

Attn: Ben Gard
Isle of Wight Council
Town Hall
Castlefield Road
Reigate
RH2 0SH

Your ref:
Our ref: BG BEM1.2
Direct dial: 020 3319 3700
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05 May 2021

Dear Sirs,

Re: URGENT PREACTION PROTOCOL LETTER

1. This is a letter before action sent in line with the judicial review pre-action protocol.

The Claimant

2. Bembridge Harbour Trust.

Proposed Defendant

3. Isle of Wight Council.

Decision to be Challenged

4. The decision dated 30 March 2021 to grant planning permission (reference P/00637/14 TCP/11822/Y) on land at Duver Marina, the Duver St Helens, Ryde PO33 1YB and Bembridge Marina, Embankment Road, Bembridge ("the sites") for the following development:

Bembridge Marina - Demolition of harbour office; outline for terrace of 5 houses; terrace of 3 houses; floating shower and toilet facilities; associated parking (Additional information relating to ecological impacts, flood risk and requirement for floating shower and toilet block; revised access arrangements, revised ownership plans relating to Embankment Road ecological mitigation area)

Duver Marina - Demolition of harbour office and toilet facilities and removal of septic tank; outline for terrace of 5 houses; new harbour office with shower and toilet facilities; sewerage treatment plant; associated parking (Additional information relating to ecological impacts; revised plans relating to the footprint for proposed houses, revised vehicle parking and turning areas) (further re-advertised application)

The Issues

5. The application was first submitted to the Council in May 2014. The Council resolved to grant planning permission on 1 December 2015. This was then deferred in order for the Council to review viability, address outstanding environmental issues, and apply the sequential test for flood risk. From late 2016 officers informed the applicant Bembridge Investments Limited (“BIL”) that the Council was minded to refuse the application due to the likely availability of alternative funding for what had been characterized as enabling development (for harbour improvements). This position changed around August 2017 for an unspecified reason. The application then came back before the Council’s Planning Committee which resolved to grant permission on 12 December 2017 subject to a section 106 agreement being signed. That was signed on 29 March 2021 and permission issued the next day.
6. It should be noted the directors and shareholders of BIL and Bembridge Harbour Improvements Company Limited (“BHIC”, the statutory harbour authority) are one and the same. Given that the development involves a private company (BIL) realising private gain on the back of public benefits to a public authority (BHIC), the Council should have been particularly assiduous in scrutinizing the application to determine whether the status of BHIC was being abused in order to realise private profit.
7. The main issues before the Council were the qualification of the scheme as “enabling development”, the quantum and nature of the public benefits of the scheme, the application of the sequential test for areas at high risk of flooding (the site lies with Flood Risk Zone 3), and the potential of an adverse effect on a large number of sites designated due to their national and/or international importance for nature conservation.
8. On the latter, Bembridge Harbour is designated as the “Solent and Southampton Waters” SPA and Ramsar site. The lagoons to the east of the access road to the marina (Embankment Road) and the south-east corner of the harbour are designated as the “Solent and Isle of Wight Lagoons” SAC. The “silt lagoon” proposed for mitigation lies outside the SAC but lies within the SPA. “Brading Marshes to St Helen’s Ledgers” is also nationally important as a designated SSSI.

Details of the Proposed Ground of Challenge

Ground 1: Erroneous consideration of enabling development

9. The Council accepts, as set out in the officer’s report to the Council’s Planning Committee regarding the application, that the development proposals are not in accordance with the development plan (comprising the Island Plan, adopted March 2012 and currently under review, and the Bembridge Neighbourhood Development Plan, made 28 July 2014). The site is located outside of the settlement boundary (thus contrary to policy SP1 of the Island Plan and policy BNDP.H.1 of the Neighbourhood Plan), proposes more than nine dwellings (thus contrary to policy BNDP.OL.1 of the Neighbourhood Plan), does not propose any contribution towards affordable housing ((thus contrary to policy DM4 of the Island Plan and policy BNDP.H.4 of the Neighbourhood Plan), and is at risk of flooding (thus contrary to policy SP5 of the Island Plan). There are also outstanding issues regarding nature conservation (the latter two issues are the subject of further putative grounds of challenge below).



