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

REPLY

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1. This Reply does not respond to every matter, only those of key relevance to the threshold of permission. The Grounds of challenge are maintained.

GROUND ONE

ARGUABILITY

2. 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. What has changed is the practical application of the test; the bar has lowered. The reality is that in practice, since the Court of Appeal's judgment in October 2017, it is now understood that whereas previously Local Planning Authorities were adopting a highly risk averse approach to their housing trajectories so their trajectory would withstand challenge on appeal (as they were commonly challenged by larger developers/larger developments), they are now able to with confidence carry a high level of uncertainty in a trajectory. In practice that means a lower standard.

3. Second. The DSGR misses the point. The key point is not either that "*The Court of Appeal did not hold that para 47 of the NPPF means that it is Government policy that a site must be included in the 5YHLS if there is any realistic prospect of housing being delivered in the 5 year period"* (DSGR, para 10, emphasis added) nor that "*it is a matter for the Defendant's planning judgment whether potential development sites should or should not be included in the 5YHLS*" (DSGR, para 11). The key point 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 failed to have regard to

how *St Modwen* has made clear how tests of deliverability are to be, or may be, applied in practice (the "test") to a lower standard than that which the Defendant applied. It is not lawfully exercised if the Defendant's officers had failed to advise Members how the Defendant/Members were applying a "golden hurdle" in their trajectory, which they did not have to apply. It is not lawfully exercised if the reasons given are so grossly inadequate that an interested party cannot assess whether the judgment has been lawfully exercised.

4. Third. The Claimant's evidence shows that there is (to put it at its lowest) a real likelihood that had that judgment been lawfully exercised, the Defendant would have concluded that it had a 5YHLS. It is telling that no substantive comments are made about the detailed evidence that Dr Ireland gives for the Parish team. This is despite the fact that the Interested Party has spent in excess of £16,000.

5. Fourth. 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, there is a high chance the Defendant would have concluded it had a 5YHLS. It is immaterial that this evidence post-dates the August committee meeting, as the Court of Appeal judgment was in October; but it is also noted (see Dr Ireland's statement at [9]-[11]) that contrary to the Defendant's usual practice, five clear days were not given before the Committee meeting, and thus if this were to be a good point (which it is not), there would be in the alternative real prejudice the Claimant could point to as to what it could have said but did not.

6. Fifth, the IP at IPSG [5-9] and [14] relies on an earlier meeting in July 2017, apparently it appears to assert that Members at the meeting in August 2017 understood how a 5YHLS was calculated. This shows no such thing; it simply shows the formal answer given in a meeting. It is no evidence at all that Members understood how the 5YHLS is calculated and approached or the areas for their judgment in making such decisions, and it is no evidence at all that Members were properly advised that they did not have to adopt a "*robust"* or "golden hurdle" approach to a trajectory. As Dr Ireland's Second Witness Statement exhibits at [23], the evidence in fact shows that the Defendant is aware that its Members do not have that expertise. Earlier this month the Defendant's "Overview and Scrutiny Committee" commissioned a review topic on the 5YHLS because "*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".*

7. Sixth. The Claimant is not the only party to have lodged a challenge in the Planning Court related to the practical consequences of the *St Modwen* judgment. It is understood another challenge (in fact

two challenges but the same matter) has been lodged under CO/374/2018 and CO/378/2018), see Dr Ireland's Second Witness Statement at [22].

8. Seven. As to the point at DSGR, para 8, as to how the Inspector's decision in *St Modwen* was considered by the Court of Appeal. The short answer is that the fact that there was no challenge in *St Modwen* to the planning judgment in fact exercised in that case and the reasons given for it is of no relevance to this case, where there are no reasons or no adequate reasons given to assess whether the Defendant lawfully applied its planning judgment.

9. Eight. The 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, directly 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. IPSGR [35] therefore gains nothing by relying on IPSGR [9]. 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.

