

22 June 2021

South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge
CB23 6EA

Dear Sir/Madam,

Judicial review pre-action protocol: Failure to submit lawful planning performance returns pursuant to section 62B of the Town and Country Planning Act 1990

- (1) South Cambridgeshire District Council is the prospective defendant in a claim for judicial review.
- (2) The prospective claimant is the Fews Lane Consortium Ltd, a community action group that campaigns on issues relating to planning and development.
- (3) Since at least January 2019, the prospective defendant has acted unlawfully in failing to submit planning performance returns to the Secretary of State that comply with the requirements approved by both houses of Parliament pursuant to section 62B of the Town and Country Planning Act 1990. The prospective claimant intends to challenge the legality of these acts through judicial review.
- (4) The details of the prospective claim are set out below.
- (5) Section 62B of the Town and Country Planning Act 1990 (the "1990 Act") provides that:
 - “(1) An authority may be designated for the purposes of section 62A only if—
 - (a) the criteria that are to be applied in deciding whether to designate the authority are set out in a document to which subsection (2) applies,
 - (b) by reference to those criteria, the Secretary of State considers that there are respects in which the authority are not adequately performing their function of determining applications under this Part, and
 - (c) the criteria that are to be applied in deciding whether to revoke a designation are set out in a document to which subsection (2) applies.
 - (1A) A document to which subsection (2) applies may set out different criteria for each description of application prescribed under section 62A(1A).
 - (2) This subsection applies to a document if—
 - (a) the document has been laid before Parliament by the Secretary of State,
 - (b) the 40-day period for the document has ended without either House of Parliament having during that period resolved not to approve the document, and
 - (c) the document has been published (whether before, during or after the 40-day period for it) by the Secretary of State in such manner as the Secretary of State thinks fit.

(3) In this section 'the 40-day period' for a document is the period of 40 days beginning with the day on which the document is laid before Parliament (or, if it is not laid before each House of Parliament on the same day, the later of the two days on which it is laid).

(4) In calculating the 40-day period for a document, no account is to be taken of any period during which—

- (a) Parliament is dissolved or prorogued, or
- (b) both Houses of Parliament are adjourned for more than four days."

(6) Section 62A of the Town and Country Planning Act 1990 (the "1990 Act") provides that:

"(1) A relevant application that would otherwise have to be made to the local planning authority may (if the applicant so chooses) be made instead to the Secretary of State if the following conditions are met at the time it is made—

- (a) the local planning authority concerned is designated by the Secretary of State for applications of a description specified in the designation; and
- (b) the application falls within that description.

(1A) Only prescribed descriptions of application may be specified in a designation under subsection (1).

(2) In this section "relevant application" means—

- (a) an application for planning permission, or permission in principle, for the development of land in England, or
- (b) an application for approval of a matter that, as defined by section 92, is a reserved matter in the case of an outline planning permission for the development of land in England,

but does not include an application of the kind described in section 73(1) or an application of a description excluded by regulations."

(7) In November 2018 and December 2020, documents entitled "Improving planning performance: Criteria for designation" were laid before both houses of Parliament pursuant to section 62B of the 1990 Act.

(8) Each of these documents were laid before Parliament by the Secretary of State, published by the Secretary of State, and no resolution not approve either document was adopted by either house of Parliament. Accordingly, the documents came into legal effect pursuant to section 62B of the 1990 Act.

(9) Both the 2018 and 2020 documents provide that:

"The performance of local planning authorities in determining major and non-major development will be assessed separately, meaning that an authority could be designated on the basis of its performance in determining applications for major development, applications for non-major development, or both. The assessment for each of these two categories of development will be against two separate measures of performance:

- the speed with which applications are dealt with measured by the proportion of applications that are dealt with within the statutory time or an agreed extended period; and,
- the quality of decisions made by local planning authorities measured by the proportion of decisions on applications that are subsequently overturned at appeal.

Therefore, the performance of local planning authorities will be assessed separately against:

- The speed of determining applications for major development;
- The quality of decisions made by the authority on applications for major development;
- The speed of determining applications for non-major development;
- The quality of decisions made by the authority on applications for non-major development. [...]

Speed of decisions

The measure to be used is the percentage of decisions on applications made:

- (a) within the statutory determination period; or
- (b) within such extended period as has been agreed in writing between the applicant and the local planning authority as recorded for major development in Live Tables P151a and 151b, and for non-major development in Live Table 153 from the data collected by the Ministry of Housing, Communities and Local Government.¹⁰ [...]

The designation thresholds, below which a local planning authority is eligible for designation are:

- a) For applications for major development: less than 60 per cent of an authority's decisions made within the statutory determination period or such extended period as has been agreed in writing with the applicant;
- b) For applications for non-major development: less than 70 per cent of an authority's decisions made within the statutory determination period or such extended period as has been agreed in writing with the applicant."

(10) Both the 2018 and 2020 documents provide in footnote 10 that:

"The extended period could be through a planning performance agreement or an agreed extension of time (which should be in writing, be agreed before the end of the statutory determination period, and set out a timescale for the decision)."

- (11) The prospective defendant's internal auditor has established in a report published in April 2021 that the Council has not and does not apply the standard set forth in footnote 10 of the 2018 and 2020 documents approved by both houses of Parliament in preparing its PS2 quarterly planning performance returns submitted pursuant to section 62B of the 1990 Act.
- (12) The prospective claimant alleges that the prospective defendant has erred in law and continues to err in law by failing to apply the lawful standards set under footnote 10 when submitting its quarterly planning performance returns pursuant to section 62B, and the prospective claimant intends to apply for expedited judicial review seeking a declaration that the prospective defendant has erred in law, a mandatory order that the prospective defendant submits corrected planning performance returns to the Secretary of State within 30 days of the order, and an order that the prospective defendant pay the prospective claimant's costs in the claim.
- (13) The prospective claimant would be pleased to consider any means of alternative dispute resolution that is appropriate, but the prospective claimant is also aware that the prospective defendant has been aware of the illegality alleged since last year and has taken no steps to rectify its course of action.
- (14) The prospective claimant intends to seek a permission hearing and a substantive hearing on an expedited basis on the grounds that the public interest is best served by having the prospective defendant's planning performance made available to its members, the public, and the Government as soon as possible.
- (15) The prospective defendant is a public authority. It failed to meet the performance standards approved by Parliament. Rather than acknowledging its performance shortcomings in an honest and straightforward manner, it instead has attempted to deceive its own members, the public, and the Government by submitting misleading performance statistics.
- (16) Had the prospective defendant completed its planning performance returns in accordance with the law, it likely would have been designated by the Secretary of State as an underperforming local planning authority. It would not be in the public interest for the court to allow the prospective defendant to continue to attempt to skirt responsibility in this matter.

- (17) The prospective claimant intends to apply for a judicial review costs capping order once permission for judicial review is granted.
- (18) The prospective claimant would like to propose a pre-action protocol reply date of 6 July 2021, which is 14 days from the date of this letter.
- (19) Should the prospective claimant not receive a satisfactory response from the prospective defendant by the date stated above, the prospective claimant may issue judicial review proceedings without further notice.

Yours faithfully,

Daniel Fulton
Director