reasonable to assume that similar considerations arise in relation the contribution Goring-on-Thames conservation area makes to the Chiltern Hills AONB on the Goring side of the river.
21. In light of the fact that the Streatley Conservation Appraisal states explicitly that the Conservation Area (which it is acknowledged would be harmed) contributes to the natural beauty of the North Wessex Downs AONB it was irrational (in the Wednesbury sense) to find harm to the conservation area but not to the AONB. The two findings are logically irreconcilable.

Other Harm to the AONB

22. The Officer’s Report considers noise impact only from the perspective of the residential amenity of neighbouring dwellings (paragraph 6.7ii). However, the AONB Management Plan for the Chilterns Hills is explicit (page 23 point 29) that loss of tranquillity (which includes peace and quiet) will constitute harm to the AONB. The Defendant has failed to have regard to the fact that the noise generated by the development will harm the tranquillity (and therefore the character) of the AONB. This is a relevant material consideration to which the Defendant failed to have regard.

Statutory Duty and the NPPF

23. In doing so the Defendant was in breach of the statutory duty pursuant to section 85 of the Countryside and Rights of Way (‘CROW’) Act 2000 to have regard to the purposes of conserving and enhancing the landscape and scenic beauty of the Chiltern Hills and North Wessex Downs AONBs. Paragraph 115 of the National Planning Policy Framework (NPPF) requires ‘great weight’ to be given to conserving landscape and scenic beauty in AONB which have the highest status of protection in relation to landscape and scenic beauty. In erroneously determining that the proposal would cause no harm to the AONB the Defendant necessarily failed to give great weight to that harm as required by national policy.
24. The Defendant therefore erred in finding that there had been no harm to the Chiltern Hills and North Wessex Downs AONBs and in doing so failed to have regard to the policy contained in paragraph 115 NPPF. The Defendant’s decision to grant planning permission breached the statutory duty imposed by s 85 CROW and was unlawful.

Ground 3

25. In order to give effect to the Statutory Duty under s 66(1) of section 72(1) of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 (LBCAA) decision makers must give "considerable importance and weight" to preserving and enhancing listed buildings and their settings. There is a strong presumption against granting planning permission for development which would cause harm to a listed building (including its setting) or a conservation area (*East Northamptonshire v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137 per Sullivan LJ at [29] and [23].)
26. Nowhere in the OR, the Conservation Officer's representations, nor the reasons for the decision refer to the statutory duty to under s 72(1) of the LBCAA to pay special attention to the desirability of preserving or enhancing the character or appearance of the Goring and/or Streatley Conservation Areas.
27. Although the recent Court of Appeal decision in *Secretary of State for Communities and Local Government v Mordue* [2015] EWCA Civ 1243 has made clear that the burden of proof is on the Claimant to show that the local planning authority failed to apply the statutory presumption under s 66(1) and the policy requirement in NPPF paragraph 132¹, nevertheless, the decisions in *Barnwell Manor* and *Forge Field* make clear that a decision maker must give 'considerable importance and weight' to any harm (even that which is less than substantial) to a heritage asset. The OR does not take that approach. Rather it appears to treat harm to the conservation area as a matter to be weighed in the planning balance without any special consideration. This is the wrong approach and renders the decision unlawful.
28. Moreover, there are a number of listed buildings in the vicinity of the development, for example building 1 on Appendix IV the Streatley Conservation Area Appraisal is the grade II listed Swan Hotel. The Defendant does not appear to have paid any, let alone special, regard to the desirability of preserving this building's setting. The decision was therefore also in breach of the statutory duty imposed s 66(1) of the LBCA Act 1990.²

Ground 4

29. The Defendant did not seek its own expert hydrological advice but relied exclusively on the advice received from the Environment Agency (the EA), which in turn relies on the developer's 2010 Flood Risk Assessment V2. The EA's reliance on the 2010 FRA V2 produced by Peter Brett Associates (PBA) fails to take into account the effects from recent flood events — information which plainly would be known to the EA in its role as the relevant statutory advisor and also because it is the owner of the weir. In fact the EA has repeatedly issued flood warnings for Streatley and Goring, most recently in January 2014 for two periods:

¹ The same approach will apply to the s 72.

² The Claimant's legal advisors are presently researching the full picture in relation to designated heritage assets on both sides of the River Thames which is made more difficult by the lack of a published Conservation Area Appraisal for the Goring-on-Thames Conservation Area and information will be requested in the PAP letter; the foregoing ground of claim is without prejudice to additional heritage assets which have not be considered by the Defendant in the OR.

there was a five-day alert in effect between 7 and 12 January and a further 9 day alert in effect between 8 and 17 January. Previously in 2012 according to information publicly available.

