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14th January 2022

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Your Ref: REC00001
Our Ref: CC803.16504.BM

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Response to a Letter Before Claim in proposed judicial review proceedings

We refer to your Letter Before Claim dated 23 December 2021. This letter is a formal response to that letter and is set out in accordance with the Pre-Action Protocol for Judicial Review under the Civil Procedure Rules.

THE CLAIMANT

Mark Record of 22 Barton Road, Chichester, West Sussex, PO19 3LJ

FROM

West Sussex County Council, County Hall, West Street, Chichester, PO19 1RQ.

REFERENCE DETAILS

Becky Moutrey, Legal Services, West Sussex County Council, details above.

Reference: CC803.16504.BM

THE DETAILS OF THE MATTER BEING CHALLENGED

The decision of the County Council to authorise the Director of Law & Assurance to make the Traffic Regulation Orders and allow for the installation of the pedestrian crossing places and road humps as set out in the highway improvement report.

Response to Proposed Grounds of Challenge

1. The Defendant misinterpreted and misapplied Government guidance, so failed to have regard to a mandatory material consideration and had regard to an immaterial consideration, particularly in relation to the actual and effective width of (i) the Shared Space and (ii) the cycle elements of the Crossings.

As a general point, this ground of challenge entails a plethora of detailed criticisms of the design recommended by the Council's highways officer to the relevant Cabinet Member with respect to the road improvements in question. Contrary to the attempts to characterise those criticisms as errors of law on the basis of alleged errors of fact/misinterpretation of the guidance, the allegations are in substance criticisms as to how detailed, technical guidance on highways design has been applied, whether in the LTN 1/20 or the Design Manual for Roads and Bridges "DMRB" or the Traffic Signs Manual (which you describe as "Traffic Control").

It is well-established (and trite) that whilst the interpretation of policy or guidance is a matter of law, the application of policy or guidance can only be challenged on *Wednesbury* grounds. In this case the application of the technical guidance in question was entirely a matter of expert, technical engineering judgment by the highly experienced officers concerned who advised the Cabinet Member regarding this scheme, and there is no basis at all (nor has any been contended by your client) that it was applied in an irrational way. Furthermore, the fact is that this scheme was subject to an independent road safety audit which confirmed that the scheme would be safe to all road users (a point made to your client by Mr Shaw in response to his e-mail to the Cabinet Member on 1 December).

Your draft grounds of challenge also in any event betray a fundamental misconception regarding that guidance in the way it is assumed that this detailed technical guidance constitute binding mandatory requirements on the County Council and their highways engineers who advised the Cabinet Member. They clearly do not.

First, the duty on the Council as a highways authority in taking these measures is the duty set out in section 16 of the Traffic Management Act ("TMA 2004"). The only binding obligation on the Council is to have regard to the statutory guidance issued by the Secretary of State. You have not alleged or contended that there is any breach of that duty. It is also not alleged that there was any failure to take into account relevant technical guidance.

Second, your criticisms assume that when designing measures, the detailed recommendations in the guidance (whether in relation to effective widths, separation distances or in other respects) are mandatory minimums. They are not. They are (and can only be) recommendations and it is a matter of professional judgment as to whether, in any particular instances, they should be strictly adhered to.

The above is sufficient to demonstrate that any claim based on the grounds alleged in your draft is misconceived. However, turning to the detailed allegations raised in your draft grounds of claim (references are to the paragraphs numbers of that document) under Ground 1:

At [54] it is alleged that there was a failure to have regard to the existence of a pedestrian crossing beacon, and on that basis there was an error of fact regarding the effective width of the crossing. That is plainly misconceived: first and foremost there is no evidence of any mistake by the officers in their analysis. Nowhere is there any suggestion in the officer report that such beacons were not present nor can any such mistake be inferred: what the effective (as opposed to actual) width is a matter of judgment not simply a matter of fact. The officers were plainly aware of what physical apparatus was at this location (the beacons are marked on the relevant plans), and officers took the view that the mere fact that there was a crossing beacon column did

not justify any reduction in what the effective width was. That was plainly correct and a view they were entitled to reach: traffic beacons are a single isolated piece of highways apparatus that are materially different to walls and other continuous vertical features referred to in the guidance.

At [55], it is contended that the actual width measure of 3.06m was mistaken due to the inspection of a "BT inspection cover". That is, with respect, an absurd contention: the cover did not materially intrude above the road surface and plainly could be included in the width of the Shared Surface in question. There was no mistake about its existence, or the actual width in question.

