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Your Ref: 21/01935/CREG3

Our Ref: RGA/LEL/00239524/2

Date: 26 October 2021

Attn: Nazeya Hussain, Executive Director, Place
Tim Naylor, Assistant Director, Strategic
Planning and Infrastructure
Barry Lomax, Acting Head, Development
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By post and email: nazeya.hussain@kingston.gov.uk;
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LETTER BEFORE CLAIM

Dear Royal Borough of Kingston upon Thames

Proposed claim for judicial review in respect of proposed grant of planning permission for demolition of the former Kingfisher Leisure Centre building under reference 21/01935/CREG3

We write this letter in accordance with the Pre-Action Protocol for Judicial Review.

1. The Defendant

The proposed defendant is the Royal Borough of Kingston upon Thames (the "Council").

2. The Claimant

The proposed claimant is Caroline Shah, a local resident of Kingston upon Thames.

3. Reference details

The Council's planning application reference is 21/01935/CREG3.

Our case reference is: RGA/00239524/2

4. The details of the matter being challenged

The proposed grant of planning permission by the Council following its Planning Committee's resolution to grant dated 1 September 2021 for the demolition of the Kingfisher Leisure Centre (the "Leisure Centre").

5. Details of any Interested Parties

The owner of the Leisure Centre is the Council. We do not consider that there are any other interested parties save for the Council in its capacity as landowner.

6. The issue

Factual background

On 13 May 2021, the Council's Response and Recovery Committee "*considered a report that set out the strategic case for development of key Council owned sites including the existing Kingfisher Leisure Centre site*" and resolved to delegate authority to "*the Executive Director of Corporate and Communities, in consultation with the Leader and Portfolio Holder for Finance and Commissioning, to approve any procurement strategies, in particular the replacement Kingfisher Leisure Centre, valued above £5m required to deliver the ambitions set out in this report on the recommendation of the Commissioning Governance Board*"¹.

On 16 June 2021, the Council submitted an application to itself for the demolition of the Leisure Centre. Such application was considered by the Council's Planning Committee on 1 September 2021, which resolved to grant the application. As yet, no decision notice has been issued following the Planning Committee's resolution and planning permission is therefore yet to be formally granted.

We are not aware of any other resolution or decision of the Council in respect of the redevelopment of the Leisure Centre. In particular, we are not aware of any resolution to submit a planning application for the demolition of the Leisure Centre. The 13 May resolution of the Response and Recovery Committee was to approve procurement strategies for the replacement of the Leisure Centre and did not contain any resolution to seek its demolition. Our client's position as regards the lawfulness of the submission of the planning application is reserved, but any illegality in this regard is not the subject of this letter.

¹ As reported in the committee minutes: <https://moderngov.kingston.gov.uk/mgAi.aspx?ID=43360>.

Ground 1: officer's report significantly misled members as to the effect of the Response and Recovery Committee's resolution

Officers misled the Planning Committee as to the resolution of the Response and Recovery Committee of 13 May 2021 and in particular as to how such resolution might meet the requirements of planning policies including Policies DM24 (Core Strategy), S5 (London Plan) and K6 (KT-AAP). These policies (along with the paragraph 99 of the NPPF, which would apply to the demolition and intended redevelopment of the Leisure Centre) have overlapping requirements. They all require that in a case such as this where a sports facility is to be demolished and redeveloped, equivalent or better facilities must be provided in place of what is to be lost.

The resolution of the Response and Recovery Committee is only to delegate authority to approve procurement strategies for the redevelopment. There is no firm commitment to re-provide the Leisure Centre, and nor has the funding been secured to do so. In this regard, we note that the officer's report to the Response and Recovery Committee states at paras 17 – 29 that the project will need to be cost neutral for the Council. It follows that the redevelopment would not proceed if adequate funding could not be obtained. In these circumstances, the planning officer's report which gives "*the decision of the Council's Response and Recovery Committee to re-provide a leisure centre significant weight*" significantly misled the planning committee so as to amount to an error of law.

Ground 2: failure to set out and consider all relevant policy requirements in respect of redevelopment of sports facilities

Allied to the error identified above is the failure to set out and consider all relevant policy requirements, including NPPF para 99(b) and (c) which allows existing recreational buildings to be "built on" only where the benefits of what is to be provided in place of the existing has been considered against what is to be lost. There is no consideration whatsoever in the officer's report of what is intended to be developed in place of what is existing – there is not even any firm proposal and certainly no planning application for any redevelopment.

