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For the attention of: Patrick Arran

7 November 2023

PRE-ACTION PROTOCOL LETTER
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Sirs,

1. This is a letter before action sent in accordance with the Pre-Action Protocol for Judicial Review.

Proposed Claimant

2. We are instructed by Thames Farm Action Group/Shiplake Parish Council/Henley Town Council/Harpsden Parish Council ("the **Claimants**") in respect of a proposed application for judicial review of three decisions of South Oxfordshire District Council ("**SODC**") taken on 13 October 2023 to approve the discharge of various conditions in relation to planned development at the Former Wyevale Site, Reading Road, Lower Shiplake, Oxon, RG9 4AE ("**the Site**").
3. This letter is sent on behalf of the Claimants, members, and residents of whom are directly affected by the proposed development in this case. These include individuals whose rights will be affected.

Decisions Under Challenge

4. Specifically, the Claimant proposes to challenge the following decisions:
 - a. SODC's decision conveyed by a letter dated 13 October 2023 from Adrian Duffield, SODC's Head of Planning, to Matthew Parry of Beechcroft Developments Ltd to approve details submitted by the Developer in purported discharge of condition 3 on application P21/S4271/RM requiring a Source Protection Strategy – SODC reference: P23/S0993/DIS ("**Condition 3**");
 - b. SODC's decision conveyed by a letter dated 13 October 2023 from Adrian Duffield, SODC's Head of Planning, to Matthew Parry of Beechcroft Developments Ltd to approve details submitted by the Developer in purported discharge of condition of condition 4 on application P21/S4271/RM requiring a Piling Method Statement – SODC reference P23/S0994/DIS ("**Condition 4**");
 - c. SODC's decision conveyed by a letter dated 13 October 2023 from Adrian Duffield, SODC's Head of Planning, to Matthew Parry of Beechcroft Developments Ltd to approve details submitted by the Developer in purported discharge of condition 13 on application P18/S0951/O relating to surface water drainage works – SODC reference P23/S0992/DIS ("**Condition 13**").

(together, “the **Decisions**”)

5. The Decisions were each made under delegated powers conferred by SODC’s Scheme of Delegation, as contained within its constitution dated 3 June 2023.

Proposed Defendant

6. The Proposed Defendant is SODC, which is the local planning authority (“**LPA**”) for the Site.

Interested Parties

7. Beechcroft Developments Ltd is identified as the applicant for all three of the Decisions and it is therefore considered that they should be an Interested Party.
8. The grounds of challenge articulated below relate in part to the Environment Agency’s (“the **EA**”) involvement with the Decisions, and it is therefore considered that they should be an Interested Party.

Grounds of Challenge

9. The Claimant challenges the Decisions on the following grounds:

(1) Breach of Openness of Local Government Bodies Regulations 2014 (“the 2014 Regulations”): SODC acted unlawfully by failing to produce written records containing reasons for the Decisions, in breach of Regulation 7(1) of the 2014 Regulations when read with Regulation 7(3)(b).

(2) Failure to Consider JBA Consulting Reports: SODC failed to take into account a material consideration and / or acted in a procedurally unfair manner by failing to consider and form its own view as to expert reviews provided by JBA Consulting raising serious concerns with the materials submitted for Conditions 3, 4 and 13 such that, in JBA Consulting’s view, the conditions should not have been discharged.

(3) Common law reasons: Alternatively, and in addition to ground 1 above, SODC failed to provide reasons for why, if it considered that JBA’s expert views on a principal controversial issue should be discounted, that should be so given the concerns evidenced.

(4) Irrationality: it was irrational for SODC to decide to discharge Condition 3 in the absence of a Source Protection Strategy.