At [56] it is contended that on the officer report extract of the plans (i.e the 'clip') is inconsistent with WGRS-100-Rev P2. That latter plan was wrong and was superseded by P4 which removed the grass area in question. This point therefore goes nowhere.

Application of the DMRB

It is contended (under the "Second Group" of allegations) that the Council "*misinterpreted the DMRB as applying to these circumstances on the basis that it was an immaterial consideration*" (at [64]). That, with respect, is again misconceived: the DMRB states that it "shall" be used for motorway or trunk roads but there is nothing that precludes it application, where appropriate, to other roads. It is frequently used by professional highways engineers in the design of other more minor roads. Government Guidance GG101 says in terms that local highways authorities may decide to use the DMRB (in whole or part). To suggest it is immaterial is plainly wrong.

Finally, there is nothing in the analysis in the OR that indicates any misinterpretation of the DMRB: the mere fact that this particular scheme does not conform to the minimum recommended separation distances and the visibility splays in the DMRB does not mean that there was any misinterpretation of the Guidance. Officers applied that guidance and took the view that in these particular circumstances and given the function of this Shared Space and the function of the existing highway that there was no need to follow this particular recommendation. There is nothing unreasonable about the application of the DMRB in this way.

Application of "Traffic Control"

Again, the mere fact that the recommendation in the Traffic Signs Manual at 17.2.6 was not strictly followed does not mean that there is any misinterpretation of that particular recommendation. The Manual itself emphasises (at section 1.3) the distinction between mandatory requirements and recommendations, and the fact that it was considered appropriate in this case to design a scheme below the recommended width was a matter of professional engineering judgment. There is nothing to suggest that judgment was irrational.

2. The Defendant (i) failed to consult with an organisation representative of those with disabilities, erroneously purporting to consult with the West Sussex Association for Disabled People in circumstances where that organisation had ceased to exist in 2012/2013, and failed to consult with organisations representative of vulnerable road users, and consequently, and generally, failed to discharge its public sector equality duty (ii) erroneously believed there had been public consultation on the Junction proposals of concern to the Claimant (and others) before grant of planning permission referred to in the Decision, and erroneously relied upon that same non-existent consultation and/or predetermined the Decision.

Alleged lack of consultation

It is contended by your client that the PSED entails a duty to "specifically consult" with groups representing the disabled and/or that the LTN 1/20 underlined such a duty. This contention is clearly misconceived.

As an initial point, there was no specific duty to formally or "specifically" consult such groups in the Equalities Act nor have you pointed to any authority which suggests there was. The Council in this case clearly had due regard to the matters prescribed by s.149 of the Equalities Act as summarised at paragraph 7.3 of the OR.

LTN 1/20 refers to early engagement, which is different to formal consultation (this misconception and failure to differentiate between the two concepts is a recurrent feature of the draft grounds of claim). That is dealt with below as a separate point. Please can you point to any authority to support the proposition that as part of the PSED a duty to specifically consult with specific groups.

In any event, there was both a full statutory consultation on these proposals as set out in the OR and appropriate engagement with groups representing the disabled and vulnerable. The OR explained the extent of the consultation:

"An extended 28 day statutory consultation period ran between 8th July 2021 and 5th August 2021 due to COVID 19 restrictions. Between these dates copies of the Notice, Order plan, scheme drawings, draft Order and statements of reasons were available to view on the WSCC website, a Notice was advertised in the Chichester Observer newspaper and Site Notices were placed on lamp columns along the affected roads. Notification of the consultation was sent directly to a range of stakeholders including the Police and bus companies."

On this basis it cannot possibly be argued that the proposals failed the *Gunning* principles because they were not subject to public consultation: they clearly were.

Alleged lack of engagement

Furthermore, these proposals were discussed via the Infrastructure Steering Group ("ISG") which was established following the grant of the planning permission as part of the section 106 agreement which was entered by the developer in question. The Chichester District Access Forum was invited to be part of this group at which these proposals were discussed. Several residents groups also attended this Group and provided input throughout this process in discussions that took place since at least as early as July 2020. As your client has noted in an e-mail to the Council's officers, there was also a meeting in March 2021 at which the design for this scheme was discussed.

