



Brighton and Hove City Council
c/o Alice Rowland
Head of Commercial Law
Room G101
Hove Town Hall
Norton Road
Hove
BN3 3BQ

BY E MAIL AND POST

Date 25 April 2019
Your ref
Our ref 0356/325606-1

Dear Sirs

**Valley Gardens Phase 3 Project ("VG3")
Pre-action protocol for judicial review
Letter before claim**

1 Proposed claim for judicial review

To:
Brighton and Hove City Council
c/o Alice Rowland
Head of Commercial Law
Room G101
Hove Town Hall
Norton Road
Hove
BN3 3BQ

2 The claimant

Valley Gardens Forum CIC
c/o DMH Stallard LLP
Griffin House
135 High Street
Crawley
RH10 1DQ

Griffin House 135 High Street Crawley West Sussex RH10 1DQ DX DX 57102 Crawley

Offices in London, Gatwick, Guildford, Brighton and Horsham. Web: www.dmhstallard.com

DMH Stallard LLP is a limited liability partnership registered in England (registered number OC338287). Its registered office is Griffin House, 135 High Street, Crawley, West Sussex, RH10 1DQ and it is authorised and regulated by the Solicitors Regulation Authority. The term partner is used to refer to a member of DMH Stallard LLP. A list of members may be inspected at the registered office. The firm is part of Law Europe and is represented around the world through its international network.





3 Defendant's reference details
HKW/AR/EC709.419

4 Claimant's legal advisers
Heidi Copland
DMH Stallard LLP
Griffin House
135 High Street
Crawley
RH10 1DQ

5 Details of the matter being challenged

The City Council's decision, articulated on 23 April 2019, that the further period of non-statutory public consultation into VG3 will only be based on the approved, preferred option, that no further public consultation will take place on any other options and that the further public consultation material will not make it clear to those consulted that they are at liberty to press the case for Options 2-4.

6 Interested Parties
None.

7 The issue

The City Council elected to undertake non-statutory public consultation into VG3. Having elected to do so, it is under a common law duty to act fairly.

The requirements of fairness are linked to the purposes of consultation.

A number of legal principles have arisen from the court cases concerning consultation. One of these principles is that the consultation must be at a time when proposals are still at a formative stage. Second, fairness may require that interested persons are consulted not only upon the preferred option but also upon arguable yet discarded alternative options. Third, even when the requisite consultation is limited to the preferred option fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options.

The City Council has already acknowledged the first of these three legal principles: see paragraph 7.5 of the officer report into VG3 provided to the Environment, Transport and Sustainability Committee ("ETS") members on 9 October 2018. Regrettably, paragraph 7.5 is very far from a complete summary of the law on consultation. As to the second of these three legal principles, the court in R (Medway Council) v Secretary of State [2003] JPL 585 held that the consultation exercise was unlawful because the options

consulted upon did not include one particular alternative option. As to the third legal principle, the court in Nichol v Gateshead MBC (1988) 87 LGR 435 endorsed the particular consultation exercise because the authority had made clear what the other options were. Similarly, the court in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of PCTs (2012) 126 BMLR 134 endorsed the particular consultation exercise because the defendant had made clear to those consulted that they were at liberty to press the case for an alternative option.

Sadly, the Council's public consultation to date is contrary to the above legal principles. The Council did not consult on VG3 Options 2-4 during either of the "public consultation" exercises to date. Rather, the ETS simply resolved on 9 October 2018 to agree Option 1 and the subsequent public consultation was only on Option 1. On 7 February 2019, the ETS resolved to approve the Final Preliminary Design for VG3 and agreed that it should be progressed to the detailed design stage, which would include further public consultation and stakeholder engagement but without setting out the scope of that further public consultation and stakeholder engagement. It set this out in its email dated 23 April 2019.

It is no answer to say that there was some "public consultation" between 21 May and 29 June 2018. This was merely a data collection exercise to help inform the options. It was not a consultation exercise into Options 2-4 or indeed on any options. The City Council's Principal Transport Planner – Policy & Strategy described it as "a general quality survey to understand the public perceptions across the public realm and transport infrastructure – there are no options as yet." On 16 October 2018, the Secretary of the GMB Brighton & Hove Taxi Section informed the City Council that its members were very disappointed at the lack of consultation into VG3.

The consultation exercise between 15 October and 25 November 2018 did not consult the public on the arguable yet discarded options (namely Options 2-4). The Council in that consultation exercise did not make it clear to those consulted that they were at liberty to press the case for Options 2-4.

The Council plans further public consultation. However, as it has now explained, this will be limited to public consultation into the approved, preferred option, no public consultation will take place on any other options (whether Options 2-4 or otherwise) and the further public consultation material will not make it clear to those consulted that they are at liberty to press the case for Options 2-4 or any other options.

It follows that the planned further public consultation will not remedy the legal flaws described above. It further follows that the City Council's public consultation into VG3 will be unfair.

8 Details of the action that the City Council is expected to take

The City Council is expected to confirm, upon sensible reflection, that the further public consultation will be into Options 2-4 as well as the approved, preferred option and/or that the further public consultation material will make it clear to those consulted that they are at liberty to press the case for Options 2-4.

The City Council is also expected to confirm that it will not execute a funding agreement for VG3 with the Coast to Capital LEP unless and until these envisaged judicial review proceedings or the issues between the parties have been finally determined.

The City Council is further expected to confirm that the proposed claim is an Aarhus Convention claim, to which the £10,000 limit on costs recoverable from the claimant will apply.

9 ADR proposals

The claimant would be happy to attend a meeting with the City Council to discuss ways in which a judicial review claim or hearing may be avoided.

10 Details of any information sought

The date on which the City Council's further public consultation into VG3 will begin.

Whether or not the Coast to Capital LEP (Investment Committee or Board) has met since 8 April 2019 to determine if its funding conditions 1-5 (as set out in its 1 February 2019 letter to Nick Hibberd of the City Council) have been met.

Whether or not the Coast to Capital LEP has informed the City Council since 8 April 2019 that its funding conditions 1-5 (as set out in its 1 February 2019 letter to Nick Hibberd of the City Council) have been met.

Whether or not the City Council has received engrossed versions of a VG3 funding agreement from the Coast to Capital LEP.

Whether or not the City Council has executed a VG3 funding agreement with the Coast to Capital LEP.

11 Details of any documents considered relevant and necessary

The material published by the City Council for the purposes of the VG3 data collection exercise conducted between 21 May and 29 June 2018.



The material published by the City Council for the purposes of the 15 October to 25 November 2018 VG3 public consultation exercise.

A copy of any correspondence from the Coast to Capital LEP to the City Council since 8 April 2019 informing it that its funding conditions 1-5 (as set out in its 1 February 2019 letter to Nick Hibberd of the City Council) have been met.

A copy of any final version of any VG3 funding agreement between the City Council and the Coast to Capital LEP.

12 Address for reply and service of court documents

As per this letter.

13 Proposed reply date

No later than 4pm on 2 May 2019. The previous correspondence between the parties means that this timescale is appropriate.

We are sending a copy of this letter to the Coast to Capital LEP, for its information.

We await hearing from you.

Yours faithfully

DMH Stallard LLP

