Document E

KELSEY ESTATE PROTECTION ASSOCIATION (KEPA)

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

PRE-ACTION LETTER – JUDICIAL REVIEW

12 August 2015

By email:

To:
Marion Paine, Lawyer – by email

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

Dear Ms Paine

Thank you for your letter of 6 August (your ref L15/8/5/35/13).

Thank you for referring to Civil Procedure Rule 54.5(5) setting out the 6 week time-line for issuing Judicial review claim from the date of the planning decision Planning Notice and CPR 54.21(2)a)(i) supplemented by Practice Direction 54E requiring such proceedings to be taken in the Planning Court. As you know, it is the application for Judicial Review and not the pre-action letter of proposed judicial review that is issued in the Planning Court. Further, as we acknowledged in our letter, including paragraph 8 "action the Defendant is expected to take" we intentionally issued the pre-action letter ahead of the issuance of the Planning Notice so that the remedial action available to the Authority was not unduly restricted. Once the Planning Notice issues the planning authority's option to return the application to the planning committee would be made problematic by paragraphs 97-100 Town and Country Planning Act 1990 including the matter of a claim for compensation by the applicant. Accordingly, we intentionally did not name any interested parties in paragraph 6 but we are content for you to informally notify them of this correspondence, which I infer you have done. Once the Planning Notice issues and subject to action flowing from our correspondence and any remedial action, we will issue a further formal pre-action letter with the applicant as an interested party and further to that an application for Judicial Review in the Planning Court. We do not consider contractors commissioned by the applicant to carry out work on their behalf to be interested parties.

We are happy to agree to your suggestion to meet with Mr Kehoe, the Chief Planner, to whom this letter is copied and we would be grateful if his office can provide us with suitable dates on his return week commencing 31 August or 7

September. I should point out that we did seek such a meeting at a much earlier date ahead of the application going to planning committee but the request was declined and we were instead invited to meet a planning officer at the site whilst she conducted a scheduled site visit.

At this stage we think it sensible for the meeting to be between the Authority and KEPA only. As pointed out in your letter the ground for judicial review is the legal process of the decision as administered by the Authority and not the planning merits of the application submitted by the applicant. We are content to restrict the meeting to 3 members of KEPA and 3 members of the Authority and will inform you of our representatives in due course and will exclude legal representation as you suggest. Following this meeting if the Authority feels it will be of further help to invite other parties to another wider meeting we will consider a further invitation.

We note your Counsel's comments in respect of grounds for Judicial Review. For the avoidance of doubt it may be help to re-affirm that in our pre-action letter KEPA is not seeking to substitute its view of the planning merits of the application for that of the planning committee, nor is it seeking to substitute its view of the balance of educational need against the detriment to the conservation area for that of the planning committee. Our concern is solely with the administrative law governing the process and the material mistakes of fact. In challenges to planning decisions it is normally necessary to establish that the decision maker acted on an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (or availability of evidence of that fact) and that that fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and un-contentious evidence (see Hounslow LBC v SSCLG (2009) EWHC 1055 Admin) per Collins J at [14]-[15].

Whilst the wording of the Lambeth Methodology (LM) envisages a degree of flexibility and common sense, such flexibility must be within the bounds of rationality and reasonableness. Within the LM a clear distinction is drawn between commercial developments deploying a 500 metre survey distance and others deploying 200 metres and it would not be rational to treat an infant school as a commercial development contrary to established borough precedent. Equally, the methodology allows for flexibility to extend and contract the 200 metre cut off points where for example the route straddles corners, but the distance to Stone Park Avenue is 250 metres and yet it was extended beyond this point and the distance to Kelsey Way is 170 metres yet it was extended round the corner to 580 metres beyond even the commercial parameters. This is not a rational and reasonable application. Equally important the parameters applied by the applicant were non-compliant with those agreed with Bromley as evidenced in documentation we hold. Accordingly, the planning officer's report mis-directed the planning committee in its consideration of parking stress and the evaluation of its effect on the conservation area.

The planning officer's report also mis-directed the planning committee in its consideration of the scale and nature of educational need. The application was in

respect of school places commencing 2017/18. The Council presented figures to the committee for the relevant educational planning areas 1 and 2 of 1,056 available places (including the Harris Beckenham temporary 60 primary places) and 1,095 demand for places, giving a surplus of 39 places and a deficit of 21 if the Harris places desisted in 2017/18. This is spread across all the 17 primary schools in planning areas 1&2 or just over 1 pupil a school. As low as that figure was it was still inaccurate as it included 5% headroom of places designed to accommodate parental choice, the exclusion of which would turn the 21 place deficit above into a 29 surplus. Whilst educational choice derived from the 5% headroom may be deemed a desirable objective it does not constitute educational need in material planning terms. In addition the figures entirely ignored the 60 places available at the approved Langley primary school to come on stream September 2016 a full year before the 2017 effective date of the application under consideration. The report also declined to mention that 8% of the demand profile opt each year for private education. The planning committee should have been presented with the correct figure of educational need which was objectively +29 surplus for 2017/18 and been invited to further consider the factors of 5% headroom for choice, 8% opting for private education and the imminent Langley primary school. Instead they were directed that there was a deficit of places of 21 places and these children would be without a school place. This is objectively inaccurate and misleading. Accordingly the officer's report mis-directed the committee.

We further maintain that if the planning committee had not been mis-directed in the officer's report and instead furnished with the accurate statistics on parking stress and educational need, the planning committee in discharging its duty to balance educational need against detriment to the conservation area in the manner set out in legal precedent (Barnwell Manor v Northants DC SSCLG 2014 EWCA) would have arrived at a different conclusion. It would be wholly irrational in the meaning of that word for the purpose of judicial review to conclude that the objective statistical educational need of 29 pupil place surplus across 17 schools would outweigh the parking stress of 120+% and attendant damage to the conservation area, notwithstanding the exclusion of the Langley primary places. It would be concluding that additional choice rather than objective need over-rode the duty to preserve and enhance the conservation area.

We acknowledge your Counsel may take a different view on these matters to our Counsel. We look forward to discussing the matter with the Authority once suitable dates have been provided by Mr Kehoe.

We are content with your proposed revised date for the provision of requested in information.

Yours sincerely

MR M MIELNICZEK
On behalf of KEPA