Factual Background

10. SODC will be familiar with the detailed background to this matter. What follows is a summary of events material to the grounds of challenge outlined above.
11. The Site is located within a Groundwater Source Protection Zone with designation SPZ1 (connoting the highest level of risk to the water source from contamination). This is because the Site is located above a deep chalk substrata which houses aquifers that supply potable water to the nearby Harpsden borehole (operated by Thames Water).
12. On 25 November 2019, SODC granted outline planning permission for “*demolition of all existing structures, development of B1 and/or B2 and/or D1 floorspace and required parking and servicing facilities on the south-eastern part of the site; development of up to 40 dwellings on the rest of the site; off-site highways works together with associated*”

*open space and landscaping. All matters to be reserved with the exception of access" (SODC reference P18/S0951/O – "the **Planned Development**").*

13. The Officer's Report provided in advance of the grant of planning permission stated under the heading of "flood risk and surface / foul drainage" that:

"6.42 The development would need to incorporate sustainable drainage details to ensure that all surface water run-off is accommodated within the confines of the site and discharged in a controlled manner. As the site is in a groundwater source protection zone the drainage details will need to provide a robust solution to pollution prevention and this should be in consultation with the Environment Agency. As required by our drainage consultant, the details of this can be secured by condition, in accordance with policies EP6 and EP7 of the SOLP, which seek to protect ground / surface water resources.

6.43 Thames Water have advised that they have no objection with regards to water network infrastructure capacity. They have also raised no objection with regards to waste water network and waste water process infrastructure capacity. Details of foul drainage can be secured through a condition."

14. To reflect this, the outline planning permission contained a condition, Condition 13, which required the submission to and approval by SODC of details of sustainable drainage measures – including *"an Environment Agency approved Hydrogeological Risk Assessment"* – prior to the commencement of development (and to which the development had to be constructed in accordance with).
15. At this point in time it appears that there was no suggestion that piling at the Site would be necessary for the Planned Development; for example, the Planning Statement dated 13 March 2018 submitted in support of the planning application makes no mention of piling.
16. On 22 February 2023, SODC approved a reserved matters application for *"40 dwellings and a minimum of 250 sqm Use Class E(c)(i, ii and iii), E(g)(i, ii, iii) and/ or F2(b) floorspace for the approval of details of the appearance, landscaping, layout, and scale pursuant to Condition 1 of Outline Planning Permission P18/S0951/O."* (SODC reference P21/S4271/RM – "the **Reserved Matters Approval**")
17. The Officer's Report provided in advance of the reserved matters approval stated under the heading of "drainage" that:

"6.55 The application site is located within a Source Protection Zone (SPZ). The Environment Agency defines SPZs for groundwater sources such as wells, boreholes and springs used for public drinking water supply. These zones show the risk of contamination from any activities that might cause pollution in the area. The SPZs mapping indicates that the site is located within a SPZ 1 (Inner Protection Zone).

6.56 The site lies in a highly sensitive location directly opposite a public water supply and well within the inner source protection zone. Given the location of the site within a SPZ 1, and the proximity of water abstractions, careful consideration should be given to drainage design and groundwater protection.

6.57 Given the sensitivities of this site, and based on the comments from Thames Water, it is recommended that conditions are attached to the reserved matters consent requiring:

- *The approval and implementation of a Source Protection Strategy,*
- *The approval and implementation of piling method statement (if piling using penetrative methods)*
- *The approval and implementation of details of measures to prevent the potential for damage*

to the water main. These matters all have some link to the layout of the development in relation to where the homes will be positioned relative to the drainage constraints.

6.58 The council's drainage engineer had concerns that the initial submission did not provide information to demonstrate that sufficient space would be available on site for the infiltration features. It is noted that multiple chalk cavities were identified on the adjacent site (Thames Farm), which heightens the risk that similar features could be present on this site.

6.59 Given the knowledge of the issues on the adjoining site, it is important that any constraints relating to drainage provision are known in advance of determining the application so that the layout can be designed to take account of the constraints. The council's drainage engineer therefore requested that a detailed stage ii intrusive site investigation and geo-environmental assessment be undertaken to provide an assessment of the chalk strata.

6.60 Following the submission of a Ground Investigation Report, a Flood Risk Assessment and drainage layouts, the council's drainage officer has no objection to the proposed layout. The drainage strategy clarifies stand-off distance requirements between soakaways and buildings based on further intrusive site investigation and national guidance. Based on this information, the council's drainage engineer is satisfied that the reserved matters consent can be issued.

