Bolton Council
Chief Executive’s Department
Legal Services
Town Hall, Victoria Square
Bolton BL1 1RU

Attn. Ms Nicola Raby

Your ref: 84065/10
Our ref: BHEAG1-001/SR/AC
Email: acopithorne@richardbuxton.co.uk

JUDICIAL REVIEW PROTOCOL

THIS LETTER REQUIRES YOUR URGENT ATTENTION

24 February 2011

Dear Sirs

Pilkington Quarry – letter before claim in judicial review – 84065/10

1. We write further to our letter of 9 December 2010 in relation to this application
   (ref 84065/10) under s.73 Town and Country Planning Act 1990 for an
   extension of dimension stone/aggregate quarry operations at Pilkington
   Quarry, Makinson Lane, Horwich, Bolton BL5 6NA.

2. We have considered the decision of 7 January 2011 granting permission and
   are of the opinion that it is unlawful for the reasons given in this letter. We
   have therefore advised our clients to invite the Council to agree to quashing
   the permission. Should the Council not be minded to agree to quashing,
   subject to its reasons for defending the permission, we will advise our clients
   to bring a claim in judicial review. This is a letter before action sent in
   accordance with the pre-action protocol for judicial review.

Details of the proposed claimant

3. We have been instructed by the Blackrod and Horwich Environmental Action
   Group, Horwich Moor Residents Association, Arcon Village Residents Group
   and Montcliffe Residents Association to send this letter before action.

Details of the decision under challenge.

4. The grant of permission dated 7 January 2011 for the extension of dimension
   stone/aggregate quarry operations at Pilkington Quarry, Makinson Lane,
   Horwich, Bolton BL5 6NA, subject to conditions.
Details of the order sought

5. An order will be sought a) quashing the grant of permission of 7 January 2011 and b) that the Council pay our clients' costs.

6. Should the Council not be minded to consent to judgment and it becomes necessary to issue a claim, we will be applying for a protective costs order to limit the liability of the named claimant to pay the Council's costs.

Summary of facts

7. The facts are well known to the proposed Defendant and Interested Party and we do not propose to set them out here. We have referred to the relevant facts when setting out the grounds below.

8. However, one factual area which is entirely unclear to us is the current operations at the existing quarry. The environmental statement for 80931/08 (the withdrawn appeal application) states that as of 2008, "the existing quarry is currently active, extracting high quality aggregate and dimension stone, primarily for use as a building stone". At 3.2.2 it is stated that reserves at the existing quarry will only last for 1-2 years.

9. However, some two years later, the environmental statement for the 84065 application makes an identical statement at 1.3.1, namely that the existing quarry is currently active. It is never explained how two years after the ES for 80931/08 was submitted the quarry is still active and the reserves have not been worked out.

10. The planning officer's report for 84065/10 (drafted for the November meeting) states at page 2 that, "The adjacent Pilkington Quarry site is currently utilised for the extraction of high quality sandstone." However, that is contradicted at page 25 of the same report, which says in relation to the existing quarry that restoration works are ongoing. Further references through the officer's report(s) are to restoration at the site rather than continuing extraction.

11. A restoration scheme for the existing quarry was apparently approved in August 2008. The condition to the 62530/02 permission and the 50252/97 permission requires a restoration plan to be submitted within 6 months of the cessation of extraction operations, which shall be implemented within 12 months of approval. If this condition was not breached, then extraction operations at the quarry must have ceased in 2008.

12. As far as we are aware all extraction plant and machinery was removed from the existing quarry at the end of 2005 and there does not appear to have been any extraction of stone since that date. Photographic evidence does not reveal any changes of appearance that can be attributable to quarrying operations.

