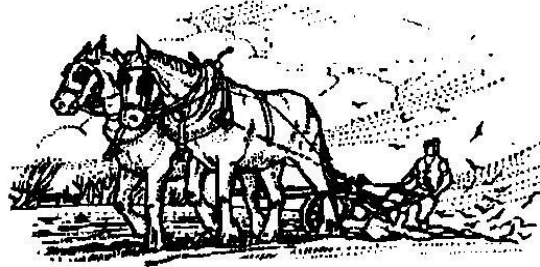


Bentley Pauncefoot Parish Council



2000

17th May 2021

Dear Ms Felton,

**Re: Planning Application 16/0263 and 2016/077/OUT
Our Ref: LAC/SHO/BEN512/1
Your Letter dated 16th April 2021**

Bentley Pauncefoot Parish Council (BPPC) have considered your response of 16th April to our Legal Advisor's letter of the 3rd March. Unfortunately we are not satisfied that you have fully addressed the issues raised.

Throughout the determination of this application BPPC has sought to work constructively with the Planning Department to ensure that our residents' concerns are fully considered and any decision to approve planning application Ref 16/0263 is conditional upon appropriate mitigation.

BPPC is fully prepared to pursue a number of alternative courses of action towards the resolution of our concerns but firstly we would seek to explore a route with the Planning Authority acceptable to both sides.

With this in mind we propose a meeting of myself and BPPC Vice-Chair Barry Spence with the Planning Department to discuss a way forward. We would be happy to host this meeting or attend your offices if you prefer. In order to assist in your preparation for the meeting we have set out in this letter further detail on our points of concern.

1. The Applicant's Site Access and Development Triggers document (the Document).

We are unclear why it is considered that although this document is a material consideration you do not agree that it had a material impact. Without this document there would have been no reason for WCC Highways to make the substantial change to their original phasing and trigger conditions, submitted in response to the revised TA in July 2018.

In paragraph 2 of your response regarding Legal Principles you state that *'as the norm, the Council would not place on the website all of the documents which were considered by the LHA. The consultation Response from the Consultee Highways Authority is sufficient. That said, the Document was placed on the Council's planning portal for the public to note and consider.'*

The Document was submitted on behalf of the Applicant, it is therefore a background document that falls under the requirements of section 100D of the Local Government (Access to Information) Act 1985. We note that the section is reproduced at the start of the reports pack for BDC Planning Committee meetings.

Thus, it should have been available to the public in the same way as all the other documents submitted by the applicant and their agent.

BPPC consider that placing the Document on the Council's planning portal after the application had gone before both BDC and RBC Planning Committees was a breach of the LPA's obligation to the public's 'right to know' preventing us from considering, and commenting on, an issue central to our concerns at a time when we had the opportunity to influence the decision.

In *Joinery, R (on the Application of) v Northumberland County Council [2014] EWHC 3657 (Admin)* before Mr Justice Cranston. In his introduction he states: *This judicial review raises an issue about the consequences when information which by law is to be accessible to members of the public is not available in a timely fashion to enable them to participate effectively in democratic decision-making.*

It dealt with the late availability of a document submitted by the applicant and details the requirements of the legislation regarding the 'right to know' provisions of the Local Government (Access to Information) Act 1985. Paragraph 35 deals with Section 100D and addresses access to background papers:

"Section 100D addresses access to background papers. It provides in its relevant parts:

100D.- Inspection of background papers.

(1) Subject, in the case of section 100C(1), to subsection (2) below [a time limit], if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public—

(a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and

(b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.

...

(3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy.

Background papers are defined in section 100D(5).

(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and

(b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

In paragraph 43 it is pointed out that, although a report fell within the definition of background papers per section 100D(5) the officer's report for the planning committee '*did not contain a list of background papers*' and goes on to comment in paragraph 45 that the failure to make that background document publicly accessible meant that '*the public's right to know what is being proposed regarding a planning application would be frustrated.*'

Mr Justice Cranston went on (in para 47):

'The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ ordinary members of the public) and its bearing on the decision (tangential/ central).'

Having reviewed the Officer's Report for each Planning Committee meeting for the Foxlydiat 16/0263 and 2016/077/OUT application, none of them appear to contain a list of background papers. Had they done so BPPC, and other members of the public, would have been alerted to documents they hadn't seen. The Document from the applicant for the Foxlydiat application is 70 pages of detailed technical modelling data. Without this document the LHA would not have changed their recommendation on the phasing of the accesses to the development which, as the element for which detailed planning permission was sought, was one of the most important parts of the Case Officer's report. It was the phasing of the accesses in the document that the Case Officer recommended approval of to the Planning Committees of both Bromsgrove and Redditch.

The Document is dated 02/11/2018. Throughout 2018 and into 2019, BPPC had meetings with the LPA regarding the application and especially the traffic concerns. Yet BPPC were not advised of the document's existence. If it had been placed on the website at the time it was issued interested parties, including BPPC, would have had adequate time to consider it and seek expert opinion on it so that we could make 'sensible contributions to the democratic decision-making process in time to have influence on the decision'.