10. Finally, whilst the IP purports to rely at IPSGR [25] on the passage *in St Modwen* where the Court of Appeal considered the parties in the claim before it, the Defendant (rightly) does not. The Defendant plainly cannot rely on the fact that the Court of Appeal held in *St Modwen* that it would be "*most surprising"* if an experienced Inspector following evidence as to the trajectory tested on appeal, or the Secretary of State, went astray in their application of planning policy. The decision and context is entirely different. These planning applications were being considered in a Planning Officer's Report, which gives no reasons for the conclusions reached on these points, and relies on the AMR, which fails to give any or any adequate reasons for the trajectory; in so far as it does give reasons, these do not distinguish properly or at all between deliverability and delivery. The AMR and all the surrounding evidence (including FoI requests) suggests that the Defendant applied a "golden hurdle" to its trajectory which the Court of Appeal judgment makes clear is not required. The reasons for the trajectory are so poor that members of the public are pursuing complaints to the Information Commissioner, in an attempt to get better reasons. Finally, as above, the Defendant's own evidence suggests it considers its Members do not understand the 5YHLS issues.

<u>CHALLENGING A 5YHLS AND BUFFER</u>

11. For the avoidance of any doubt, the Claimant challenges the Defendant's approach to the calculation of the Council's 5YHLS, which includes the consideration of both where sites are placed within the trajectory and what the buffer is as to the target that needs to be reached for that trajectory to establish that there is a 5YHLS. However the Defendant's position does not state whether a 5% or 20% buffer is in the Defendant's judgment being adopted as appropriate, but reflects that the Defendant's position was that on either a 5% or 20% buffer the Defendant purports to indicate that the Defendant considers that it does not have a 5YHLS. The Claimant considers that if the correct test in *St Modwen* had been applied, the Defendant would have been highly likely to have concluded that it did have a 5YHLS. There is an evidential range between a 5% and 20% buffer, as Dr Ireland explains. The Defendant, having unlawfully failed to consider the correct test when applying its discretion, further unlawfully failed to direct Members to consider which buffer was appropriate, as it wrongly considered that on either basis it did not have a supply. Further, it is clear from the evidence that it highly likely that had Members been directed as to which buffer should be applied, the historic delivery is such that it is highly unlikely they would have concluded that a 20% buffer was appropriate. Finally, to the extent necessary, the Claimant was caused prejudice in relation to this issue by the failure of the Defendant to have provided the Claimant (and other members of the public) with five clear day notice of the Planning Committee meeting, as Dr Ireland explains.

DELAY AND THE AMR

12. The Claimant challenges the grant of planning permission under B/15/01678 and B/15/00673. There has been no relevant delay (DSG [3-4]). Not only are both clearly in time, but the key basis for challenge only arose from the Court of Appeal judgment of 20 October 2017, and the work the Claimant Parish has done in relation to the Defendant's trajectory (see Dr Ireland's first statement) was self-evidently time consuming.

13. As to the status of the AMR of June 2017, this is a thoroughly bad point. Firstly, the relevant provision of CPR 54.5(1) is that a claim form must be filed "*promptly"* and "*in any event not later than 3 months after the grounds to make the claim first arose".* The grounds did not arise until 20 October 2017. Secondly, even if this was a good point, which it is not, it is a clear example of when time should be extended. Thirdly, the status of the AMR is a collateral matter not the focus of the challenge and would fall within the general principle best indicated by *Boddington v British Transport Police* [1999] 2 A.C. 143. Finally, the Claimant seeks the reasons for the trajectory and simply seeks such other such relief as the Court may consider necessary in relation to that AMR and the Claimant recognises that a "*suitable but reasonable time frame*" could fit with the AMR which will be published in June 2018.

