

The Deputy Director of Technical Services
Eden District Council,
Mansion House,
Friargate,
Penrith,
Cumbria
CA11 7YG

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0)117 939 2000
Fax: +44 (0)117 902 4400
email@burgess-salmon.com
www.burgess-salmon.com
DX 7829 Bristol

Direct Line: +44 (0)117 2740
patrick.robinson@burgess-salmon.com

Our ref: PR01/21691.3/ROBIN

Your ref: Fao Jane Langston

25 October 2018

When telephoning please ask for: Patrick Robinson

Dear Sirs

Judicial Review Pre-Action Protocol: Letter Before Claim

The Claimant

- 1 We act on behalf of Adrian and Belinda Hill of Woodside Farm, Brougham, Penrith, CA10 2AP, the proposed Claimants in this matter.
- 2 This claim relates to the actions of Eden District Council ("**the Council**") in relation to the promotion of an area for development referred to as "the Beacon Villages" through, amongst other routes, the "Penrith Strategic Masterplan: A Vision to 2015" ("**the Masterplan**"). This document was issued to the public in September 2018. It was accompanied by separate Technical Appraisal dated August 2018.
- 3 The Council is presently involved in what is described as a process of consultation ("**the Consultation**") that includes an online questionnaire. The Masterplan document is intrinsically linked to the Consultation, referring to it within the document and providing contact details for participation in it and publicising its closing date of 2 November 2018.
- 4 The preparation of this letter has been undertaken against a background of significant difficulty our clients have encountered in obtaining clear information from the Council in respect of its past and proposed actions in relation to this land. There has also been a background of the Council varying its stance on key issues at short notice and with very limited supporting explanation, including a reported recent decision not to apply for the Garden Community funding referred to below.
- 5 These factors place particular importance on those parts of this letter that seek further information from the Council and assurances as to how the Council will act from here on. Our clients inevitably at this point must reserve their rights to amend the proposed grounds of claim set out below in light of any substantive information received in response to this letter.

Details of the matter being challenged

- 6 The matter being challenged is the action being taken in reliance upon a consultation exercise presently being undertaken by the Council on the Masterplan. As the Claimants are as yet not fully appraised of the extent of those actions, what is set out below is just that which the Claimants understand to be the case, which include a present or future intent:
 - (a) (up until circa 18 October 2018) to submit an application for government funding for future development costs as part of the present Garden Community initiative of the Department of

WORK\32693997\v.3

Classification: Confidential

Also at: 6 New Street Square, London, EC4A 3BF
Tel: +44 (0)20 7685 1200 Fax: +44(0)20 7980 4966

Burgess Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol, BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burgess Salmon entities, including details of their regulators, is set out on the Burgess Salmon website at www.burgess-salmon.com.

Housing, Communities and Local Government (the Council's position being unclear thereafter) and

- (b) to advance the Masterplan in reliance upon the outcome of the Consultation exercise, including but not limited to it being included as a formal proposal within the statutory Development Plan.

Details of Interested Parties

- 7 The Judicial Review Pre-Action Protocol states that a letter before claim should normally contain the details of any potential interested parties. We are instructed that there may be a number of interested parties and that a principal landowner in the development area covered by the Masterplan, and owner of the Penrith Beacon referred to below, is understood to be the Lowther Family Estates, who may seek Interested Party status in this litigation. There may be other Interested Parties as well as this case develops.