Therefore, there is no question that there was not appropriate engagement with vulnerable groups: they were invited to attend this Group, and several residents groups attended. After extensive engagement with the local community the Council clearly had sufficient information to enable it to fulfil its 149 duty (nor have you contended otherwise).

Your assertion that CDAG's attempts to "engage" with the Defendant regarding the issues of concern were rebuffed is entirely unsubstantiated: if you intend to pursue this point, please provide the relevant evidence supporting such an assertion to allow the Council to respond to this particular allegation more fully in follow up pre-action correspondence. Please be on notice that the duty of candour applies equally to the Claimant and to that end please disclose all e-mail communications or other communications you have in this respect with CDAG.

For the avoidance of doubt, the e-telephone exchange you refer to from CDAG on the last day of the consultation period is not an attempt to "engage": according to your own analysis, it was a complaint about the lack of notice of the consultation. That complaint (on CDAG's part – not Mr Record who seeks to bring this claim) was not a valid

complaint as the statutory consultation requirements had clearly been fulfilled in this case. The Council also notes that it does not form any part of your client's complaint (as opposed to CDAG's) that the consultation period was too short.

Alleged predetermination

Please provide the evidence that you rely on to substantiate the assertion that any indication was given by telephone to the representative of CDAG that "any Shared Space aspects were set" (ie the allegation contended at paragraph 19) so that the Council can respond to this allegation. For the avoidance of doubt, the context of any such remark (even if it were made) is relevant and it is not accepted that it constitutes any predetermination on the part of the Council.

The simple point however in response to this is that any such remark certainly cannot constitute any basis for an allegation of predetermination on the part of the Cabinet Member who took the decision your client is intending to challenge.

Reference to the West Sussex Association for Disabled People

The fact that the Council, after the decision was taken, referred to consultation with the now defunct West Sussex Association for Disabled People, does not change what the obligations upon the Council were in respect to consultation on these proposals. Furthermore, the statement provided in the FOI request did not form part of the OR to the Member concerned and so any mistake in relation to the existence of that Forum cannot affect the lawfulness of the decision in question.

The scope of the outline planning application

As to the "second limb" of your complaint regarding consultation, the point you make at [78] – [79] about the scope of the works covered by the application goes nowhere. The reference to the planning application including the works to the junction is taken out of context. It is merely a reference to the fact that the need for the works in question were considered as part of that application, and the principle of these works was agreed. There is nothing erroneous about such a statement. In any event, the fact is that there had been statutory consultation on these proposals, so even if there was any misdirection to the Member about the extent of what was covered in the separate planning process, any such error goes nowhere and is immaterial to the overall decision.

In the absence of a specific duty to formally consult the particular group you refer to, the Council has clearly not acted unlawfully.

DETAILS OF ANY OTHER INTERESTED PARTIES

None that the County Council is aware of.

REQUESTS FOR INFORMATION AND DOCUMENTS

1. Correspondence from the County Council to disability groups that were consulted in relation to the Decision, including correspondence to the West Sussex Associated for the Disabled (WSAD) – *the position in relation to consultation is set out in the substantive response above.*
2. Any response, automated or otherwise, received from WSAD - *No response was received.*
3. Notes made by Steven Shaw during his conversation with Glynis Spencer of Chichester District Access Group on 5 August 2021 – *no notes were made of this conversation.*
4. Any correspondence inviting comments from organisations representing vulnerable pedestrians beyond the disabled, such as the elderly – *the position in*

relation to consultation is set out in the substantive response above. I attach to this letter the e-mail that was sent to numerous people/groups/organisations inviting them to the Infrastructure Steering Group meetings in May 2019. This invitation was extended to the Chichester Access Group along with local resident groups.

5. Whether there is another drawing, beyond P2, that the County Council used for the "clip" in the officer's report, Appendix c, but has not been disclosed to date. – *as referenced above the most up to date plan is WGSR-100 Rev. P4. (attached) This has evolved during the highway works process.*

Aarhus Convention Claim

The County Council does not agree with the claimant that this is an Aarhus Convention Claim. Please can you explain on what basis it is contended that this falls within the scope of the Aarhus Convention. The Council reserves all its rights in this regard pending that explanation.

ADDRESS FOR FURTHER CORRESPONDENCE AND SERVICE OF COURT DOCUMENTS

Please refer to the details as the top of this letter.

Yours faithfully,

Becky Moutrey
Senior Solicitor