LACK OF FIVE CLEAR DAYS' NOTICE

14. As Dr Ireland explains, it is the Defendant's usual practice to give the Claimant (and others) five clear days' notice of Planning Committee meetings by publishing on its website the agenda for the meeting and the accompanying officer reports. This is a common place practice amongst local planning authorities. The Defendant accepts that it did not place the material on its website five clear days before the meeting, but only four clear days. The Defendant's failure to do that in this case has caused the Claimant substantial prejudice in depriving it of the normal amount of time it would have to prepare its responses to the Officer's Report, and in this case not on just one, but on three, applications, where the Claimant is also dependent on volunteers, and the Planning Committee met in the school summer holidays, see in particular see Dr Ireland's witness statement at paragraph [11] and above at paragraph [5] and [11] above. This prejudice relates directly to the substantive concerns raised as Ground 1 and Ground 2 in this claim. Thus, it is not considered to be a stand-alone complaint of unfairness, but parasitic on Grounds 1 and 2 and moreover, is the response to the points made by the Defendant and the IP in relation to delay. To the extent necessary (if at all), it can be considered as a further matter; there is of course no dispute that a departure from a substantive course of conduct by a public authority can give rise to unfairness rendering the decision unlawful, (e.g. *Bhatt Murphy* [2008] EWCA Civ 755]).

Defendant's constitution and Local Government Act 1972

15. There is a further point, which the Claimant's position is reserved on, and on this point it may become necessary to apply to amend the Grounds at a later date. It may or may not be the case that the Defendant is also in breach of its constitution or the Local Government Act 1972 in this regard. In any event, regardless of whether the constitution was complied with, the established practice was not, see above. The Claimant does not seek to raise this formally at this stage, having only raised it with the Defendant on the 12 February, but awaits the Defendant's reply. It is fair to record that the Defendant asserts that it has complied with both the Local Government Act 1972 and its constitution, but the evidence of the same has not been provided. For the avoidance of doubt, the Claimant will formally apply if it decides to amend its grounds in this respect, after receiving the Defendant's response.

16. As to this point, the Claimant only very recently became aware of correspondence between a member of the public and the Defendant (as annexed to Dr Ireland's witness statement at [9]) and promptly requested full clarification and evidence from the Defendant on the 12 February (copied to the Administrative Court and to the Interested Party, so all parties are on notice) as to whether its constitution and the law was complied with in this respect but has not at the time of settling this Reply been provided with a response. Clarity is important, because 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. It is no doubt this legislative background is why the Defendant as its usual practice gives five clear days' notice by placing documents on its website. As already noted, the Defendant asserts that it has complied with both the Local Government Act 1972 and its constitution, but the evidence of the same has not yet been provided. Further if the Defendant has particular provisions in its constitution as to how it will consult, 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".* The same reasoning would apply to any other provision in this respect in the constitution.

GROUND TWO - ARGUABILITY

17. One short point is repeated, which clearly shows that Ground 2 is arguable. The Defendant asserts at DSG [27] "*there is no requirement in law or in policy that cumulative impacts had to be assessed by reference to the total number of dwellings".* This is wrong; see Grounds [27(iii)]. The adopted Supplementary Planning Guidance expressly requires "*how many additional dwellings are proposed and what proportionate increase will this be in the number of dwellings in the village"* and the cluster.

AARHUS COSTS CAP

18. It is agreed that the claim falls within the Aarhus Convention rules for the Planning Court. The Defendant (rightly) takes no issue with the usual cap. The Claimant seeks the usual Aarhus rules to apply, the reasons for which are set out in the First and Second Witness Statement of Dr Paul Ireland.

19. The Second IP seeks to vary the limit of the Claimant's cap upwards (although it does not say by how much). The relevant rule in CPR 45.44 on varying the limit on costs recoverable from a party in an Aarhus Convention claim provides as follows:

> (2) The court may vary such an amount or remove such a limit only if satisfied that—
> (a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and
> (b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.
>
> (3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—

(a) exceed the financial resources of the claimant; or
(b) are objectively unreasonable having regard to—
(i) the situation of the parties;
(ii) whether the claimant has a reasonable prospect of success;
(iii) the importance of what is at stake for the claimant;
(iv) the importance of what is at stake for the environment;
(v) the complexity of the relevant law and procedure; and
(vi) whether the claim is frivolous.