The Issue

- 8 The Council's actions in conducting this Consultation and seeking to rely upon its findings are and will be unlawful for the reasons summarised below. For brevity and to avoid repetition, attached to this letter is an opinion ("**the Opinion**") of specialist planning Counsel, commissioned by the Claimants, that has been publicly available and, we understand, known to the Council, since the date of its production, 25 September 2018. This contains relevant background to the matter and an exposition of the legal issues behind the claim.
- 9 In summary, however, the Opinion sets out how the consultation falls so far short of the minimum requirements of a lawful consultation that it does not answer the description of a consultation at all and that the surrounding documentation, especially the current online questionnaire, wrongfully indicate that all other options for development have already been ruled out of account and that the principle of this development has already been decided.
- 10 The issue is compounded by the fact that the Masterplan itself gives the impression that it is concentrating upon what is described as the favoured option.
- 11 As the points made in the paragraphs above have not as a matter of fact occurred, it would be manifestly wrong for the Council to act as if those matters had happened. Similarly, it would be manifestly wrong to rely upon, or allow others to rely upon public responses born of any misunderstanding on those facts.
- 12 The potential for consultees to have been unfairly influenced by the manner in which the Masterplan and the Consultation have advanced arguments is added to be the fact that a very high profile aspect of the Masterplan was the development of an area called "The Beacon", a highly valued local area of woodland. During the Consultation exercise a decision was apparently taken not to pursue this development any further leaving the Council in a position where it reportedly has indicated that it will look at the Consultation responses received on matters other than The Beacon. This ignores the obvious risk that such a high profile and unpopular development suggestion would have served to deflect interest in other aspects of the Masterplan and thereby under-represented potential opposition to them.
- 13 A further potential issue relates to impartiality. Whilst it is unclear whether there will be a separate ground of challenge at this point, our Clients require transparency on the consultants employed by the Council to prepare the Masterplan and confirmation that they have not been employed by a third party in a similar capacity in respect of the site to ensure there is no risk of partiality in the advice being given to the Council in its role in the formulation of new policy on development in the area.

Proposed grounds of challenge

- 14 Any step to apply for Garden Community funding or to place any other reliance on the current Consultation exercise would be unlawful because that consultation exercise falls substantially short of the minimum legal requirements of a valid consultation exercise and is misleading as to the current status of other options for development, in that :
- (a) Such a consultation should be undertaken when proposal are still at a formative stage
 - (b) Fairness would require in this case that there is consideration of as yet un-disregarded options and
 - (c) Consultees must be given a clear and meaningful opportunity to press the case for those alternatives.
- 15 None of the requirements a to c above are met by the present Consultation or Masterplan.

Details of the action that the defendant is expected to take

- 16 For the reasons summarised above, the Claimants require the Council to take the following steps:
- (a) Undertake not to place any further reliance upon the present Consultation.
 - (b) Undertake not to make any application for Garden Community funding in respect of this land that makes any reference to this Consultation.
 - (c) Undertake not to take any steps in furtherance of the Masterplan that make any reference to the Consultation.
 - (d) Undertake to carry out and publish an independent review of the Masterplan and Consultation to advise how they can be re-cast to avoid the potential for reporting unrepresentative views as described above.

Details of any Interested Parties

- 17 A copy of this letter has been sent to Lowther Estates and Properties, Lowther Estate Office, Lowther Castle, Lowther, Penrith, CA10 2HH. If you are aware of other interested parties we ask that you inform us of their details.

ADR proposals

- 18 In view of the nature of the challenged decision, there is considered to be limited scope for ADR. However, the purpose of writing this letter before claim ahead of any further steps with the Consultation is to enable the Council to address our Clients concerns through its own internal procedures, without having to resort to litigation.

The details of any information sought and any documents that are considered relevant and necessary

- 19 We ask that you now provide us with copies of any internal communications relating to this matter (i.e. in addition to those which are available on public files) including any emails, memoranda and other recorded communication concerning the issues identified in the grounds for challenge set out above, by way of example, but not limited to:
- (a) The instructions by which the Consultation material was drafted and approved

- (b) The details of any parties involved in providing input to both the Masterplan and the Consultation, including external consultants and if so, the terms of their appointment so our Clients can satisfy themselves that no conflicts of interest arise
- (c) The process by which the potential for conflicts of interest and avoidance thereof in any advisers to the Council were managed
- (d) Any discussion on the sifting criteria to be used in consideration of development options in the Masterplan
- (e) Any previous drafts of the Masterplan and commentary upon them and subsequent revisions to be undertaken
- (f) Any material supporting or evidencing a decision by the Council to make or desist from making an application for Garden Community funding
- (g) Any other material indicating the Council's future intent in relation to potential development of this land.

20 In addition to those specific requests, we remind the Council that it has a duty of candour in judicial review proceedings and it must therefore consider whether there are any further documents or any information that should be disclosed having regard to the proposed grounds set out above.

