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JUDICIAL REVIEW PROTOCOL

THIS LETTER REQUIRES YOUR URGENT ATTENTION

24 November 2010

Dear Sirs

Pilkington Quarry – letter before claim in judicial review

1. We write further to our letters of 12 October and 10 November 2010 in relation to the applications (refs 83999/10 and 83299/09) under s.73 Town and Country Planning Act 1990 to amend conditions to those permissions to extend the life of Pilkington Quarry until 22 February 2042.
2. We have considered the decisions of 15 October 2010 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 grants of permission dated 15 October 2010 to a) vary condition 1 on application 50252/97 to allow operations at Pilkington Quarry, Makinson Lane, Horwich, Bolton to continue until 22 February 2042; and b) to vary

condition 1 on application 61530/02 to allow operations at Pilkington Quarry, Georges Lane, Horwich, Bolton BL6 6NA to continue until 22 February 2042.

Details of the order sought

5. An order will be sought a) quashing the grants of permission of 15 October 2010 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.

Grounds of challenge

8. The 83999/10 and 83299/09 permissions are challenged on the following grounds.

Ground 1: unlawful approach to section 73 TCPA 1990 in respect of 83299/09 and 83999/10

9. The officer's report of 14 October 2010 advised that:

"A common theme that must be paramount in Members minds when considering this application is that the principle of the development is not for their consideration, but solely the conditions and specifically whether the 2042 end date for mineral extraction ought to be imposed."

10. Similarly, the "Analysis" section of the report advised that:

"... the principal material consideration is a matter of law based upon case law for similar developments."

11. In the light of the legal analysis their counsel advised that "...the Council should accede to Armstrong Aggregates application to vary 50252/97..." and the officer advised that it would be "quite perverse" not to grant the other application as well.
12. The overall effect of the advice given was that the Council considered that it was bound to grant the applications if the time limit condition on permission 50252/97 was unlawfully imposed.
13. The Council erred in taking this approach. The Courts have made it clear that a section 73 application is to be determined in the light of the development plan and all material considerations as they stand at the time the application is determined: see for example *R v Leicester City Council ex p Powergen* (2001) 81 P&CR 5. In the present case the Council unlawfully fettered its

discretion under section 73 by following the advice that it was given, since it failed to engage in the planning merits of the development proposed.

14. Consideration of the planning merits in the circumstances as they stood in October 2010 may have led it to (a) refuse the applications or (b) grant one or both permissions subject to different conditions (not merely a different time limit condition): on the latter, see *Earthline* [2003] 1 P&CR 24 (CA) at para 20.

Ground 2: unlawful approach to the requirements for EIA in respect of both planning applications

15. The two applications for planning permission were made pursuant to section 73 TCPA 1990. The EIA Regulations 1999 and the EIA Directive apply to such applications. The Council's report accepted that the EIA Regulations applied, but went on to state that:

". . . the application is not seeking approval for the principle of mineral extraction as this is established. The application does not go to the heart of the development but relates solely to a single condition and again it must be stressed that this condition is unlawful and therefore unenforceable and the development of the site for mineral extraction already has the benefit of the two extant consents. It is the view of the officers and that of the legal advisors that under these particular circumstances an EIA is not required. "

16. No formal screening opinion was carried out.
17. The Council erred in following this approach and in failing to carry out a formal screening opinion. Satisfying the requirements of the EIA Regulations was obligatory for these section 73 applications. Not only do the EIA Regulations clearly apply to section 73 applications as the Council accepted they did, but an analogy can also be drawn with ROMP applications where EIA is also required in principle.

Ground 3: unlawful failure to impose conditions recommended by the Environment Agency

18. In its letters of 26 February 2010 (in response to consultation on 83299/09) and 3 June 2010 (in response to consultation on 83999/10) the Environment Agency recommended that certain conditions be imposed on any grant of planning permission in order to ensure that restoration was appropriately carried out in light of the fact that waste (some of it apparently highly contaminated) had already been imported on to the site and the site is known to be geologically unstable.
19. The conditions recommended by the EA address significant environmental concerns associated with the quarry site, including:
 - I. an assessment of the pollution potential and geotechnical risk associated with the previously imported wastes, and for any necessary mitigation measures to prevent pollution or geotechnical risk;
 - II. monthly recording of groundwater levels in each of the currently available monitoring boreholes, with detailed directions as to the construction and monitoring.