Ground 3: regard to an immaterial consideration in the form of proposed future restrictions on sale or section 106 covenants and failure to have regard to the obviously material consideration of the ability to develop the land without re-providing the Leisure Centre

The Supplemental Late Material provided in advance of the Planning Committee meeting states as follows:

"Officers consider that the scheme does meet the requirements of local Policy DM24 and Policy S5 of the London Plan 2021 for the reasons discussed in the

committee report. However should the Royal Borough of Kingston Upon Thames Council decide to sell the land in question to a third party, Officers would want to ensure that any future landowner would provide a replacement leisure facility and as such officers recommend that any potential future owner is required to enter into a legal agreement to re-provide a leisure facility.”

This discloses an error. The officers make it clear in this statement that it is important for a re-provided leisure facility to be secured in order to meet the relevant planning policy requirements. However, they then recommend that a section 106 agreement be secured only in circumstances where the land is sold. This is in circumstances where the committee, as planning decision maker, has no control over the Council as landowner's intentions in relation to the site. The Council could for example choose to develop the land without selling it. Nor does the planning committee have the ability to require any particular future section 106 covenants to be secured once planning permission has been granted. As such, the potential for conditions on sale or a section 106 agreement to be secured in future are an immaterial consideration that could not lawfully be taken into account in determining the current planning application.

The corollary to the above is that the Council has failed to take into account an obviously material consideration, namely the possibility that the Council as landowner may change its intentions for the site, and that nothing has been secured in the proposed grant of planning permission to prevent it from doing so. That means that there is a significant risk that the Council could demolish the Leisure Centre without providing any form of replacement facilities. In such circumstances, the development plan and NPPF policy requirements would not be met (even assuming there is any reasonable basis for assuming they are met currently).

Ground 4: officers significantly misled members as to the weight that could be given to the Sport England objection

The Supplemental Late Material notes the following:

“An email has been received from Sport England indicating that they wish to object to the application. As a matter of fact, Sport England is not a statutory consultee in this application as defined by Schedule 4 of the The Town and Country Planning (Development Management Procedure) (England) Order 2015. Furthermore, Officers question whether Sport England constitutes a non-statutory consultee given the circumstances of the application i.e. the decision taken by the Council to redevelop the leisure centre site coupled with the length of time the centre has been closed.”

The Planning Practice Guidance (“PPG”) advises local planning authorities to consult Sport England in cases where development “might lead to...loss of, or loss

of use for sport, of any major sports facility". The proposal will lead to the demolition of a major sports facility. Officers did not refer members to this guidance, but obliquely suggested that there might not have been any need to consult with Sport England because of *"the decision taken by the Council to redevelop the leisure centre site coupled with the length of time the centre has been closed"*. We have already referred to the issues arising from the fact that there is nothing to secure the re-provision of the lost sports facilities. In any event, neither the purported re-provision of the Leisure Centre nor the "length of time it has been closed" would mean that the guidance for consultation with Sport England would not apply. Officers misled members in suggesting that less or no weight should be given to the Sport England consultation on the basis of the guidance in the PPG and in failing to refer to the requirements of the guidance.

Furthermore, the substance of the objection was not provided to members and so could not have been taken into account by them at all. This was a failure to have regard to an obviously material consideration.

Ground 5: failure to have regard to any potential to repair and re-open the existing Leisure Centre versus the redevelopment proposal; the timescale of the redevelopment and the lack of facilities in the interim; or the possibility for a temporary re-opening to provide facilities in the interim, particularly to those with particular needs

There is no weighing up in the officer's report or elsewhere of any potential to repair and re-open the existing facility versus the redevelopment proposal, nor any consideration of the timescale of the redevelopment and the lack of facilities in the interim, nor any consideration of a temporary re-opening to provide facilities in the interim, particularly to those with particular needs. These are material considerations that should have been taken into account as part of the planning decision.²

It may be that there are groups of people with protected characteristics who are particularly and disproportionately affected by the long term closure of the Leisure Centre and the time lag and uncertainty pending any redevelopment. In resolving to grant planning permission for the demolition the Council has failed to have regard to its public sector equality duty under section 149 of the Equality Act 2010. The Council did carry out an equalities impact assessment when the Response and Recovery Committee delegated approval of procurement strategies for the redevelopment. However, that assessment looked only at the impacts of any potential redevelopment proposal and did not assess what impacts

² They are also material considerations which should be taken into account as part of any decision by the Council as landowner and as provider of local sports facilities not to repair but to demolish and rebuild the Leisure Centre. We are not aware of any formal resolution in this regard, save for the resolution of the Response and Recovery Committee dated 13 May 2020, but this was only to delegate approval of *procurement strategies* for the redevelopment.

the demolition, as well as any delay between demolition and re-provision, would have. The potential impacts of the demolition on those with protected characteristics has not been considered at all in the planning process.

