In the High Court of Justice
Queen's Bench Division
Administrative Court

CO Ref no: CO/5916/2017

In the matter of a claim for Judicial Review

The Queen on the application of

EAST BERGHOLT PARISH COUNCIL

versus BABERGH DISTRICT COUNCIL

Notice of RENEWAL of claim for permission to apply for Judicial Review (C P R 54. 12)

1. *This notice must be lodged in the Administrative Court Office, by post or in person and be served upon the defendant (and interested parties who were served with the claim form) within 7 days of the service on the claimant or his solicitor of the notice that the claim for permission has been refused.*

2. *If the claim was issued on or after 7 October 2013, a fee is payable on submission of Form 86B. Failure to pay the fee or lodge a certified Application for Fee remission may result in the claim being struck out. The form for Application for Remission of a Fee is obtainable from the Justice website http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do*

3. *If this form has not been lodged within 7 days of service (para 1 above) please set out below the* ***reasons for delay:*** order dated 15.2.18 received on 21.2.18

4. *Set out below the grounds for seeking reconsideration:*

See enclosed Grounds of Renewal.

5. *Please supply*
   COUNSEL'S NAME: Sasha Blackmore (Landmark Chambers)
   COUNSEL'TELEPHONE NUMBER: 0207 430 1221

Signed Teacher Stern LLP Dated 27.2.18

Claimant's Ref No. DAB/EAS40-1 Tel.No. 0207 242 3191 Fax No.

To the Administrative Court Office, Royal Courts of Justice, Strand, London, WC2A 2LL

Claim No: CO/5916/201

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

B E T W E E N:-

EAST BERGHOLT PARISH COUNCIL

Claimant

and

BABERGH DISTRICT COUNCIL

Defendant

And

MR AND MRS P AGGETT
COUNTRYSIDE PROPERTIES PLC

Interested Parties

GROUNDS OF RENEWAL

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1. Ground One, and the related issue about prejudice caused by the lack of one full day's notice raised in the Reply, is maintained in full and permission is sought. Ground Two is not maintained.

2. These grounds of renewal otherwise address the Judge's reasons for refusing permission:

   1) The judgment of Lindblom LJ altered the practical impact of the interpretation of footnote 11. Firstly, it is clearly arguable that *St Modwen* is having a real practical impact; read carefully, neither the Defendant's Summary Grounds of Resistance ("DSGR") nor the Second IP's Summary Grounds of Resistance ("IPSGR") deny this. The reality is that prior to the Court of Appeal's judgment in St Modwen, most local planning authorities adopted a risk-averse approach to the assessment of their housing trajectories.

   2) Even if Lindblom LJ did not profess to make a new point of law in *St Modwen*, nonetheless it is clearly arguable that the practical guidance to local planning authorities given by Lindblom LJ is, rightfully, having a real impact on the manner in which local planning authorities identify their supply of specific deliverable sites. This is particularly so in relation to the use of "golden hurdles" for sites to be included in the supply and the unnecessary exclusion of sites that ought to be considered "deliverable".

   3) In this case, the evidence shows that this local planning authority

a. adopted a "golden hurdle" to its trajectory; it applied an unnecessarily high standard to its assessment of its trajectory, in particular its conclusion that it would only include a site with consent in its trajectory if it had a s.106 agreed;

b. Failed to ever advise members that such a golden hurdle was not required and that they could adopt a less stringent approach as a matter of their planning judgment;

c. Conflated the concepts of deliverable and deliverability; IPSGR [9] quite clearly sets out quotations which show the Defendant's members conflating the concepts of delivery and deliverability, or in any event blurring any practical distinction between the two, contrary to *St Modwen.* The Defendant applies a "golden hurdle" because it directs itself to delivery, and does not satisfy itself, as the Inspector explained, that there is "*not simply doubt or improbability but no realistic prospect that the sites could come forward within the 5 year period*". The quotations in IPSGR [9] show that for sites to be included in the Defendant's 5YHLS, it is their delivery status, which it considers relates to the extent of the build out or construction, or how recently it has obtained planning permission, which is key. The Defendant's "golden hurdle" therefore rejects sites which self-evidently meet the tests as the Court of Appeal have explained for deliverability. If the Defendant is in substance applying the wrong threshold for deliverability, or conflating the concept with that of delivery, then it gets it nowhere to merely cite the tests for deliverability in the NPPF in form;

d. The Claimant maintains that the reality is that prior to the decision of St Modwen, local authorities were routinely adopting risk-averse trajectories in order to have confidence in maintaining them at s.78 appeals. It is noteworthy that in this case, the approach the Defendant was taking altered following Bidwells' reports (See Grounds 21(3)), from considering it had a 5YHLS to stating it did not. These reports wrongly "talk down" the 5YHLS as unlawful when following the Court of Appeal judgment in *St Modwen* such an approach would not be upheld.