The application has not been back before RBC's Planning Committee since the Document was placed on the planning portal. It is true that the Document was placed on the planning portal before the application went back before BDC's Planning Committee for a second time however Mr Justice Cranston makes several important points regarding breach of statutory duty to disclose information and the impact late publication has on the public's ability to influence decision-makers.

In paragraphs 51-52 he states: '*..the claimant will be entitled to relief unless the decision-maker can demonstrate that the decision it took would inevitably have been the same had it complied with its statutory obligation to disclose information in a timely fashion.*'

'In the circumstances of this case the Council have not persuaded me that the decision would inevitably have been the same had the .. report been available as it should have been....More time to prepare written representations, to accompany his oral presentation [at the committee meeting], might have enabled the claimant to persuade the planning committee to exercise caution in light of this background.'

In paragraph 53 he refers to Sullivan J's note in *R v Mendip District Council ex p Fabre (2000) 80 P & CR 500*, at 515, that *representations after the public is alerted by disclosures under these provisions of the Local Government Act 1972 will in many cases lead to the need for further input from officers. That in turn may lead a Council to rethink. That could have been the case here...'*

He adds: *'Finally, there is the decision-maker in this case. It was a committee of politicians where the vote was not whipped. It is a very bold person who will hazard that in such circumstances a particular result is inevitable.'*

Mr Justice Cranston makes a further important point in paragraph 56. *'The committee had spoken, and although it could be reconvened, the inevitable institutional momentum would be to maintain the decision.'*

In summary he states (para 59): *By denying him [the claimant] timely access to information to which he was entitled it limited his full participation in democratic decision-making.... This was a serious breach by the Council of its statutory obligations.*

In your response you confirm the dates when you went out to public consultation on this application. BPPC do not disagree, our point is that this important document and hence the phasing and triggers recommended to the planning committee for approval was not made available for BPPC, the existing residents who will be affected by it and other interested parties to submit comments at a time when proposals were still at a formative stage. This is against the principles of fair consultation as defined by the Sedley principles.

Richard Clayton QC stated: *The principles of fair consultation have been settled for many years. In Moseley the Supreme Court endorsed [25] the long standing Sedley principles formulated in 1984 by Stephen Sedley QC in argument in R v Brent LBC ex p Gunning (1985) 84 LGR 168 (subsequently approved by the Court of Appeal in R v Devon County Council ex p Baker [1995] 1 All ER 73 pp 91 and 87 and in R v North and East Devon Health Authority ex p Coughlan [2001] QB 213 [108]; and see also R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts (2012) 126 BMLR 134 [9] where Arden LJ described the Sedley criteria as a 'a prescription for fairness'.)*

In order for consultation to be fair, a public body must ensure:

- that the consultation must be at a time when proposals are still at a formative stage;*
- that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;*
- that adequate time is given for consideration and response; and*
- that the product of consultation is conscientiously taken into account when finalising the decision*

You also state that all documents were placed on the Council's planning portal for consideration. Placing documents on the public access web site after the application had been before the planning committee prevented BPPC, and others, seeing the data that caused WCC Highways to significantly amend the phasing and triggers for the development at a time when BPPC had the opportunity to influence the decision.

It was a breach of BDC's statutory obligations and the requirements of fairness in the decision-making process.

Although the application did go back before BDC we believe J Cranston's point, regarding inevitable institutional momentum, is well made particularly as the Planning Committee were reminded, both verbally and in writing, that they had already approved the application.

It has not been back before RBC's Planning Committee since the document was made available.

2. Mott MacDonald (MM)

We understand that WCC Highways are the statutory consultees for traffic assessments but we do not accept that MM's role is merely that of providing background material.

At the Council meeting on 21st June 2017 an urgent motion was agreed that for any planning applications of 10 or more units BDC would only accept data from WCC Highways once it had been reviewed by its own consultants.

The Overview and Scrutiny Transport Planning Report of February 2019 confirms the importance of Mott MacDonald's work to BDC's planning process. For example:

'The ongoing lack of confidence felt towards WCC has been highlighted by the continued use of Mott MacDonald and the need of the Council to seek that support to enable them to continue carrying out its every day duties as the planning authority.'

'The Head of Planning and Regeneration also commented that she took comfort from the data provided by Mott MacDonald for a number of planning applications moving forward. She also made a number of interesting points, which resonated with Members, in particular she reiterated the lack of confidence in WCC Highways'

'Members went on to discuss case studies which validated the use of Mott MacDonald "checking" the work of the Highways team and it was agreed that that fed into some of the questions which had previous been put forward and was there as a supporting challenge. It also provided Members with the confidence to make the right decisions with future planning applications, knowing that this work had been carried out.'

These examples clearly demonstrate why the opinions of MM were given such prominence in the Officer's Report not only for the Foxlydiat application but the Officer's Reports of all the large applications, such as Perryfields, that have been before the Planning Committee in recent years. Indeed, the OR for the Perryfields application demonstrates just how influential MM's input is with the inclusion of a £705,000 'Monitor and Manage' package. Representatives from MM also attended the planning committee meetings.