The address for reply and service of court documents

21 The address for reply and service of court documents is as follows:

Burgess Salmon LLP
One Glass Wharf
Bristol
BS2 0ZX

Tel: 0117 307 6063
Fax: 0117 902 4400

Email: patrick.robinson@burgess-salmon.com

Please mark any correspondence for the attention of Patrick Robinson

Proposed reply date

22 In view of what we understand to be the potential imminence of any application for Garden Community funding, where there is a deadline of 9 November 2018 for such applications, the imminent closure of the Consultation, and the short time limit for making an application for permission to apply for a judicial review in a planning case, particularly if there were a need to apply for injunctive relief, we ask that :

- (a) A response is made in respect of the undertakings required by 8 November 2018, 17.00 hrs; and
- (b) The information required is supplied by 22 November, 17.00 hrs.

Planning Court

23 Under CPR 54.21(2), the proposed claim, if brought, would be a Planning Court claim as it relates to the judicial review of processes that play an important part in the eventual development of land for a

major scheme in excess of 5,500 houses. It should be classified as a significant claim as it raises important points of law regarding planning process and the fairness of public involvement.

Yours faithfully

Burges Salmon LLP

BURGES SALMON LLP

Cc

The Deputy Chief Executive
Fao Matthew Neal
Eden District Council,
Town Hall,
Corney Square,
Penrith,
Cumbria
CA11 7QF

PENRITH MASTERPLAN INADEQUATE CONSULTATION

ADVICE

Introduction

1. I am asked to advise “Keep Penrith Special” on the legality of the consultation exercise undertaken by Eden District Council (“**the Council**”) into the “*Penrith Strategic Masterplan: A Vision to 2050*” (“**the Masterplan**”).
2. For the reasons below, my view is that:
 - (i) The Masterplan falls woefully short of the legal requirements of a valid consultation process; and
 - (ii) The surrounding documentation and – in particular – the online questionnaire imply that other options have now been ruled out of account without consultation, and that the principle of development in this broad location has already been decided.

Background

3. The Masterplan was published online in September 2018¹ - not on the Council’s website, but on the website of something called “Beacon Villages”, a point I return to below.
4. The Masterplan detailed the Council’s preferred option (“**Option 4**”) which includes “5,560 new homes across the three Beacon Villages” to the north-east of Penrith.
5. Other options were considered and discarded without consultation.

¹ http://beaconvillages.co.uk/wp-content/uploads/2018/09/Penrith_Masterplan_Brochure.pdf

6. Section 16 of the Masterplan states that:

“The proposals in this Masterplan will only happen with public support so it’s vital we hear what you have to say.

[...]

Please send us your views by completing the questionnaire at www.beaconvillages.co.uk before Friday, 2 November 2018.”

7. The questionnaire comprises 14 questions. Consultees are asked:

- (i) Whether they live in Penrith or how often they visit;
- (ii) For three things they would improve “to make Penrith a better place to live, work and visit”;
- (iii) How important a number of issues are scaled from 1-10, including the “requirement for additional housing”, the “requirement for additional affordable housing” and the “requirement for housing to meet a wider range of needs”;
- (iv) Whether Penrith faces any other challenges;
- (v) To tick boxes for the steps which should be taken to “overcome” these challenges – options include encouraging housing led by community groups, building affordable homes and building more homes, supporting more self-build homes and encouraging the “development of environmentally friendly homes”;
- (vi) To tick boxes for “important considerations when locating a new settlement in Eden”
- (vii) Whether they “agree”, “partially agree”, “disagree” or are “unsure” about the “location of the proposed new settlements within Option 4.
- (viii) If concerned, to identify whether “any of the areas previously assessed should be reconsidered and assessed in more detail”;

- (ix) To tick a list of matters which are thought to be “important for creating a vibrant new community” (including “health services” and “good education facilities”);
- (x) To suggest any “any specific improvements to Penrith Town Centre”;
- (xi) To suggest uses for Beacon Hill;
- (xii) To add “any other comments”;
- (xiii) Age; and
- (xiv) Postcode.

Requirements of a lawful consultation

8. I note three particular requirements of a lawful consultation:

- (i) It must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response.²
- (ii) Fairness may – particularly (as in this case) when statute does not limit the subject of the requisite consultation to the preferred option – require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.³

² *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at §108, Lord Woolf MR, endorsed by the Supreme Court in *R. (Moseley) v Haringey LBC* [2014] 1 W.L.R. 3947 at §25.

³ *R (Montpeliers & Trevors Association) v City of Westminster* [2005] EWHC 16 (Admin) at §29, *R. (Moseley) v Haringey LBC* [2014] 1 W.L.R. 3947 at §27.