6.61 As required by condition 13 of the outline permission, development should not commence until the council has approved details of sustainable drainage measures. Amongst other matters, this condition requires the submission of an Environment Agency approved Hydrogeological Risk Assessment. It is noted that this condition is significantly more detailed than the drainage condition attached to the Thames Farm permission, which was allowed through the appeal process. Furthermore, the applicant has updated their Flood Risk Assessment (Ref: 012_8210674_C Issue iii: 8 July 2022) and the council's drainage officer has recommended that the details submitted for condition 13 expand on the information in this report to include detailed designs of the mitigation measures referenced in the report.

6.62 Given the detailed requirements of condition 13 of the outline permission, in combination with the investigations already carried out, and the additional protections provided by the imposition of further conditions, there is no valid reason to withhold planning permission in relation to ground conditions, ground water and surface water drainage matters."

18. The subsequent Reserved Matters Approval accordingly included the following conditions:

"3. Prior to the commencement of the development, a Source Protection Strategy detailing how the developer intends to ensure the water abstraction source is not detrimentally affected by the proposed development both during and after its construction, shall be submitted to and approved in writing by the Local Planning Authority. The development shall be constructed and maintained in accordance with the recommendations of the strategy.

Reason - To ensure that the water resource is not detrimentally affected by the development in accordance with Policies INF4 and ENV11 of the South Oxfordshire Local Plan 2035.

4. Piling using penetrative methods shall not be carried out other than with the written consent of the Local Planning Authority. In the event that piling is required a piling method statement shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of the development. The development shall be implemented in accordance with the approved details.

Reason: To ensure that the proposal does not harm groundwater resources in accordance with Policies INF4 and ENV12 of the South Oxfordshire Local Plan 2035."

19. The EA were not consulted at either the outline permission or reserved matters stage.
20. On 14 March 2023, the Beechcroft Developments Ltd submitted applications for discharge of Conditions 3, 4 and 13. Included within these applications was a combined Hydrogeological & Piling Risk Assessment completed by Southern Testing dated 13 March 2023¹, which stated in its summary that (with original emphasis):

"The object of this report is provide sufficient information to discharge Planning Condition 13a (An Environment Agency approved Hydrogeological Risk Assessment) as outlined in the Planning Permission (ref: P18/S0951/O) and Condition 4 (Piling using penetrative methods shall not be carried out other than with the written consent of the Local Planning Authority. In the event that piling is required a piling method statement shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of the development. The development shall be implemented in accordance with the approved details) of the Reserved Matters (ref: P21/S4271/RM).

...

Surface water management and drainage strategy, and source protection strategy is outside the scope of this report."

21. The application materials submitted for Condition 3 included an eight line document entitled "Source Protection", which stated as follows:

"Condition 3 – Source Protection Strategy

It is anticipated that the risks to the local water abstraction source are from either surface water drainage or piling.

These risks are discussed in detasil (sic) in the following documents.

Hydrogeological and Piling Risk Assessment.

Flood Risk Assessment

Both reports consider the risks and detail how the risks are mitigated."

22. The application for discharge of Condition 3 was accompanied by the Hydrogeological and Piling Risk Assessment. Although the applicant provided various further documentation prior to the Decisions being made, at no point was a dedicated source protection strategy provided.
23. In April 2023, consultants appointed by the Thames Farm Action Group ("**TFAG**"), JBA Consulting, provided a technical review of the documents submitted in relation to Condition 13 and Conditions 3 and 4. This review concluded as follows (with all three highlighted red):

"Condition 13: Insufficient demonstration that the risk posed by current soakaway design to structural stability and public water supply is controlled by effective mitigation measures.

Condition 3: Absent – notably during operational stage of the development.

Condition 4: Insufficient details provided."

¹ This was subsequently updated, but not materially for the purposes of this proposed claim.

24. In relation to Condition 3, the review stated *inter alia*:

"The applicant has not provided a specific document dealing with the provision of a source protection strategy but relies on information within the HRA and FRA.

...

The applicant's attempt to derive a maintenance and adoption strategy cannot be satisfactory in the absence of a thorough and systematic description of hazards during construction and operational stage of the development. A site-specific source protection strategy should be developed that considers final development detailed design. This strategy should cover both construction and operational stage of the development."

25. The conclusion to this review stated:

"Based on the above discussion, the applicant's environmental consultancies do not appear to have considered the significance of the planning policies and guidance for the proposed development, resulting in mitigation measures conflicting with site conditions.