10. In line with the Council's statutory duty under s.38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") the development should have been refused unless material considerations indicate otherwise. It is clear from the decision that the Council concluded that the development qualified as "enabling development" and this was the material consideration that warranted the grant of planning permission contrary to the development plan.
11. That conclusion was flawed for the following reasons.
12. Paragraph 2.7 of the officer's report states that the overall conclusion of the district valuer was that the proposed development (the housing and improvements) would make a marginal loss of £3,058. That is not correct; it was the profit assumed by the applicant (20%) minus £3,058. This error was pointed out by those instructing in their submission to the Council of 7 December 2017 but was not thereafter corrected in the officer's report to the Committee. Whilst orally the officer stated to the Committee that the applicant would secure a 20% profit, there was no explicit correction of the conclusion in the officer's report and so we do not know how members considered the matter: it may be they attributed the 20% profit to the sale of the housing aspect of the scheme but assumed the officer's report's conclusion of an overall net loss. In light of the clear conclusion in the officer's report that there would be an overall net loss, the position before the Council was muddled at best and the officer's report was misleading. It was clearly important that the Council had the correct profit/loss figures before them, particularly when they were presented with a figure representing a loss when in fact the district valuer's conclusion was a six-figure profit.
13. Further and in any event, several factors have changed which call into question the basis of the Council's decision.
14. Firstly, BHIC will be charged "market terms" (according to the s.106) for the new office. even though it will be built on its own land. Further, those "market terms" are an estimated £45,000 (based on figures from BIL's surveyor Hose Rhodes Dixon), yet the rent on the current offices is only £18,000 (based on figures stated by BHIC in June 2017). It is impossible to understand how any sensible commercial transaction could involve the apparent yet inexplicable donation of land only to then rent it back for a figure greatly in excess of its current rent. It was not clear to the officer or to the committee at the time of the decision that BHIC would be charged market rent, BHIC receiving no public benefit at all. Further, it is now clear that the majority of the office will be built on its own land. These facts call the entire scheme into question and were not before the Council or the district valuer.
15. Second, it has now emerged that two-thirds of the office space will be built on BHIC's own land, as well as part of the housing element of the development. It was wrongly claimed before the Council that BIL owned this land. At no point has the value to BHIC of selling its land to BIL so that it can develop the site been reflected in the viability information for the assessment of profit / benefit. It follows that the figures before the Council and the DVS were not correct. The overall viability position cannot be relied on unless the figures are accurate.
16. Third, the Director of BIL and BHIC subsequently, in 2018, confirmed during the s.106 negotiations that BHIC may now be in funds to purchase the new properties outright upon completion. This is in stark contrast to the stated position before the Committee, and is a clear



statement that BHIC now believed it could afford to fund the new facilities itself. This directly calls into question the need for, or qualification as, enabling development.