20. The Council failed to impose the conditions recommended by the EA and has failed to provide any lawful reasons or justification for not doing so.
21. Committee members were verbally advised by Tim Hill, chief planning officer, at the Committee meeting on 14 October 2010 that it was not possible to impose any new conditions since the applicant had only asked the Council to consider the condition limiting duration. That advice is clearly misleading and wrong.

Ground 4: unlawful failure to differentiate between the two planning applications

22. The Council were advised that condition 1 setting the time limit on permission 50252/97 was unlawful and that therefore development under that permission could take place indefinitely, whereas condition 1 under permission 61530/02 had been imposed unlawfully. The latter meant that the 2002 permission was time expired and no development could take place under it.
23. Despite these differences, officers advised the Council that it would be 'quite perverse' to grant the application relating to the 1997 permission and refuse the application relating to the 2002 permission.
24. This advice was itself perverse. The Council's approach to the application relating to the 1997 permission was determined by its advice that the time limit condition on that permission was unlawful. That consideration did not apply to the application relating to the 2002 permission. It was perverse of the Council to approach the latter application as though that consideration did apply.

Ground 5: perversity and failure to consider securing the surrender of the 1997 permission

25. The Council's decision was perverse because it proceeded by way of flawed logic. In an addendum advice, the Council was advised by counsel that permission 50252/97 was still extant and capable of implementation. This advice was treated as supportive of the grant of the planning applications.
26. The Council's approach was flawed. The reasons given as to why the 1997 permission was still extant will continue to apply even upon implementation of the permissions under challenge. Thus in the absence of any surrender of the 1997 permission, the developer will continue to be able to rely upon it. In these circumstances the Council's reasoning that the continued existence of the 1997 permission supported the grants of planning permission proceeded by way of flawed logic.
27. Further, the Council erred in failing to exercise its discretion, or failing to consider exercising its discretion, to seek a planning obligation requiring the developer not to implement the 1997 consent.

Ground 6: failure to consider lawfully the implications of permission 50252/97

28. The Council concluded that condition 1 of permission 50252/97 was unlawful and that as a result development under that permission could continue indefinitely. As a result, the Council approached the applications as though it was powerless to prevent mineral extraction from continuing in the event that

it decided to refuse the applications for planning permission. This ground challenges that approach. For the avoidance of doubt, the other grounds referred to above are not affected by the outcome of this ground of challenge.

29. Even if the condition attached to the 1997 permission was unlawful by parity of reasoning with Earthline, the Council erred in its approach since:
 - I. Even if the Council were right in its analysis of the status of condition 1 on the 1997 permission, it does not follow that it was powerless to prevent mineral extraction. The Council ought to have considered whether a revocation order would have been justified in the light of its acknowledged error, the planning circumstances in October 2010 and its earlier view that mineral extraction should cease in 2007.
 - II. In the circumstances of this case we are aware that residents have purchased houses near to the quarry in the belief that quarrying operations had effectively ceased. In Earthline the Court of Appeal acknowledged that an unlawful condition would not necessarily be struck down if there was evidence that a member of the public had been misled by seeing it on the register: see para 19 of the CA judgment. It follows from this that the Council could not assume that the unlawful condition was to be treated as having no effect. In the present case its operation should be upheld since otherwise there could be demonstrable prejudice to local residents and the Council erred in treating the condition as though it were of no effect.
 - III. In the alternative, the claimant will contend that condition 1 went to the heart of the planning permission and could not be severed from it. Accordingly, the 1997 permission as a whole was rendered unlawful and of no effect, and no development could continue under it.