The potential risk to the Public Water Supply is severe, with significant hazards identified from construction activities and low to medium hazards following development (absence of control for site activities).

The FRA and HRA indicates detailed design should be developed. Due to the significance of the risk, detailed design is required to ensure an appropriate assessment is undertaken. Following issue of detailed design, the risk assessment should be reviewed comprising a detailed piling methodology and piling risk assessment. The latter is currently inappropriate and should be re-submitted with significant complementary information."

[Emphasis added]

26. By contrast to the outline planning permission and reserved matters stages, the EA were consulted on these condition discharge applications. In response to Conditions 3 and 4, the EA sent identical responses on 8 April 2023 stating, *"this application relates to a condition that was not requested by us, we therefore have no comments to make with regards the discharge of condition."* In relation to Condition 13, on SODC's website there is an email from the EA to SODC dated 8 June 2023 stating, *"please see below from response from April in which we have no comments to make on this discharge of conditions application"*. We have not been able to access the April response itself as it is not on SODC's website.

27. JBA Consulting provided a further review in July 2023 in light of updating documents submitted for Conditions 3, 4 and 13, which maintained the concerns initially raised. The conclusion to this review stated:

"Following on from April review of submitted document by the applicant, revisions of the HRA and piling risk assessment have been submitted.

Although further assessment have been made and details supplied, the documents that have been provided since April 2023 do not address potential risks related to construction activities and design of the proposed development which can still have significant adverse effects on the public water supply.

The potential risk to the Public Water Supply is severe, with significant hazards identified from construction activities (piling and general site construction activities) and low to medium hazards following development (absence of control for site activities)."

28. This review also raised the following concern regarding the materials proposed for the piling:

"Furthermore, Product Data Sheets have been provided instead of Safety Data Sheets and which have not been assessed by the applicant. The Safety Data sheet for the concrete mix intended for use, as specified by Hanson, have been reviewed and are provided in Appendix A. Sika® Plastiment®-190 and Sika® Stabilizer-500 VCC products both contains substances with hazard statements H317 and H412 referring to "May cause an allergic skin reaction" and "Harmful to aquatic life with long lasting effects" respectively."

29. It is of note that JBA Consulting's concerns were conveyed by TFAG to both SODC and EA.

30. On 8 September 2023, following concerns being raised regarding the EA's approach, Emma Hill of the EA emailed TFAG as follows (as is material, with original emphasis):

"In relation to applications P18/S0951/O and P21/S4271/RM, the local planning authority did not consult us in the first instance as we are not a statutory consultee for this type of development, as set out in Schedule 4 of the Town and County Planning (Development Management Procedure) (England) Order 2015.

...

*Our internal consultation arrangements for developments (residential) would not result in land contamination and where the site itself is not contaminated or does not have a history of contamination, we provide no bespoke comments. Our guidance -The Environment Agency's approach to groundwater protection, states in N8 that for "Physical disturbance of aquifers in SPZ1 Within SPZ1, the Environment Agency will normally object in principle to any planning application for a development **that may physically disturb an aquifer.**"*

In this instance, the development proposed at this site does not pose a threat to groundwater receptors.

Subsequently, we would not comment on the reserved matters planning application - P21/S4271/RM because we would not have provided comments (including recommending planning conditions) on the outline application from which the reserved matters application will be made.

As the outline planning application would pose no threat to groundwater resources, we would not need to comment on it or the reserved matters application. Again, we emphasise that where we did not recommend planning conditions, we usually would not comment on any discharge of conditions application. Our response to the application as you noted reflected our position.

...

To further satisfy your concerns, we have reviewed the planning applications -P23/S0992/DIS, P23/S0994/DIS, and P23/S0993/DIS. In summary, we have no concerns that the proposed development would have an adverse impact on groundwater resources.

Whilst we appreciate that the risk of pollution is never completely void, in terms of our engagement with planning we focus on the higher risk proposals, but all developers, operators, and members of the public have a responsibility to ensure they do not pollute the environment. The developer appears to have taken reasonable steps to ensure groundwater would not be impacted."