Given the well documented lack of confidence in WCC Highways across the LPA it was an important consideration for planning committee members to see that Mott MacDonald had 'robustly scrutinised' transport elements and had no objection. It would have meant that Members were 'provided with the confidence to make the right decisions' knowing that the work of the Highways team had been "checked" by MM.

Hence, for the OR to emphasis that MM had robustly scrutinised all the phasing proposed for approval of Foxlydiat when they hadn't seen either the applicant's evidence or WCC Highways response was extremely misleading to the committee members of both BDC and RBC. This is also true of the case officer's response to submissions and questions posed by BPPC where they were again strenuously rebutted with the statement that '*There is no objection from the Highway Authority or BDC's Highway Consultant in this respect*'.

You state that it was immaterial that MM had not seen any of the documents that the Case Officer based the phasing and trigger point conditions on for his Officer's Report that provides guidance to Planning Committee Members. Yet it is clear that the case officer felt it important to stress, at

many points throughout the Officer's Report (and those submitted by BPPC), that all the documents had been 'robustly scrutinised' by them.

But it is not just the LPA who has made erroneous statements. In their email response on 7/2/2020 to a submission from BPPC, and included in Committee Update 1 for the RBC Planning Committee Meeting on 19/2/2020 WCC Highways state:

'..... additionally it has been reviewed by Mott MacDonald on behalf of Bromsgrove District Council.'

It is interesting that WCC Highways, the LHA, felt it necessary to reinforce their claims by stating that MM had also reviewed data.

The was followed by a further Officer's comment:

The technical submissions made to BDC/RBC for the hybrid applications have been scrutinised by highways officers at Worcestershire County Council and by independent transport consultants (Mott Macdonald) acting on behalf of Bromsgrove District Council. There are no outstanding technical objections and neither WCC Highways or Mott Macdonald deem there to be a severe impact on the local highway network

To state that submissions had been fully scrutinised by MM when they hadn't was clearly misinforming both Planning Committee Members and the public about relevant facts.

Lord Justice Lindblom is often quoted in regard to Officer's Reports. The appeal R (Loader) v Rother DC and Anor [2016] EWCA Civ 795 was before Lord Justice Laws, Lady Justice King and Lord Justice Lindblom. It succeeded on only one ground:

'.... but only on the ground relating to the council's failed consultation of the Victorian Society and the officer's misleading advice to the members on that matter.'

One of the grounds for the appeal being granted was whether the Council's Planning committee was misled about the consultation of the Victorian Society. In describing the reason for the appeal it explains, in paragraph 47: *"In the officer's main report, in section 5.0, "Consultations", paragraph 5.8 states simply:*

"Victorian Society: No comments received."

It was argued (in para 49) *'that this was seriously misleading. The committee was given the impression, wrongly, that the Victorian Society had been consulted and had made no comment on the application, whereas, in truth, the council's attempt to consult them had been abortive. In effect, they had not been consulted.'*

Lord Justice Lindblom went on (in para 54) *'In the first place, regardless of the statutory requirements for consultation, the council plainly thought it necessary to obtain the Victorian Society's views on this proposed development..... it saw the need to seek the Victorian Society's view, even though it was not statutorily obliged to do so. Their view, whatever it might be, would assist the Planning Committee in the exercise of its own planning and aesthetic judgment'*.

He goes on (in para 56) *'.... Obviously, however, the absence of any comment from the Victorian Society – positive, negative, or neutral – was seen by the officer as significant enough to mention in his report, instead of simply saying nothing. It was, he thought, something the members should have in their minds. It was, in his view, significant. This much seems plain. But anyway, there can*

be no doubt that, left uncorrected, the implication of the words "No comments received" could only be that the Victorian Society had been consulted on this proposal, had considered it, and had concluded they did not wish to object to it. This was the impression the committee was given. It was false.'

And in para 57 '..... In this case, in my view, there can be no question but that the mistake made by the officer in his report was, in its context and circumstances and in its possible consequence, sufficiently misleading to invalidate the committee's decision. It was "significantly" – or "seriously" – misleading on a material matter, and it was left uncorrected before the decision was taken.'

In writing the OR for the Foxlydiate application 16/0263, the Case Officer clearly felt that Mott MacDonald's views were '*significant enough to mention in his report, instead of simply saying nothing. It was, he thought, something the members should have in their minds. It was, in his view, significant. This much seems plain.*' The repeated statements that MM had 'no objection' and had 'been subject to [MM's] considerable scrutiny', etc. clearly gave committee members the assurance that MM had no objection to the proposals. But it was false.

In conclusion BPPC re-iterate our request that the LPA reconsider its position prior to the grant of planning permission with a view to resolving outstanding issues with BPPC. I and BPPC Vice-Chair, Barry Spence, would be happy to meet with the LPA to discuss how this can be achieved. There are other matters that remain unresolved that a meeting would allow us the opportunity to discuss. These include S106 contributions for Community Transport and Free Home to School Transport and the answers to our questions on the CEMP that have been outstanding since October 2020.

Yours sincerely

On behalf of Bentley Pouncefoot Parish Council

cc: Ms R. Bamford