17. Fourth, back in December 2016 the officer wrote to the applicant pointing out that alternative funding was a key issue. It was noted at the time this could potentially come from the sale of new houseboat plots (nine unoccupied plots were proposed as part of an application for a lawful development certificate, at a potential gain of, on average, around £100,000 per plot). A further application for seven houseboat plots and sewage treatment facilities was then submitted. However, the officer's update report to the Planning Committee rightly stated (August 2017) that the Council should not place weight on the income to be generated from the houseboat plots arising from an application that had not even been validated, let alone positively determined. A certificate has now been granted for 25 plots. A material factual change is the grant of planning permission for another two houseboat plots, meaning alternative funding is available. Furthermore, the Director has publicly stated the firm intention to apply imminently for a total of five plots in addition to the 25 approved by the certificate and in addition to the additional two new plots. This would realise, within the lifetime of the permission, sufficient funds to build the new facilities without the need to lose operational harbour land due to the development of housing in an area at risk of flooding.
18. Fifth, BHT in its formal submission on the planning application of 28th December 2020 identified four sources of funds improperly removed from BHIC since the committee resolution, totalling some £794,000. These funds, if retained within BHIC could have substantially funded the new facilities avoiding the claimed need for enabling development.
19. Sixth, on the applicant's own submission the information used by the district valuer was incorrect. The applicant claimed (as of 28 July 2017) it would repay all of BHIC's outstanding debts with the proceeds of the development. This undertaking was relied upon by the officer in his report to committee of 2017. These debts then stood at in excess of £1,000,000. To achieve this the development would have to make at least 35% profit. This is contrasted to the 20% profit used by the district valuer in his viability appraisal. The district valuer's report in turn formed the basis of the Council's resolution to grant planning permission. As the profit is now predicted to be well above 20% the scheme no longer qualifies as enabling development, rather, it is far in excess of what could be justified. Because this issue relates to a prior decision on policy-compliance it is no answer to refer to a claw-back clause in the s.106. Further, the applicant refused to formalise the commitment to repay BHIC's debts in the section 106 agreement.
20. Seventh. The series of material changes of financial circumstances – BHIC ability to purchase: new sources of funds; available funds being disposed of; withdrawal of benefit of debt repayment - go to the heart of the justification for enabling development and should have been reported back to the committee
21. As the development does not qualify as enabling development it is contrary to the development plan, no material considerations indicate permission should be granted contrary to the development plan, and permission ought to have been refused.
22. It follows that the Council's exercise of its duty under s.38(6) of the 2004 Act was legally flawed.



Ground 2: Erroneous application of the sequential test

23. The Council's erroneous consideration of the enabling development aspect of the development also has implications in terms of the sequential test, which had concluded that, in light of the figures representing the profit of the scheme, purchasing alternative more appropriate land for the housing development would render the scheme unviable (officer's report, paragraph 2.47).
24. A revised report was submitted by AECOM which included new material on site availability. This report concluded, in essence, that although alternative sites were available, these were not appropriate because the harbour facility elements of the scheme could not be located remote from the harbour and/or purchasing third party land would render the scheme unviable.
25. The officer's report improperly mixes policy considerations and objectives. This is not appropriate under the sequential test. The aim of the policy is to identify those areas which are at lowest risk of flooding and to restrain such development.
26. There may, nevertheless, then be exceptional reasons to permit development. That is why there is a separate, subsequent, exception test. The latter is the point where other considerations should be taken into account. However, if that point is reached, i.e. if the sequential test is not passed, then there is presumption against such development. It is a weighty planning policy consideration against the grant of planning permission. Here, the officer's report concluded there were additional reasons which could be said to justify the proposed development prior to concluding whether the sequential test was passed or not. Such other justifying considerations are irrelevant to the application of the sequential test. Other sites are available, and there was clear evidence before the Council that this was the case. The sequential test has therefore not been passed. It is only at that point for the Council to consider other features of the application which might, nevertheless, justify a departure from the policy of restraint which flows from the sequential test. The Council should have asked itself the following questions: what is the flood risk; are there other sites. The outcome is that the sequential test is failed. Only then should the Council have considered whether the policy presumption against the development was outweighed by other material considerations. The fact that these considerations were taken into account in deciding whether the sequential test was passed or not is a fundamental error in the decision.
27. Therefore, the proper procedure to carry out the sequential test has not been followed. Further, as set out above under 'ground 1', there are reasons to question the conclusion that the exception test was passed. These errors render the decision unlawful.

Ground 3: Failure to comply with nature conservation duties

28. Notably, the RSPB, the CPRE, the National Trust, and the Hampshire and Isle of Wight Wildlife Trust ("the Wildlife Trust") all objected to the development. The Council carried out an appropriate assessment, albeit only after first resolving to grant permission, and produced a number of revised versions (most recently dated December 2020). While this assessment briefly considers the risk of oil from the car park polluting the protected sites pursuant to a flood event (this land is within Flood Zone 3 and adjoining the SSSI and SPA, and adjacent to the SAC, therefore there is a risk of such an event occurring) mitigation to prevent a material pollution pathway has not been secured. Specifically, condition 16 does not reflect the requirements of the appropriate assessment.