Ground 6: regard to unenforceable conditions

Condition 8 purports to ensure sufficient protection of stag beetles, which are protected under the Wildlife and Countryside Act 1981 (schedule 5 and section 9(5)). The stag beetle is also a priority species under the UK list of BAP Priority Terrestrial Invertebrate Species (2007) and is afforded further protection under NPPF para 179(b). Accordingly, it is important that any condition purporting to secure adequate protection of the stag beetle is sufficiently clear and enforceable. The proposed condition as to the protection of the stag beetle is not sufficiently clear and precise to be enforceable. The reference to “further information” is vague and uncertain. At a minimum the information required should be subject to prior approval.

Proposed condition 12 is a nonsense and is unenforceable. It refers to “beneficial occupation” as a trigger in circumstances where the proposed development is demolition.

Reliance on such unenforceable conditions amounts to regard to an immaterial consideration and an error of law.

Ground 7: failure to have regard to asset of community value listing

Officers note in their report that an application to list the Leisure Centre as an asset of community value (“ACV”) was at the time pending determination. They considered the pending application to amount to a material planning consideration, but that it carried “little weight” because of their conclusion that the proposal “*would not result in the net loss of community facilities*”. Notwithstanding the issues we have identified with the suggestion that the proposal would not result in the loss of community facilities, we note furthermore that the ACV application has now been determined and the Leisure Centre was added to the Council’s list of assets of community value on 15 September 2021. This fact should be brought to members’ attention so that they may determine what weight to give to the ACV listing and whether it warrants a refusal of planning permission. Failure to bring the matter back before members would result in a failure to have regard to a material consideration.

7. Action the defendant is expected to take

We request that the Council’s officers consider the grounds of challenge identified in this letter and prepare an addendum report to the Planning Committee which

addresses the legal issues identified. They should then refer the application back to Committee for redetermination.

8. ADR proposals

We do not consider that the circumstances are amenable to ADR, but should the Council have any proposals in this regard, please let us know.

9. Information / records

To allow us to complete our investigations, and in accordance with the pre-action protocol for judicial review, as well as your ongoing duty of candour, we request that you provide us with any documentation which is relevant to the proposed claim for judicial review.

Apart from the above general request, we seek particular disclosure of:

- a) Any resolution or decision by the Council relating to the demolition and redevelopment of the Leisure Centre site apart from the resolution of the Response and Recovery Committee dated 13 May 2021, including any background documents to such resolution or decision.
- b) All background documents to the resolution of the Response and Recovery Committee on 13 May 2021 to delegate authority for approval of procurement strategies for the redevelopment of the Leisure Centre, including such documents whose inspection has until now been restricted.

The information sought above is relevant to proposed Ground 5 above and whether the Council has carried out any assessment of any potential to repair and re-open the existing Leisure Centre versus the redevelopment proposal, the timescale of the redevelopment and the lack of facilities in the interim, or the possibility for a temporary re-opening to provide facilities in the interim, particularly to those with particular needs. This information must be provided in order for the Council to comply with its duty of candour and to assist our client in having a better understanding of the merits of her case.

We refer you to paragraph 13 of the Pre-Action Protocol for Judicial Review as outlined in the Civil Procedure Rules which states:

“Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not

to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions."

We further remind you that you are under an ongoing duty of candour in these proceedings. The underlying principle concerning this duty is that a public authority's objective should not be to win at all costs, but instead should assist the court in its role of assessing the lawfulness of the decision under challenge, with a view to upholding the rule of law (*R v Lancashire County Council ex part Huddleston* [1986] 2 All ER 941.)

Any failure to provide documents and disclosure by the Defendant will be a failure to comply with duty of candour in the course of the pre-action phase of these proceedings.

10. Proposed reply date

We request a response within 14 days, i.e. by 9 November 2021.

11. Address for reply and service of court documents:

The address for service is:

Leigh Day
Panagram
27 Goswell Road
London
EC1M 7AJ

However, we encourage service by email to rgama@leighday.co.uk, copied to llehouch@leighday.co.uk.

Yours faithfully



LEIGH DAY