(iii) It must be made clear to consultees that they are free to “press the case” for those alternatives.⁴

9. The way in which the questions are asked in a consultation exercise may be very important. One of the principal purposes, if not the principal purpose, of any consultation exercise is to enable consultees to identify and draw to the attention of the decision maker relevant factors which the decision maker may, either by accident or design, have overlooked when deciding upon a preferred option for consultation.⁵
10. In addition to those common law principles, the Council is required by statute⁶ to consult in a way that complies with its Statement of Community Involvement (“SCI”)⁷, which promises among other points that:

“We will explain to people why we are consulting and how their views will be taken into account.

[...]

We will seek to explain issues clearly to all the audiences we wish to reach and make responding easy, both on and off-line. In organising the consultation, we will provide a summary of the main issues, a clear set of questions, and ability to make comments.

In relation to on-line consultations, we will provide a broad range of background information to ensure stakeholders have good opportunity to form opinions on the basis of balanced information.”

⁴ *Moseley* at §28.

⁵ *R (JL & AT Baird) v Environment Agency* [2011] EWHC 939 (Admin) at §41.

⁶ Section 19(3) of the Planning and Compulsory Purchase Act 2004.

⁷ <https://www.eden.gov.uk/media/3095/sd039-statement-of-community-involvement-december-2013.pdf>

Analysis

11. In my view, the Masterplan falls woefully short of the requirements of a lawful consultation.

In particular:

- (i) Option 4 was selected without public consultation, and the discarded options were not and are not even now the subject of consultation.
- (ii) The Masterplan simply does not make clear:
 - (a) What the purpose is of the consultation;
 - (b) What matters are of particular importance to the process;
 - (c) How the plan is intended be taken forward, and
 - (d) To what degree responses will be able to shape that plan, particularly if those responses are not supportive of Option 4.
- (iii) The online questionnaire does not, in my view, present the issues in the “balanced” way required by the Council’s SCI. In particular:
 - (a) The vast majority of options for members of the public to pick between are obviously supportive of very significant housing growth in broadly the locations outlined in Option 4.
 - (b) Members of the public are not asked any questions on the detailed comparative merits or demerits of the other options.
 - (c) Each of the questions assumes that very substantial development to the north-east of Penrith will take place, and consultees are not asked for their views on the merits

of that strategy, or on the principle of development (as opposed to its broad location).

(d) In consequence, the fundamental spatial strategy which underlies the Masterplan is assumed to be acceptable, and consultees are asked no questions at all about its merits.

(iv) Even the phrasing at section 16 which I set out above (“*the proposals in this Masterplan will only happen with public support*”) implies that what is sought is public support in order to facilitate the delivery of Option 4.

12. What complicates matters further is that the consultation appears to be run not through the Council’s website, but by another unspecified organisation – “Beacon Villages”.⁸ The nature of the association between Beacon Villages and the Council is not clear from the Masterplan itself. But the relevant point is this: the fact that the consultation is being run through a body which is itself named after the preferred option in the Masterplan⁹ reinforces the flaw I identify above, i.e. the impression is given to a fair-minded reader is that other options have now been effectively ruled out of account, and that the principle of development in this area has already been decided.

13. For those reasons, in my view the Masterplan document falls short of the legal requirements of a valid consultation process.

14. Finally, I am instructed that some at the Council have referred to this consultation exercise as “informal”. That is surprising; it is not referred to in that way in the consultation

⁸ <http://beaconvillages.co.uk/>

⁹ Under the heading “About Beacon Villages”, the website states: “*Beacon Villages is an exciting plan to bring 5,560 new homes and over 7,000 new jobs to the Penrith area over the next three decades. It is the cornerstone of the Penrith Strategic Masterplan [...]*”

document itself. On the contrary, it is plain that the Council has treated this consultation “formally” – at least until now. In any event, the claimed “informality” is not relevant. Once a public body decides to embark on a consultation exercise, it is bound by the strict legal requirements I refer to above. Those requirements derive from the fundamental tenets of procedural fairness. They cannot be softened or circumvented only after a consultation exercise has been launched by describing that exercise as “informal”.

Conclusion

15. Those instructing me should not hesitate to contact me in Chambers with any questions arising out of these instructions.



ZACK SIMONS

Landmark Chambers
180 Fleet Street
London EC4A 2HG

zsimons@landmarkchambers.co.uk

25th SEPTEMBER 2018