4) Plainly it is not disputed that whether or not a site is deliverable is a matter of planning judgment, but the key point which the Judge does not address is whether the Defendant has lawfully exercised its approach to its discretion; a discretion must be lawfully exercised. It is not lawfully exercised if the Defendant has:

a. failed to advise Members how the Defendant/Members were applying a "golden hurdle" in their trajectory, which they did not have to apply.

b. failed to have regard to how, as established in *St Modwen,* tests of deliverability are to be, or may be, applied in practice (the "test") to a lower standard than that which the Defendant applied.

c. Given reasons given that are so inadequate that an interested party cannot assess whether the judgment has been lawfully exercised.

5) The Judge holds that "*if the claimant wished to dispute the site-specific judgments it was open to it to do so in the context of the housing land supply....*" But also holds that "*the claimant had a full opportunity to present its principal case to the defendant. There was sufficient time for the Claimant to provide any additional observations in response to the Report which it thought appropriate...*". There are overlapping points:

a. This is fundamentally unfair. The Claimant did not have a "*full opportunity*" to present its "*principal case*" to the Defendant. Where a fairness point is raised, the context is everything. The Judge fails to:

i. Consider the timing of these issues. This was consultation response in the context of remitted schemes. The consultation took place on the remitted schemes following the quashing of one of those applications in December 2016. That consultation took place during the earlier part of 2017. The AMR was not even published until June 2017; an interim AMR had been published in April 2017, but with almost no supporting information. The final written responses to the consultation from the Parish were in June 2017. The previous AMR had found that there was a 5YHLS.

ii. Consider the reality for members of the public. The Parish is not a "professional" body, nor are the other local bodies who made representations. The vast majority are volunteers, deeply concerned about their community. Appendix 1 (A/p.162 – 200) lists the consultation responses. It is not at all surprising that in the context of these schemes, the majority of the responses concentrate on the planning merits of the scheme, because previously the major issue between the local community and the Defendant had been that the Defendant considered these applications were in accordance with the Development Plan (Local Plan and the Neighbourhood Plan). The Defendant now accepts that it is not in accordance. This is a major victory.

iii. Address that these complex issues around the consequences of a 5YHLS trajectory were essentially raised, to members of the public and to their understanding as to how these issues related to planning applications, for the first time in these officer's reports in relation to not only one, but three applications, in the middle of the school holidays, made available only four working days before the Planning Committee meeting.

b. The Judge also fails address the criticism of the officer's report that consultees did raise issues about the trajectory, see Grounds [23]. These consultation responses were simply attached as an Appendix. No proper guidance was given to Members about these complex matters (and see 5(c) below). Members of the public were clearly concerned about land trajectory matters, and the issues should have brought to Members' attention in a manner which enabled them to exercise planning judgment.

c. This also includes that members of the public (not the Claimant, but members of the public) were at the same time making Freedom of Information requests (see chronology) and in July 2017 raising questions in a public meeting in response to the trajectory, in relation to these issues. There was clearly major unhappiness in the local community.

d. As Ground One is arguable, this point necessary rides alongside it. It is plainly arguable that if Ground One is right, it should not be refused on the basis that the point could or should have been raised earlier in the above circumstances.

6) The officer's report for all these reasons was seriously misleading in not drawing these matters to Members' attention. "*The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision...*" This did not happen.

7) Ground One and the Reply are maintained in full, but in particular the Claimant emphasises (and which the Judge does not address):
   a. It is telling that there is (rightly) no attempt to rely on s.31 of the Senior Courts Act 1981 – the stark reality in this case is that had the trajectory been considered applying the practical lower threshold, or had Members been directed that the trajectory was considered using a high standard, there is a high chance the Defendant would have concluded it had a 5YHLS. The prejudice caused to the Claimant is therefore substantial;
   b. It is telling that no substantive comments are made about the detailed evidence that Dr Ireland gives for the Parish team;
   c. The Defendant's own "Overview and Scrutiny Committee" considers that "*There is mixed understanding among Councillors and communities regarding the 5 year housing land supply – both how it is calculated and the implications of not having one. There is also limited understanding of how to influence it...*" and the "purpose" of the review is "*To provide greater understanding of how the 5 year housing land supply is calculated*".