31. On 28 September 2023, in response to various emails from TFAG, Emma Bowerman of SODC stated:

"I think the response from Emma Hill at the Environment Agency has clarified what is required

in terms of consultation with the Environment Agency.

In response to your other query, separate planning permission is not required for piling as it is a form of foundation associated with a development that has consent. The council is of the view that further planning permission is required for Thames Farm because of the ground stabilisation works (grouting).

I have recently received some final information from Beechcroft for their conditions and my support team will upload this to the relevant applications tomorrow. It is in relation to utilising some existing soakaways and some details about monitoring groundwater. I have asked the council's drainage engineer to review this information and, subject to him raising no objection to this additional information, I intend to approve the various discharge of condition applications for the Wyevale development. Having now received confirmation from both Thames Water and the Environment Agency that they have no objection to the details submitted, I have no reason to further delay a decision on these applications."

32. On 1 October 2023, TFAG replied to Emma Bowerman stating (as is material):

"As far as this matter being closed is concerned, we do not agree as there remain a number of important issues that are still with the EA, as per my email to Emma Hill of 11 September copy attached, and our request for the OfEP to intervene.

Until these issues have been fully and properly addressed, we believe it would be unsafe for SODC to make a decision inn (sic) this matter and so reserve the right to challenge it should that arise."

33. In response to the abovementioned email from TFAG dated 11 September 2023 and an earlier email dated 8 September 2023, on 9 October 2023 Colin Chiverton of the EA (on behalf of Emma Hill) wrote to TFAG stating (as is material):

"In relation to your email dated 8 September 2023, you raised two points that you were seeking clarification on from us.

The first point being, why designate an area as SPZ1 if the application is not considered by ourselves. I can confirm we are not consulted on all applications within SPZ1 unless it is previously contaminated use or proposed contaminated use. In this instance, the development proposed at this site does not pose a threat to ground water receptors.

Your second point was regarding the applicants not carrying out sufficient investigation work to identify what ground works would be necessary for the development. As you have highlighted, we were not consulted on the initial outline application (P18/S0951/O). Based on the applications we have been consulted on, following rigorous assessment we did not identify any concerns with the information supplied within those applications that warranted any further comments from us regarding ground water contamination.

In your email dated 8 September 2023 you quoted "the latest DIS Applications indicate the developer will need to pile through the aquifers which seems at odds with the contents of your email". We have reviewed P23/S0992/DIS, P23/S0994/DIS, and P23/S0993/DIS; based on the information supplied at application, the developers have proposed reasonable steps to ensure ground water would not be affected, therefore we are satisfied that there would be no impact post development on ground water resources.

I hope this provides clarification to you on the points raised in your email dated the 8 September 2023. In relation to your email dated the 11 September 2023, you raised a number of additional points.

Specifically relating to point 1 and 2 I can confirm that under reference P21/S4271/RM there is

a discharge of condition 4 in relation to a piling method statement that was included in the application. We have reviewed the method statement and have provided comments to SODC regarding protection and monitoring methods.

As part of P23/S0993/DIS and P21/S427/RM a source protection strategy was included and the potential risks from the proposed site development to the SPZ have been reviewed and are considered to be reasonable and appropriate. I hope this satisfies point 3 in relation to source protection.

In point 4 you highlight deficiencies with the DIS/RM applications reviewed by us. As part of our statutory duty, we have reviewed all the information and data supplied to us by the applicant and have provided our technical assessment and comments to SODC with our recommendations based on our assessment.

You mention as part of point 5 that no risk assessments have been produced. As stated above, as part of our role as statutory consultee we have reviewed the Hydrogeological & Piling Risk Assessment submitted to us, in relation to the conditions to be discharged to ensure all risks have been considered and mitigated for."

34. On 13 October 2023, SODC approved the discharge of Conditions 3, 4 and 13. The decisions were not the subject of an Officer's Report nor of any other publicly recorded discussion or approval by the Council. The approval letters were signed by the Head of Planning and did not contain reasons.
35. On the same day, TFAG's solicitor emailed SODC informing them that the EA was carrying out an internal investigation and asked that the decisions on the conditions be deferred until the outcome of that investigation.