The situation of the parties

20. The Second IP, whose annual accounts record an income of £77.4 million and which had record profits last year (see Dr Ireland's Second Witness Statement) and who have instructed Sasha White QC and a junior, take issue with the Claimant's projected costs and suggests (without suggesting any other figure) that the cap should be raised. This application to raise the Claimant's cap in this case is in reality a stark example of a Party seeking to use its superior financial strength to intimidate a party so that the Parish is financially pressurised into withdrawing its claim. The Second IP has not engaged in any dialogue whatsoever with the Claimant as to what that cap should be raised too, even though the Claimant expressly sought an extension of time for the Defendant and the IPs for the Pre-Action Protocol to be engaged with. There is no separate need for the Second IP to play any role in these proceedings. It chooses to do so, as it is entitled to do. But this is quite squarely a challenge directed to the Defendant Local Planning Authority. Further the Second IP's costs for Summary Grounds are an astonishing £16,716, when the Defendant's total costs (the Defendant having also instructed a leading QC) are £5,100. Objectively the Second IP's costs are already prohibitively expensive. Whilst it is a matter for a party who it instructs, the purpose of this aspect of the Aarhus Convention is to enable environmental litigation to be brought fairly and without prohibitive expense. The Second IP also makes no reference whatsoever to the relevant caselaw. This is not the type of proceedings where the guidance from the Court in the long-running *Edwards* litigation or the guidance from the Aarhus Compliance Committee or the application of the Aarhus Convention indicates the costs cap should be raised (to which the Second IP makes no reference at all) (see e.g. (*(Edwards) v Environment Agency (No 2) (Case C-260/11) [2013] 1 WLR 2914* , *R. (on the application of Edwards) v Environment Agency* [2013] UKSC 78). The issue is that the costs of litigation should not be prohibitively expensive, which has both an objective element, and a subjective element. The CJEU indicated that:

> 49 …. in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue.

21. Subjectively, this Claimant is far removed from a "subjectively wealthy" party (unlike the Second IP, which is a classic example of such a party). The Claimant is a Parish Council. Its only income is via

the precept, from which it must fund all its activities. It would not continue without costs protection. It has no private or any commercial interest in these proceedings, but brings these proceedings because of the very serious impact to the Parish's setting in the heart of Constable Country, much of it in an AONB and with significant heritage assets and a conservation area; the impact to the Parish's very recently adopted Neighbourhood Plan, which it is now accepted that these proposals are inconsistent with; and that there is now no dispute that, absent the 5YHLS, these applications are entirely inconsistent with the Development Plan. The Defendant is not acting through a plan-led process, but is essentially exporting its housing need to its rural hinterlands, entirely contrary to its Core Strategy. The Defendant could, but has not, adopted a Sites Allocation DPD, as is envisaged in its Core Strategy. The anger and frustration across the rural community is exceedingly high; both in East Bergholt and in the wider rural area affected by the Defendant's approach to meeting its housing need through development in core and hinterland villages. This has led to unprecedented levels of community engagement, as Dr Ireland's second witness statement explains, and as shown by the examples he provides from the press. It is only proper that the Parish Council, as the democratic representatives of this community on issues such as this, bring these proceedings. It is plainly in the public interest and "*to take due account of the public interest in environmental protection in the case at issue".* It is not objectively unreasonable having regard to the situation of the parties.

Importance of what is at stake

22. Dr Ireland's statement explains the "*importance of what is at stake for the Claimant*" and the importance of "*what is at stake for the environment",* in that "*the residents in East Bergholt and the surrounding rural areas are extremely worried and frustrated about the Defendant's policy of granting permission for development in hinterland villages",* "*the challenge to the Defendant's decisions on these two planning applications is of very significant importance to the residents of East Bergholt*", and "*there have been unprecedented levels of community engagement and attendance at Parish Council and the Defendant council meetings concerning the applications*" [7]. See also as above in paragraph 21. It is not objectively unreasonable having regard to these matters

Prospects of success, frivolity and complexity

23. The Claimant has excellent prospects of success. The reality is that the October 2017 Court of Appeal judgment post-dates all relevant decisions in this case from August 2017 (or the AMR from the early summer), and there is considerable evidence to show that the Defendant adopts a "golden hurdle" which the Court of Appeal has made clear is not required. Dr Ireland's clear evidence shows that had proper regard been had, there is a high likelihood the decision would have been different, There is rightly no suggestion that the claim is in any way frivolous – as Dr Ireland explains the Claimant has "*made the most difficult financial decision to issue a judicial review claim, even though this might mean not being able to afford to fund other vital community projects, because we think it is the single most important challenge that our community and our local environment face*" [15].

