

KELSEY ESTATE PROTECTION ASSOCIATION (KEPA)

- The Residents' Association Protecting the Amenity of the Historic Kelsey Estate and the Manor Way Conservation Area -

24th July 2015.

PRE-ACTION LETTER - JUDICIAL REVIEW

For the Attention of:

Mr Doug Patterson, Chief Executive
Mr Jim Kehoe, Head of Planning
Cllr Stephen Carr, Leader of the Council
Cllr Peter Dean, Chair Development Control Committee

1. Proposed Claim for Judicial Review

This pre-action letter of a proposed claim for Judicial Review is in respect of application DC/15/00909/FULL1 approved by the Development Control Committee at 7.30pm on Monday 13 July 2015. This is an application to demolish all buildings on the current Harris Academy site on Manor Way, Beckenham and erection of replacement buildings to accommodate a 3 storey 6FE Academy for 1,150 pupils and a 2 storey primary Academy for 420 pupils together with temporary classroom accommodation for a period of 2 years, and provision of 97 car parking spaces.

2. The Claimant

Kelsey Estate Protection Association (KEPA), the residents' association representing the Manor Way Conservation Area.

3. Defendant's Reference Details

The London Borough of Bromley

4. Details of Claimant's Legal Advisers

Richard Stein of Leigh and Day Solicitors has been commissioned to provide legal advice and will be further commissioned to represent KEPA at the point of application for Judicial Review.

Please note that in accordance with the legislation pertaining to judicial review issues with a public interest connected to conservation KEPA will be applying for a protected cost order.

5. Details of the Matter being Challenged

The Development Control Committee decision on 13 July 2015 was predicated on erroneous purposefully statistics and conclusions in the Planning Officer's report to the Committee. The Planning Officer had been alerted to the fundamental errors prior to the meeting but chose not to revisit and amend the reports. The decision of the committee was not based on objective evidence-based planning facts and was thereby fundamentally administratively flawed. We are challenging that decision and seeking remedy.

6. Detailed of Interested Parties

None

7. The Issue

The date and details of the decision

The decision was made by the Development Control Committee on 13 July 2015 to grant permission.

Summary of Facts

The grounds for Judicial Review are that the decision by the Development Control Committee on 13 July 2015 was the subject of procedural impropriety. There was a failure of the traffic officer, conservation officer and planning officer in drafting their reports and the Councillors in the Development Control Committee considering those reports to observe procedural rules that are expressly set out in planning law – to make planning decision on objective material evidence based planning facts - and a failure to observe the basic rules of natural justice and to act with procedural fairness (procedural ultra vires).

Planning decisions must be based on evidence-based and material planning facts. In this application the Planning Authority in its report to the Committee and the Councilors on the Development Control Committee were under a legal duty to determine 3 matters: an analysis of primary school places education need in planning areas 1 and 2 (the contiguous areas being the designated education planning unit for primary school places); an analysis of the detriment to the Manor Way Conservation Area resulting from the application; and a balancing exercise between the two. The first two of these must be based on material evidence-based fact. The last element is a judgement flowing from the facts but the Courts have made clear (see *Barnwell Manor Wind Energy Ltd v Northants DC, English Heritage, National Trust* 7 SSCLG [2014] EWCA civ 137) that in making that judgement the Planning Department and Councilors must not simply weigh each side equally, rather considerable weight must be given to protection of the Conservation Area. In practice in this case, this means the scope and scale of educational need must be significantly greater than the damage to the Conservation Area.

In respect of the assessment of primary pupils educational need the Planning Authority relied on the Education Policy and Development Committee report of 27 January 2015 which at item 8 appendix 2 submitted for approval the most recent statistics on primary school places. These statistics showed for the relevant planning areas 1&2 a surplus of place as follows: 2015/16 (+20), 2016/17 (+41), 2017/18 (+39). An additional 60 places from the Langley Park primary school which has been approved and plans to open in 2016/17 and which falls into the same planning area were excluded. We are also cognizant of the fact that these statistics already include a 5% buffer of additional places to accommodate parental choice and also include a 8% buffer for pupils who will choose private provision.

At the point of the consideration of this application it is indisputably the fact according to the Authority's own statistics that there is no educational need for 2015/16. There is equally no need in 2016/17. The picture in 2017/18 is less clear cut. If the application was refused there would be a deficit of 21 places in 2017/18 and approximately the same for the next 10 years. However that deficit takes no account of the approved places at Langley Primary school. The Authority argued that these places cannot be considered because they are not currently in existence. Whilst this would be reasonable if the application at hand were for 2015/16 places it wholly unreasonable when the application is for 2017/18. In any professional environment of forward planning one must make reasonable judgements. Indeed the projection of pupils demand itself is based on future judgement and not present fact. We maintain that in any professional private business and public policy environment it is wholly unreasonable to simply dismiss this planned provision, particularly considering that Langley school has made it clear that they will open in 2016/17 and that they are able to do so in temporary accommodation with out planning permission resulting from the relaxation of the GPDO.