The "expected outcome" includes "*Greater understanding among Councillors and communities*".

Other matters: 5 clear days' notice and whether a breach of the constitution or Local Government Act 1972

3. The issues around the unfairness caused by the lack of 5 clear days' notice are arguable; the Claimant is willing to file amended grounds if so required[1]. The point is that unfairness/real prejudice was caused by the change of an established practice. This can be classified as either a simple response to the point taken about not providing this evidence soon, or as a general unfairness ground, or as a breach of a legitimate expectation, but in each of these cases the essence of the issue is whether or not substantive prejudice was caused by the shortened notice period by at least one clear day. If Ground One is arguable, which it clearly is, then prejudice was caused, for the reasons given above.

4. However, it remains unclear whether or not the Defendant has properly complied with its obligations under the Local Government Act 1972 and under its constitution. Five clear days is a statutory requirement under s.100B of the Local Government Act 1972, a requirement which was raised from three clear days to five clear days by the Local Authorities (Access to Meetings and Documents) (Period of Notice) (England) Order 2002/715. The Defendant asserts that it has complied with both the Local Government Act 1972 and its constitution, but evidence of the same has still not yet been substantiated, in circumstances where the Defendant's own evidence shows that the clerk was over-worked and was too busy to arrange for the reports to go on to the website. Further if the Defendant has particular provisions in its constitution as to how it will consult or notify, these must be complied with. The Court of Appeal has made clear in *R. v Swansea City Council* (1993) 66 P. & C.R. 422 that the requirement of this Local Government Act 1972 for five clear days (then three clear days) was "*a requirement in the public interest which must be observed regardless of lack of prejudice to any specific individual.... Parliament has enacted an inhibition and that inhibition must be observed. The question is, whether on the facts subsection (4), when properly construed, was contravened. The requirement of the subsection is that the agenda should be open for at least three clear days before the meeting*".

5. The Claimant wrote on the 12 February and again on the 20 February. The Defendant responded on 14 February 2018 (after the Claimant's Reply was filed) and on the 27 February 2018 (today, i.e. with insufficient time to be properly considered prior to needing to file these Grounds of Renewal also today) (copies attached). The Defendant now states that "*the agenda for the meeting held on 2nd August 2017 would have been displayed in full on the enclosed, outside notice board at the*

[1] See letter to Birketts LLP for the Second Interested Party and copied to the Defendant and the Court, 20 February 2018.

Babergh council offices Corks Lane, Hadleigh, Ipswich, Suffolk, IP7 6SJ and all agenda papers available for inspection inside the building in the public reception area." This response:

a. asserts in the conditional that the information "*would have been displayed*" which is not confirmation that it was displayed, even if that office has now closed;

b. does not provide the Claimant with evidence of this process in actual fact having been carried out, e.g. by whom, in circumstances where the Defendant says "*human error*" occurred and that the clerk "*had other work pressures and had omitted to publish the website update*" (Email, 15 January 2018)

c. provides no confirmation that the duty of candour has been complied with, where (see d)

d. the Defendant does not state its position in either the letter of the 14th February or the 20th February as to whether this would comply with the Defendant's Constitution, which was the Claimant's query. The Claimant will continue to pursue this point in correspondence, but notes for the purposes of these Renewal Grounds that the "*designated office*" at which the Defendant was obliged by its Constitution to display such information (pursuant to its Constitution adopted 25/04/2017 and effective from 23/05/2017) was rather: the Council Offices at 131 High Street, Needham Market, Ipswich IP6 8DL. It appears therefore that this does not constitute compliance with its Constitution, and further the Defendant does not assert that it does; but nor does the Defendant confirm that its constitution has not been complied with. The Defendant is under a duty of candour and has "all the cards" in relation to whether or not it complied with its own constitution.

e. This point is amplified by the failure to display the information online with the customary five days' notice, if in fact it was displayed in an entirely different building to that which any member of the public was entitled to assume it was displayed according to the Constitution (and where, the point taken above, it was not on the website, which is the main reference point). This causes at the very least unfairness, but is also (potentially) a hard-edged breach of the requirements of the Constitution. The Claimant's position is therefore reserved but it is hoped clarity will be provided before the renewal hearing.

6. The Claimant respectfully seeks permission.

SASHA BLACKMORE
HANNAH GIBBS
LANDMARK CHAMBERS
27 FEBRUARY 2018