30. The Defendant for its part also failed to grapple with the issues raised by objectors (in particular but not exclusively the Streatley Flood Forum) which noted in its letter dated 11 October 2015 *inter alia*

“The Flood Risk Assessment is based on the South Oxfordshire/Vale of White Horse District Council Flood Risk Assessment, however nearly all of the flood plain and the properties at risk are in West Berkshire and we note that the [FRA] does not cover this point

The [FRA] submitted is dated 2010 and takes no account of the recent floods in the winters of 2012/13 and 2013/14. The assessment only refers to a 1 in 100 year flood; it needs to cover all events. The flood events experienced in 1999, 2000, 2003, 2007, 2012/13 and 2013/14 have all been different which makes reliable modelling difficult.”

31. It is therefore logically impossible that the Defendant had proper regard to material considerations relating to flood risk and the NPPF duties when the FRA before the decision-maker was six years out of date and the so-called update relied on by the EA failed to deal with recent flood events. The Defendant was simply not in a position to consider the objections raised.
32. This failure is particularly egregious given that EA's own consultation response was seriously flawed, given the agency's reliance on the 2010 Flood Risk Assessment the lack of a competent update to deal with the recent and repeated flood events and the failure to give sufficient reasons how the conditions it required justify departing from its previous finding that the 2010 Flood Risk Assessment was inadequate.
33. Crucially the EA consultation response fails to make any reference to the validity of the assumptions in the flood risk assessment in relation to serious recent flood events identified by the Streatley Flood Forum to have taken place since 2010 and which plainly would be information well known to the EA in its capacity as statutory advisor who provides flood alerts. It also fails to deal with the Streatley Flood Forum's concerns that the modelling only addresses part of the flood plain and failed to consider the risk of flooding in West Berkshire.
34. The only document known to the Claimant dated after 2010 is the so-called FRA update. In reality this is a cover letter from the developer dated December 2015; it cannot rationally be said to be an update to the 2010 FRA since all the letter deals with is the repositioning of the building housing the generator equipment and unsupported claims that the changes to the scheme design would not exacerbate the flood risk and asserting that the introduction of the NPPF and PPG did not affect the conclusions of the 2010 FRA. There does not appear, as far as the Claimant is aware, to have been any further modelling work done post the floods in 2012, 2013 and 2014 to provide a credible update to the 2010 FRA.
35. Absent some indication that there has been statutory consideration of the recent events the 2010 FRA is wholly inadequate. The Decision was therefore based

upon a materially flawed FRA, failed to have proper regard to objections and the flawed document was unlawful.

36. If proceedings are lodged, the Claimant intends to name the EA as an Interested Party and seeks disclosure from it in this letter, see below. Depending on its response, and the further information, the Claimant may include the EA as a second Defendant given the egregious nature of its failings and the Council's reliance on the flawed EA advice.

Details of Legal Advisors Dealing with this Claim

Counsel

Details of Interested Party

39. Goring and Streatley Community Energy Ltd, Attn: Lisa Ashford, Yarnton House, High Street, Streatley, Berkshire RG8 9HY
40. Environment Agency, Attn.: David Griggs Howbery Park Benson Lane Wallingford Oxfordshire OX10 8BD

Details of Information Sought

41. You are required to make full and frank disclosure in judicial review proceedings.
42. We therefore require full information on how the Council has dealt with each of the points raised above.

Further information required

43. In relation to the EA, you are requested to provide the following information:
- i) A list of all flood alerts issued for the River Thames at Goring and Streatley from 2010 to present
 - ii) Copies of all information relied on in relation to the letter dated 18 February 2016 and copies of all information relied on in relation to the previous comments referred to in the latter
 - iii) Any information the EA would rely on to defend the claim that its advice was materially flawed in the event the EA is a defendant in these proceedings
44. We believe that the grounds included in this letter are more than sufficient to justify the quashing of the Decision, but we reserve our position in the light of your response and any document you may provide.

45. If there is any disagreement with the facts stated in the draft statement of facts and grounds, please provide any relevant documents that the Council and/or the EA relies on in this regard.

What the Council is requested to do

1. The Council is asked to agree to submit to judgment on the bringing of proceedings. If the Council disagrees, please explain why.
2. The Council is also asked to pay our legal costs.

Other applications

46. If the claim proceeds the claimant will apply for a protective costs order pursuant to CPR 45.43 on the basis that the claim is an environmental matter. *Venn v Sec State CLG* [2015] 1 WLR 2328. If you disagree this is an Aarhus matter or the making of a PCO please give your reasons,

Address for Reply and Service of Court Documents

cc Goring and Streatley Community Energy Ltd (at address above)
Environment Agency (at address above) (also by email)