In respect of the assessment of detriment to the Conservation Area the planning officer's report is fundamentally flawed. The Conservation Officer's assessment of damage to the Conservation Area is predicated on the traffic officer's report which in turn is predicated on the outcome of traffic surveys deploying the Lambeth Methodology. The Lambeth Methodology requires parking and traffic assessment to be conducted within 200 metres walking distance from the school gates. The applicant surveyed an area up to 580 metres from the school gate. The result was a dilution of the parking and traffic situation and a diluted projection. KEPA's traffic consultants, SLR Consulting, deploying the Lambeth Methodology correctly showed parking stress rising to 125%. This fundamental point was raised with the planning officer Tim Horsman before the Committee meeting with a request the report be re-visited and amended. This request was ignored and implicitly refused. Instead, during the preamble to the meeting Tim Horsman mentioned very quickly that the application of the Lambeth Methodology had been agreed between the transport department and the applicant and all was in order. This was a shocking statement. We contend that the planning department were quite aware of the erroneous analysis but rather than remedy the error sought to cover it up in order to expedite approval of the application.

The transport department does not have locus and discretion to agree the terms of the Lambeth Methodology, to do so would make the whole methodology meaningless and redundant. Notwithstanding this point, Nojan Rastani, the traffic officer's report, dated 20/04/2015 explicitly states that the terms of the Lambeth Methodology agreed with the applicant was 200 metres walking distance from the school gates. Tim Horsman's statement to the Committee is willfully erroneous to achieve the desired outcome. It is also noteworthy that there are many examples of school planning applications where the Authority has deployed the precedent of 200 metres walking distance from the school gate, for example DC/14/01672/VAR.

Turning to the final matter – the balance of educational need against damage to the Conservation Area. The planning committee implicitly concluded that a future deficit of 21 places in 2017/18, ignoring the 60 places of the Langley Primary school was enough of an educational need to outweigh damage to the Conservation Area based on erroneous analysis of that damage. Following on from the paragraphs above the planning Committee were unequivocally unable to make that judgement because of the erroneous statistics and reports provided by the planning and traffic officers. The correct action would have been to re-schedule the committee meeting once the reports had been accurately re-produced.

8. The Details of the Action that Defendant is Expected to Take

We understand that the Planning Notice has not issued in respect of this application as the attendant Section 106 Agreement has not yet been completed. The Planning Authority has the power to refer the application back to the Planning Committee to be correctly re-considered with full and accurate reports from the Conservation Officer, the Traffic Department and the Planning Department. In doing so, the Planning Authority would not be subject to any compensation claims by the applicant as the Planning Notice has not issued. This action would remedy the grounds for Judicial Review and thereby obviate that application and attendant award of costs against the Authority. We consider this remedy to be wholly reasonable and a course of action in the interests of due process, democratic process and natural justice.

9. ADR Proposals

None

10. Details of Information Sought

We request an explanation to the conduct set out in paragraph 8 above and the information set out in paragraph 11 below.

11. The Details of any Documents Considered Relevant and Necessary

We request copies of the following:

All correspondence and draft and final reports (written, electronic, notes of meetings and conversations) between the traffic department, planning department officers, Conservation Officer, Bromley Councillors and the planning permission applicant and his agents in respect of the implementation of the Lambeth Methodology and the outcome of the traffic and parking surveys.

All correspondence and draft and final reports (written, electronic, notes of meetings and conversations) between the Conservation Officer, planning department officers, transport officers, Bromley Councillors and the planning permission applicant and his agents in respect of the conservation area assessment connected with the application.

All correspondence and draft and final reports (written, electronic, notes of meetings and conversations) between the education department and the planning department and Councillors and the planning permission applicant and his agents in respect of the statistical assessment of educational need and the treatment in those statistics of the Langley Primary school planned to open in September 2016.

A copy of the Leader of the Council's investigative report into Councillor Wells 30 November 2014 email to Mr Bollen and others in the Education Department recording his agreement with the Chief Executive of the Council, the Education Department and the Planning Department that the Planning Authority would not robustly defend the appeal to the Planning Inspectorate in respect of application DC/14/01636/FULL1 or APP/G5180/A/14/2228314

A copy of changes in the educational needs statistics for Planning Areas 1 and 2 in the last 12 months following Councillor Wells email to educational department officers pursuant to the paragraph above to ensure that the educational need statistics and arguments in respect of the planning application subject to this pre-action letter are made more robust

12. The Address for Reply and Service of Court Documents

At this pre-action stage all papers should be sent to 68 Manor Way, Beckenham BR3 3LR. Subject to the outcome of this pre-action letter and formal submission of Judicial Review documents we will provide you with a revised address of our legal representatives

13. Proposed Reply Date

We would be most grateful for a full reply by Friday 14 August 2015