13. Clearly if the information provided to the Committee in support of this application is to be correct, it needs to be predicated on the actual state of affairs at the existing quarry. Particularly in relation to ground 1 below, the environmental statement submitted with 84065/10 will not have adequately assessed the cumulative impact of the extension (particularly in relation to noise, dust and traffic) if the operations at the existing quarry have been misrepresented.
14. Please could the Council (or the interested party) therefore provide records of the quantity of stone quarried from the existing quarry for each year from 2005 -2010?

Grounds of challenge

15. The 84065/10 permission is challenged on the following grounds (based on the information we currently have):

Ground 1: breach of the EIA Regulations and Directive

16. Objectors had complained that the ES for the planning application was defective because, for example, it failed to adequately assess the cumulative impact of the proposals relating to the extension of the quarry and the restoration of the existing quarry. The officer’s report purported to answer these complaints by relying upon the environmental statement for the withdrawn appeal scheme and additional material provided to the inspector at the planning inquiry.

17. The officer’s report thus acknowledged that the ES for the planning application itself was deficient; it ought to have been possible to assess the effects of the application scheme on the basis of its own ES, without recourse to the ES for another scheme or material provided to a public inquiry.

18. Reliance upon the ES for the withdrawn appeal scheme and further information provided to the inspector at the planning inquiry was not a lawful substitute for a deficient ES. In particular, (i) the appeal scheme ES and the additional information provided was not before the committee and they were not asked to take it into account; (ii) that information was not part of the information submitted in support of the planning application; (iii) members of the public could not be expected to conduct a paper chase nor to guess what parts of the other ES and other information the officer’s report was referring to or relying upon.

19. It would be exceptional for the court not to quash the decision in these circumstances: R (Brown) v Carlisle City Council [2010] EWCA Civ 523 at [32] to [35].

Ground 2: (a) vehicle movements and (b) the restoration scheme for the existing quarry

20. As far as vehicle movements are concerned, condition 3 of the permission limited HGV movements to 120 in and 120 out of the entire site, so that the limits applied to HGVs needed for the extension and for the restoration of the existing quarry. The ES for the planning application 84065/10 stated that the resulting movements would be 70 in and 70 out per day above existing levels.

21. However, the restoration plan for the existing quarry submitted in August 2008 and apparently approved refers to 80 lorry trips in and out per day. The cumulative total (70+80) amounts to 150 in and 150 out per day, which is more than approved.

22. Information provided to the planning inquiry (an erratum appendix AA) suggested that 152 movements in and 152 movements out per day would be
needed, though we do not know to what extent this was relevant to the application for planning permission or whether it was relied upon or considered by the planning authority before granting planning permission.

23. If the information before the planning inquiry was correct – namely that at least 152 movements in and 152 movements out are needed – then the planning permission is unlawful since it appears to have been granted on a false understanding of the HGV movements required by the proposals.

24. Related to this is the amount of fill needed to complete the restoration of the existing quarry. The officer’s report to the committee referred to the infilling of the quarry void and said that it already had permission. However, the approved restoration scheme states that “the amount of additional material therefore required above that already approved or existing is some 1.2 million cubic metres”.

25. If it is right that the restoration scheme for the existing quarry has not been fully approved because the importation of additional material needs to be approved and has not been, then the planning permission is unlawful since it was granted on a false understanding that no further approvals were needed for that restoration scheme. This may, for example, have implications for vehicle movements. On the information we have seen the position is not clear.

26. We note that the above are examples of the confusion caused by the inadequate ES and the need to conduct a paper chase in order to try and determine what the correct position is.

Ground 3: groundwater

27. The proposals intend to extract minerals down to a level close to the existing water table. The Environment Agency in its letter of 12 November 2010 raised a number of points relating to the deficiency of information on groundwater conditions in the existing quarry and the proposed extension area. In the EA’s view, further groundwater monitoring was needed “so as to be able to determine whether the activities of the quarry are likely to affect or be affected by” trends in groundwater levels. It advised that changes in groundwater may influence the proposed working or restoration scheme.