Proposed Grounds of Challenge

Proposed Ground 1: Breach of 2014 Regulations

36. As detailed above, the Decisions were not the subject of delegated Officer Reports nor of any other publicly recorded discussion or approval by the Council. The approval letters were signed by the Head of Planning and did not contain reasons.
37. The relevant parts of Regulation 7 of the 2014 Regulations provide as follows (with emphasis added):

"7.— Recording of decisions

- (1) The decision-making officer must produce a written record of any decision which falls within paragraph (2).
- (2) A decision falls within this paragraph if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either—
 - (a) under a specific express authorisation; or
 - (b) under a general authorisation to officers to take such decisions and, the effect of the decision is to—
 - (i) grant a permission or licence;
 - (ii) affect the rights of an individual; or
 - (iii) award a contract or incur expenditure which, in either case, materially affects that relevant local government body's financial position.
- (3) The written record must be produced as soon as reasonably practicable after the decisionmaking officer has made the decision and must contain the following information—
 - (a) the date the decision was taken;
 - (b) a record of the decision taken along with reasons for the decision;

(c) details of alternative options, if any, considered and rejected; and
(d) where the decision falls under paragraph (2)(a), the names of any member of the relevant local government body who has declared a conflict of interest in relation to the decision."

38. The Decisions to discharge Conditions 3, 4 and 13 come within the ambit Regulation 7(b)(ii):

- a. They are decisions which would otherwise have been taken by SODC as the relevant local government body;
- b. The Decisions have been delegated to the Head of Planning under a general authorisation to the Head of Planning to take such decisions, namely within SODC's Scheme of Delegation which delegates to the Head of Planning the power "[t]o approve or refuse items reserved for further approval by a condition attached to a planning permission or approval, or an advertisement or listed building consent (for example, details of landscaping or materials)" (page 173).
- c. The Decisions "affect the rights of an individual"; namely, the Proposed Claimant. As recognised in the Officer's Report prepared for the Reserved Matters Approval, "the site lies in a highly sensitive location directly opposite a public water supply and well within the inner source protection zone." The Planned Development therefore plainly poses risks to the supply of uncontaminated water to the nearby Harpsden borehole and, as a result, to the Claimant and other local people's right to uncontaminated potable water.² It should be noted in this regard that Henley Water Resource Zone (of which the Harpsden borehole forms one of three sources) is not connected to other adjacent zones, and therefore transfer of water into the zone from outside is not technically feasible should the supply of potable water become potable. In addition, residents and members of the Claimants as nearby neighbours to the Planned Development would be impacted by issues such as the noise caused by the required piling (around 390 in number).

39. This matter is therefore analogous to the situation faced by the High Court in *R (Newey) v South Hams District Council* [2018] EWHC 1872 ("**Newey**"). The case concerned the approval of a condition discharge application relating to a construction method statement. As recorded at paragraph 8 of the judgment, this matter was determined by an officer under delegated powers, who did not produce a report or record the reasons for approving the application.

40. The High Court considered whether the Council's decision was one which had the effect to "affect the rights of an individual" for the purposes of Regulation 7 of the 2014 Regulations. Mr Justice Garnham concluded that the council's decision to approve the construction method statement was a decision which "affect[ed] the rights of an individual" for the following reasons (with emphasis added):

"31. It is common ground that the officers taking the decision to approve the details approved by Condition 4 were acting under a general authorisation by the Defendant Council. Accordingly, two questions arise. First, is the Claimant able to identify rights of hers which were affected by the process? Second, if so, was it the decision under challenge which caused that affect?

...

34. I accept that the enjoyment of this property would be profoundly affected by the conduct of these works. Furthermore, it seems to me beyond argument, that the right to quiet

² See for example The Water Supply (Water Quality) Regulations 2016 which requires that water supplied to premises that is intended for human consumption must be "wholesome", as defined in regulation 4(2) of those regulations. The UK Government has also recognised the right to water as an element of the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights.

enjoyment of one's own property is a right within the meaning of that expression in Regulation 7; the noise and dust from the conveyor belt moving materials and waste outside the first-floor window of Grants Cottage plainly affects the Claimant's quiet enjoyment of her property. The development will also affect the light entering her property to which she has a right by prescription. Certainly, in my judgment, the conduct of these works engages the Claimant's common law rights in her property.