Ground 7: Failure to consider relevant policies in the development plan

30. The officer's report advises that section 38 of the Planning and Compulsory Purchase Act 2004 requires that applications be determined in accordance with the policies in the development plan unless material considerations indicate otherwise.
31. However, there is no mention of any of the relevant policies in the officer's report.
32. Under the 2002 permission, the previous operators of the quarry site imported large quantities of waste (including industrial and clinical waste), ostensibly to create a buttress to stabilise the north-east face of the quarry. A significant proportion of that waste was contaminated, in particular with heavy metals such as zinc, lead and copper, water soluble boron, sulphate and hydrocarbons.
33. The independent consultants, Terra Consult, who reported on the contamination in 2006 described the results from two of the samples to be so highly contaminated as to be capable of being classified in themselves as hazardous waste. The report records concerns that the hazardous materials could be leaching from the site and that the buttress materials have been producing landfill gas, both of which could pose a risk to neighbouring properties and the health of local residents.

34. The current application will ostensibly allow excavation of the site, which must carry a high risk of disturbing the contaminated material. It is not at all apparent from the documentation submitted with the applications 83999/10 and 83299/09 what the applicant intends to do with the site, nor is that commented on in the officer's report.
35. However, given that the site is known to contain contaminated material, policy EM 4 of the Bolton Unitary Development Plan is clearly relevant. That policy states:

Contaminated Land

EM4. The Council will only permit development proposed in areas which may have been contaminated by previous industrial or other uses, provided:

- (i) that appropriate investigation have been carried out by the applicant to establish the nature of the contamination and its potential impact on the development and the local environment; and
- (ii) where necessary, what suitable measures will be taken to remove or treat the contamination or to protect the development from its effects.

The Council will use conditions and legal agreements to ensure such measures shall then be carried out before the use of the site commences.

36. Nowhere in the documentation relating to this application is there any indication that the applicant have fulfilled the requirements of these policies nor do any of the conditions to the permissions seek to address the issue of the contamination. Even if that were the case, the late addendum to the planning officer's report advised the Committee that "representations relating to contamination go to the principle of the development. This is not open for consideration in the Section 73 applications". (emphasis added). Clearly this advice was incorrect for the reasons relating to section 73 applications given in Ground 1 above.
37. The Terra Consult report and the letters from the EA record concerns that the ground comprising the proposal site is unstable. Policy EM13 of the Bolton UDP on Unstable Land states:

EM13. The Council will only permit development on unstable land where effective measures can be taken to treat, contain or control any instability so that all the following criteria are met:

- (i) there is no unacceptable risk to the occupiers of the development or neighbouring land;
- (ii) there is no threat to the structural integrity of any building built, or to be built on or adjacent to the site;
- (iii) the development would not cause the instability of adjoining land or buildings; and
- (iv) that all remedial work proposed in a scheme approved by the Council has been completed before the development is first occupied.

Applications for development on unstable, or potentially unstable land should be accompanied by a specialist investigation and assessment report to establish the nature and extent of the instability, any gas emissions that might be associated with any land filling and to identify any remedial measures to deal with the instability which may be required before the application can be determined.

38. There has been a clear failure for the Council to consider or apply this policy on unstable land.
39. Policy M3 (viii) requires that development proposals for sandstone workings and associate operations will be permitted provided that the Council assesses whether an “adequate buffer zone” can be established between the mineral development and neighbouring, incompatible non-mineral development or land uses. Paragraph 15.13 of the explanatory text to the policy recommends as general practice a 200m standoff between the mineral workings and other development such as housing. The distance between the eastern face of the quarry site and the closest private residence, Heather Hall, is 50m.
40. The Council has failed to consider or apply this policy as well as the others above regarding contaminated and unstable land. These policies are intended to prevent serious detrimental impact from development on the environment and local residents. There is no lawful justification for this failure and for this reason as well the grants of permission are unlawful.
41. At this stage the policies referred to above appear to have been particularly important when considering the merits of the application before the Council. We reserve our right to refer to other policies that may have been relevant.

Details of Legal Advisers

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

Details of the Interested Party

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

Action the Council is requested to take

44. 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

45. We would be grateful for provision of the following documents (or confirmation that they do not exist) referred to in the Council's letter to our clients, dated 11 February 2010, namely:
- (1) The agreed restoration plan for the 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) The survey undertaken and submitted by the applicants (ie not the Terra Consult report, which we already have) regarding the contamination of the quarry site and records of the Council's analysis of that report and consideration of further investigation and action.

46. 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.

Requested response date

47. 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. Armstrong Aggregates Ltd
Mineral Planning Group (attn. Mr Martin Millmore)