28. The condition 24 attached to the planning permission required a scheme of groundwater monitoring to be put in place. However, although the reasons for the condition recognised that the results of the monitoring may demonstrate a need to make adjustments in the proposed restoration scheme, the permission did not impose any mechanism by which such an adjustment could be required. There is no scope to imply such a requirement: R (Sevenoaks) v FSS [2004] EWHC 771.

29. Moreover, there appears to be no mechanism which controls the proposed working scheme or prevents it from extending below the water table, if the groundwater monitoring shows that the approved excavation levels would have that consequence.

30. Further and in any event, the uncertainties regarding the impacts on groundwater, the lack of information on groundwater levels and the suitability of using conditions on the planning permission in an attempt to mitigate and
control the possible adverse effects on groundwater ought properly to have been considered in the ES and they were not.

31. Alternatively, the Council ought to have at least considered, rather than assumed, that the conditions suggested by the EA and those imposed on the planning permission were adequate to control the risks identified by the EA, and it acted unlawfully in failing to do so: see generally Gillespie v FSS [2003] Env LR 30.

Ground 4: unlawful failure to impose conditions recommended by the Environment Agency

32. The officer’s report to Committee states, “...Members are advised that, with the addition of one further condition covering groundwater assessment and monitoring which has now been agreed with the applicant, the Environment Agency have no outstanding objections and are satisfied with the proposed conditions."

33. In fact, the Environment Agency in a letter dated 12 November 2010 expresses concern about the need to "maintain a clear structural boundary between the existing and proposed quarry" until the instability and pollution issues at the existing quarry had been resolved. The EA proposes two conditions to mitigate this concern, namely:

"The residual un-worked barrier of rock between the existing and proposed Pilkington quarry voids must be retained as a precaution until or unless the unstable ‘buttress’ of imported fill material in the northern quarry void has been removed, or made stable and free from pollution risk."

And

"No further importation of wastes for storage or deposit on site without the prior agreement of the planning authority and acquisition of the relevant permits or exemptions from the Environment Agency."

34. Contrary to the officer’s report, these conditions have not been placed on the planning permission. The Council has not given any explanation or justification for failing to include these conditions and the officer’s report is clearly misleading in this respect.

Details of Legal Advisers

35. We are instructed as per the details above. Counsel instructed is Mr James Pereira of Francis Taylor Building, London.

Details of the Interested Party

36. Armstrong Aggregates Limited, Pilkington Quarry, Makinson Lane, Horwich, Bolton BL6 6NA.

Action the Council is requested to take
37. The Council is asked to agree that the grant of permission was unlawful and to consent to having it quashed by consent in the High Court and pay our clients’ costs.

Further information required

38. We would be grateful for provision of the following documents referred to in the Council’s letter to our clients, dated 11 February 2010, namely:

(1) The agreed restoration plan for the existing quarry and any further submissions for consideration of an alternative plan of ‘low level’ restoration;
(2) Copies of the enforcement notices served by the Council on the applicant requiring the removal of the ‘substantial stockpile’ of green waste and waste wood unlawfully dumped in the quarry;
(3) Records of the Council’s analysis of the report submitted by the applicants on the contamination of the quarry and consideration of further investigation and action.

39. As that letter promises to provide residents with copies of these documents (apart from the enforcement notices) we see no difficulty in providing them at this time. However, if despite this promise and despite the Council’s duty of candour in disclosing material relevant to judicial review proceedings there is any reluctance to disclose, this request is also pursuant to the Freedom of Information Act and/or the Environmental Information Regulations.

40. Please note also our request for records of stone quarried from the existing quarry since 2005 set out at paragraph 14 above.

Requested response date

41. Please respond to this letter within 14 days to enable, if necessary, preparation of a claim form and detailed statement of facts and grounds for judicial review proceedings in good time.

Yours faithfully

Richard Buxton

cc. Mineral Planning Group (attn. Mr Martin Millmore)