37. Mr Robson argues that it is not sufficient that such property rights are engaged by the works contemplated by the CMS; he asserts that those rights must be shown to be breached. I reject that submission. It is self-evident that one purpose behind the obligation to provide a written record of a decision falling within Paragraph 2 of Regulation 7 is to enable the recipient to know the reasons for the decision. That is required, amongst other things, to enable the person affected by the decision to determine whether or not his or her rights have been breached. It would be to make a nonsense of the evident intent behind the regulation if the obligation to provide reasons only arose if the person affected had been able, without those reasons, to establish a breach of his or her rights. Rights are affected, in my judgment, when activity potentially breaches the enjoyment of such rights.

38. There is here, in my view, an analogy with the jurisprudence of the ECHR. Under Art 8 of the Convention, for example, the first question to be addressed is whether rights are engaged before considering the ultimate question whether there is an interference with the exercise of those rights. In my judgment, when the regulation talks about affecting the rights of the individual, it is talking about rights being engaged by the Decision.

39. That being so, in my view, there was here an obligation pursuant to Regulation 7 to provide a written record of the Decision. There was no written record here and accordingly the Council were in breach of its obligations under the regulations. It is common ground that if I so find the only appropriate remedy is to quash the decision and remit it to the Council for re-decision."

[Emphasis added]

41. In the same manner as in *Newey*, the Claimants' rights to "wholesome" water and the quiet enjoyment of property are affected by SODC's Decisions to approve Conditions 3, 4 and 13 because the associated activities (for example piling) have the *potential* of breaching the Claimant's enjoyment of those rights.

42. As in *Newey*, there was no written record produced for the Decisions as was required for Regulation 7 of the 2014 Regulations. Accordingly, the only appropriate remedy is for the Decisions to be quashed and remitted to the Council for re-decision.

Proposed Ground 2: JBA Consulting Report

43. As stated above, detailed reviews of the documentation provided in support of the applications to discharge Conditions 3, 4 and 13 were carried out by JBA Consulting, a specialist Environmental Engineering Hydrogeological and Sustainability Consultancy. In particular, JBA Consulting highlighted the lack of a protection strategy for the construction, operation and commercial element of the Planned Development and a robust risk assessment strategy given that piling from almost 400 piles is planned which may disturb an aquifer.

44. Despite being provided with copies of reviews carried out by JBA Consulting of the materials submitted in support of the applications to discharge Conditions 3, 4 and 13, it is nowhere apparent that SODC has properly or otherwise considered the important concerns raised by JBA Consulting.

45. Instead, it appears from Ms Bowerman's email to TFAG on 28 September that she has relied heavily on the position of non-objection adopted by the EA. She states that "[h]aving now received confirmation from both Thames Water and the Environment Agency that they have no objection to the details submitted, I have no reason to further delay a decision on these applications". There is therefore no indication that she has conducted her own assessment of the materials submitted by the applicant, nor

considered the issues raised by JBA Consulting.

46. It is relevant in this regard that, notwithstanding having also been made aware of JBA Consulting's concerns, it is also nowhere apparent that the EA has properly or otherwise considered the important concerns raised by JBA Consulting.
47. In these circumstances, SODC has failed to consider an obviously relevant material consideration, namely the concerns raised by an expert organisation. Further and or alternatively, SODC has acted in a procedurally unfair manner by failing to take account of materials submitted by third parties.
48. Should SODC be unable to demonstrate that it did properly take into account the concerns raised by JBA Consulting, then the Decisions are liable to be quashed.

Proposed Ground 3: Common Law Reasons

49. Further, or alternatively, and in addition to ground 1, the common law requires reasons to be provided where fairness requires.³ JBA Consulting provided an expert review which highlighted significant and concerning deficiencies with the material provided by the Applicant. Notwithstanding the EA's response, therefore, SODC as the responsible decision-maker needed to form its own view and provide reasons why, if it thought so, the Claimants' expert evidence was to be discounted. As a matter of fairness, in a process concerning highly locally controversial applications, SODC was required to provide reasons on this principal controversial issue but did not.