29. There is a further omission in the appropriate assessment. It does not assess the addition of some 3.5 to four hectares to the land subject to the application, being the creation of a lagoon on land within the SPA and adjoining the SAC. The works to be carried out involve major works of engineering: the lagoon will be some 70m long and some 2m deep, and bounded by two embankments some 2m high. there is clearly a real risk of short term disturbance and harm to protected species and habitats. Even if the appropriate assessment had considered this aspect of the development it is not permissible as a matter of law to rely upon improvement of one part of a European Protected Site as offsetting harm (in this case loss of functional land) (Grace v An Bord Pleanala (C-164/17)).
30. Moreover, permission was granted dependent on the future acquisition of land in the Yar catchment by the Wildlife Trust (to offset harm to the harbour and Solent from additional discharge of nitrates). The tests under the Habitats Directive require certainty as to an absence of an adverse effect. There is no certainty that the proposition has been agreed to by the Wildlife Trust (who objected to the development), nor, even if they did, that they are capable of delivering this mitigation, nor, if they are capable of delivering it, whether it can be delivered.
31. Finally, the re-revised appropriate assessment (December 2020) was not published until 19th March, very shortly before the grant of permission and so was not consulted on. Whilst this is not a formal legal requirement, consultation responses can constitute material considerations which a decision maker must take into account. Here there were such requisite consultation responses: the RSPB and the Wildlife Trust both should have been consulted. RSPB own much of the SPA and SAC land and are highly concerned with effects upon these designated sites, and the Wildlife Trust has been appointed with carrying out offsite mitigation works even though they were unaware of the revised appropriate assessment. The failure to consult means the Council has failed to consider material considerations when it made the decision to issue the permission.
32. These omissions represent a failure to take into account material considerations and a failure to comply with the Council's duty under regulation 63(1) of the Conservation of Habitats and Species Regulations 2017, as well as s.38(6) of the 2004 Act as there is inadequate consideration of whether the proposals comply with policy SP4 of the Island Plan and policy BNDP.T.1 of the Neighbourhood Plan in this respect.

Details of Advisors Dealing with this Claim

Ben Garbett
Solicitor, Keystone Law
48 Chancery Lane
London WC2A 1JF

Ref. BG/BEM1.2

Details of Interested Parties

- Bembridge Investments Limited
- Bembridge Harbour Improvements Company Limited



Details of Information Sought

33. You are required to make full and frank disclosure. In particular:

- a. disclosure of correspondence and any internal reports relating to the ownership of the land at Duver Marina following BHT representations on 7th and 21st April 2020, including in particular any representations by the applicant's solicitors, Coffin Mew, including their email to the Council of 9th August and 24th September and how this was treated by the Council, including any consideration of the financial arrangements between the applicant and BHIC regarding enabling development, and qualification as enabling development generally;
- b. disclosure of any request to the applicant and / or BHIC for its views in response to financial information provided by BHT to the Council in its submission of 28th December 2020, and of any response provided by the applicant and/ or BHIC (in the same way as the Council made enquiries of the applicant in response to BHT's legal and financial report in February 2017);
- c. disclosure of all submissions and material relied upon by the Council in concluding in its Appropriate Assessment of December 2020 (at paragraph 4.18) that the proposed works to the silt lagoon identified in that document "are part of the development scheme"; and
- d. disclosure of all and any additional submissions forming part of the planning application in making revisions to the Appropriate Assessment between August 2019 and December 2020.

Details of Any Documents That Are Considered Relevant and Necessary

34. The Claimant reserves their right to amend or add grounds upon receipt of further information.

Address for Reply and Service of Court Documents

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48 Chancery Lane
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Ref. BG/BEM1.2

Proposed Reply Date

35. Given the six-week timeframe in which to launch a challenge by way of judicial review in a planning matter we request a response to this letter within a shortened timeframe, by **4pm Friday 7 May 2021**.



Yours faithfully,

Keystone Law

Cc: Bembridge Investments Limited

Cc: Bembridge Harbour Improvements Company Limited