The complexity of the relevant law and procedure is indicated by who the Defendant and the IP have instructed (Mr Bedford QC, having previously instructed in the successful challenge last year Mr Katkowski QC, and Mr Taylor QC, and the IP instructs Mr White QC). It is not objectively unreasonable having regard to these matters.

Financial resources and other matters

24. As Dr Ireland's statements explain, the Parish's financial position and budgeted costs are clearly reasonable and in addition to the above and the obvious importance of this matter to the Parish and in protecting the environment of all the rural hinterland parishes, the budgeted costs also reflect that:
    (i) This litigation has particular increased expenses, in particular the Parish and a team of volunteers has used specialist planning advice to help them in their research in relation to the trajectory, given the lack of reasons produced by the Defendant
    (ii) The Claimant, as a Parish Council, must also take into account in its budget the future likely sizeable calls on its resources – and which includes the steps in the near future which the Claimant anticipates it will be taking to continue to protect its local environment, as Dr Ireland explains.
    (iii) The Claimant's actual previous experience of litigation against this same Defendant. That litigation in fact cost the Claimant more than £60,000. Some of that was recovered, but not all of it, as it was subject to a cap. There is a plainly reasonable basis for the Parish's view that it needs to budget £70,000 or so.
    (iv) The Parish has sought to litigate reasonably – it has used a junior (Sasha Blackmore, 2005 call). It has used a more junior barrister (Hannah Gibbs, 2015 call) where practicable, to keep costs down; whereas the Defendant and the Second IP both instructing leading QCs.

25. Further, the Second IP's (unreasonable) approach raises the risk of satellite litigation about costs and whether the position being adopted is lawful under the Aarhus Convention, and the potential for a complaint to be made. The Aarhus Compliance Committee continues to examine the new provisions under the CPR. For example in ECE/MP.PP/2017/46 United Kingdom Decision V/9n, in the July 2017 (Report to the Meeting of the Parties on Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention) (emphasis added)

> 36. The Committee further considers that the uncertainty concerning the actual level of the cap in any particular case due to the possibility of variation may also be contrary to the requirement in article 3, paragraph 1, of the Convention to establish a clear, transparent and consistent framework to implement the Convention, including article 9, paragraph 4. The Committee notes with concern that the cost cap amount can be subject to change and even complete removal by the court until the very end of the proceedings, thus increasing uncertainty for claimants. The Committee also notes the observers' statements that the courts would be able to vary the cost cap more than once within one stage of the proceedings and that applicants would not be able to withdraw their case at the point when they learn of an increased cost cap against them or after their opponent has already incurred costs exceeding the default cap.21 37. The Committee notes that in the calculation of what is to be considered "prohibitively expensive", the courts will not consider the costs incurred by the claimant but only the costs of the opposing party. The

> Committee considers that the possibility to vary the caps will likely increase the likelihood of satellite litigation seeking such a variation, and these satellite proceedings would potentially result in further costs and uncertainty for claimants, a concern also raised by several communicants and observers. 38. Based on the above, while welcoming the possibility to decrease the cap and increase the costs-cap and the criteria in paragraph 3 of rule 45.44 to assess what would be prohibitively expensive for that purpose, the Committee considers that the aspects examined above take the Party concerned further away from fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n regarding England and Wales

26. For all these reasons, the usual position should apply, and the Claimant's costs should be capped in accordance with the usual framework. If any change is made, which is a matter for the Court, it is the Second IP which is clearly able to litigate without costs protection.

27. The Claimant respectfully seeks permission.

SASHA BLACKMORE
HANNAH GIBBS
LANDMARK CHAMBERS
14 FEBRUARY 2018

Statement of Truth

The Claimant believes the facts in this Reply are true. I am authorised to sign this statement on behalf of the Claimant.

Signed …….
David Alexander Bowman
Solicitor for the Claimant

Dated 14 February 2018