Proposed Ground 4: Irrationality

50. As detailed above, the applicant at no stage produced a standalone source protection strategy as required by Condition 3, instead relying principally on the Hydrogeological and Piling Risk Assessment (and other documents).
51. In its summary, however, the Hydrogeological and Piling Risk Assessment document makes plain that it was only addressing Condition 4 and Condition 13. It contains no specific analysis relating to source protection, and indeed makes clear – in bold – that **"source protection strategy is outside the scope of this report"**.
52. The applicant also intimated that the requirements of Condition 3 were addressed by its Flood Risk Assessment. This document, however, was submitted as part of the Reserved Matters Approval and does not address the requirements of Condition 3. Indeed, if it had adequately done so then there would have been no need for SODC to include Condition 3 as part of the Reserved Matters Approval.
53. The need for a dedicated source protection strategy was drawn to SODC's attention by JBA Consulting in its April 2023 review, which highlighted the *absence of a thorough and systematic description of hazards during construction and operational stage of the development* and the need for a *"site specific source protection strategy should be developed that considers final development detailed design. This strategy should cover both construction and operational stage of the development."*
54. In these circumstances, it was plainly irrational for SODC to conclude that the application has provided an adequate *"Source Protection Strategy detailing how the developer intends to ensure the water abstraction source is not detrimentally affected by the proposed development both during and after its construction"* to enable it to discharge Condition 3.

³ See *Dover DC v CPRE (Kent)* [2017] UKSC 79 at paras [51]-[57] per Lord Carnwath JSC.

55. SODC's decision to approve details submitted in relation to Condition 3 is therefore liable to be quashed.

Further Grounds

56. The Claimant reserves its position in respect of potential further grounds. In the circumstances, and pursuant to the SODC's Duty of Candor in Judicial Review proceedings, the Claimant requests by return the following further information:
- a. All records relating to any objections received by the decision-maker and other relevant third-party responses; and
 - b. All information relating to SODC's decision not to issue written reports in respect of the Decisions as required by Regulation 7 of the 2014 Regulations.
 - c. Contemporaneous documentation illustrating that the concerns raised by JBA Consulting were taken into account (such as, for example, correspondence with SODC's drainage engineer)

Costs

57. If the claim proceeds the Claimants will apply for a protective cost order pursuant to CPR 45.43 on the basis that the claim is an environmental matter: *Venn v Sec State CLG* [2015] 1 WLR 2328. If you disagree this is an Aarhus matter or the making of a PCO please give your reasons.

Counsel

58. Daniel Stedman Jones and Jake Thorold of 39 Essex Chambers are instructed counsel.

Action SODC is Requested to Take

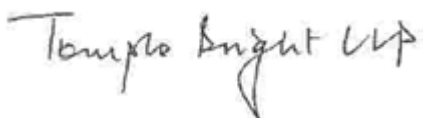
59. SODC is requested to:
- a. Consent to judgment on the Proposed Claimant's application for Judicial Review that the Decisions be quashed and remitted back to SODC for redetermination;
 - b. Require the applicant to submit a dedicated source protection strategy as required by Condition 3 prior to any redetermination;
 - c. Require the Applicant to submit a comprehensive Risk Assessment of the possible impact upon the chalk sub strata and the underlying groundwater and aquifer of the installation of in excess of 400 piles to provide the foundations for the residential content; the installation of an underground storage and pumping facility for the storage and evacuation of foul drainage proposed to be constructed within the chalk sub strata and also any piling required for the Commercial Content of the development. This information will enable a complete assessment of the likely impacts of development upon the entire site not just the residential element;
 - d. In light of the concerns raised by JBA Consulting (see paragraph 28 above), require the applicant to review its choice of piling material and select an alternative that is confirmed safe for use in this environment where a potable water supply is at risk;
 - e. Delay any redetermination of the applications to discharge Conditions 3, 4 and 13 until receipt of the outcome of the EA's internal investigation process;

f. Pay the Claimant's costs of and relating to this prospective claim.

Proposed reply date

60. Please provide a response to this letter by 5pm on 21 November 2023.

Yours faithfully

A handwritten signature in black ink that reads "Temple Bright LLP". The signature is written in a cursive, slightly stylized font.

Temple Bright LLP

Bristol office

E: polly.reynolds@templebright.com