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By email only: hannah.gosling@dmhstallard.com

Date 18 March 2019
Your ref
Our ref 0356/324490-1

Dear Ms Gosling

Investment Committee Conditions of funding for the Brighton Valley Gardens Phase 3 project

We are instructed by Valley Gardens Forum ("VGF").

We refer to your letter dated 1 February 2019 to Nick Hibberd of Brighton and Hove City Council ("BHCC") and to his reply to you dated 12 February 2019.

VGF is very pleased that the Investment Committee's ("IC's") funding conditions referred expressly to VGF.

VGF disputes aspects of Mr Hibberd's reply to you. It does not fully or accurately represent VGF's position or the actions (or omissions) of BHCC in connection with the Brighton Valley Gardens Phase 3 project ("VG3").

Condition 1

The IC sought written confirmation from BHCC's Monitoring Officer ("MO") that all statutory requirements in relation to consultation have been met in relation to all project aspects.

BHCC's MO has not provided any such written confirmation.

It follows that condition 1 has not been met.

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The fact that the MO is a practising solicitor said to be unable to give a statement which might be construed as giving the LEP advice on legal matters is beside the point. The MO could provide the LEP with the written confirmation sought, whilst explaining that it represents BHCC's position and that it should not be construed as legal advice to the LEP. The fact that the MO is unwilling to provide the LEP with a written statement as sought should cause the LEP serious concern.

Condition 2

As far as we are aware, Mr Hibberd is not a qualified or practising lawyer. His reply was not written in any capacity as a qualified or practising lawyer. His assertion that BHCC "has carried out consultation in compliance with its statutory requirements" is an assertion he is not qualified to provide.

The simple fact is that the LEP sought confirmation in writing from the MO that public comments, including those of the VGF, have been appropriately considered, responded to and addressed in accordance with BHCC's statutory duties.

BHCC's MO has provided no such written confirmation.

It follows that condition 2 has not been met.

Again, the fact that the MO is unwilling to provide the LEP with a written statement as sought should cause the LEP serious concern.

For the record, whilst statute may impose a duty of consultation so may the common law. BHCC's reply does not address consultation at common law.

BHCC has undertaken some limited consultation into VG3. Having elected to undertake consultation, the Council 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 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 consultation to date is contrary to the above three legal principles. The Council did not consult on VG3 Options 2-4 during either of the public consultation exercises. Rather, the ETS simply resolved on 9 October 2018 to agree Option 1 and the subsequent public consultation was only on Option 1.

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 on Options 2-4 or indeed on any options. BHCC’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 BHCC 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 planned, this will be limited to public consultation on the revised Option 1. It follows that the planned further public consultation will not remedy the flaws described above.

We made these points as to common law consultation to BHCC in a letter dated 7 February 2019. As Mr Hibberd’s letter explains, ETS resolved in response to approve the officer recommendations albeit “subject to obtaining independent legal advice...”

We would also mention that your letter of 1 February 2019 was not provided to the ETS members before or during the ETS meeting on 7 February 2019.

Following this 7 February 2019 resolution, BHCC instructed Counsel to advise. As of 13 March 2019, BHCC had not received that advice. On 15 March 2019, we asked BHCC if it had now received that advice. We have not yet had a reply to that question. Even leaving aside the fact that Mr Hibberd is not qualified to provide you with his assertion as to the law, his reply to you was plainly sent in circumstances where BHCC was still awaiting independent legal advice on the common law requirements as to consultation canvassed in our 7 February 2019 letter. That letter also described as “a complete illusion” BHCC’s proposition that a possible £0.59m funding shortfall may be plugged by private sector developer contributions via the planning process. We do not know if BHCC has instructed Counsel on this point too; certainly, BHCC has provided us with no legal advice addressing it.

VGf certainly does not consider that its public comments as to VG3 have been appropriately considered, responded to or addressed. It has not been given an opportunity to provide, during any public consultation exercise into VG3, representations as to VG3 Options 2-4 or any other option except Option 1. Despite repeated requests, BHCC has not provided VGf with the baseline data as to traffic movements, noise or air quality.

Condition 3

The LEP sought written confirmation from BHCC’s MO that the scheme design meets all the requirements of all relevant statutory legislation.

The MO has not provided that written confirmation.

It also appears that, despite the terms of the LEP’s condition, BHCC’s MO is *not* going to be providing the confirmation sought *within* the funding agreement.

It follows that condition 3 has not been satisfied.

We note Mr Hibberd’s assertion that “the Final Preliminary Design” meets all the requirements of all relevant statutory legislation. Again, his role and qualifications mean that he is not in a position to provide that statement to the LEP’s satisfaction. Moreover, his answer relates only to the “Final Preliminary Design” whereas the LEP’s question was as to the scheme design. As Mr Hibberd implies, the scheme design has not yet been finalised. BHCC has undertaken no statutory environmental impact *assessment* of any of the phases of the Valley Gardens Project. Indeed, it has not even

undertaken any statutory environmental impact *screening* of any aspect of the project. BHCC asserts that it has undertaken non-statutory environmental impact assessment of phases 1-2 and "an assessment against environmental criteria" (whatever that means) for VG3, but it has not published or provided VGF either of these non-statutory assessments. There is no planning permission for phases 1-2, but for some landscaping works, and BHCC has not yet even determined if VG3 requires planning permission.

Condition 4

The LEP sought written confirmation from BHCC's MO as to future engagement with VGF and members of the public.

The MO has not provided that written confirmation.

It also appears that, despite the terms of the LEP's condition, BHCC's MO is *not* going to be providing the confirmation sought *within* the funding agreement.

It follows that condition 4 has not been satisfied.

As recorded above, it seems that future public consultation into VG3 will be limited only to revised Option 1.

Condition 5

The LEP sought confirmation that the relevant BHCC committee has approved the scheme, to allow the project to be delivered.

The ETS has not yet approved the final scheme. Its members are awaiting Counsel's advice on the lawfulness of the scope of the past and future public consultation and, possibly, on the possible £0.59m funding shortfall discussed above. There will be further public consultation in any event, before a final ETS decision.

If VG3 requires planning permission, there may need to be a decision of the appropriate BHCC planning committee.

Mr Hibberd refers to possible objections to Traffic Regulation Orders ("TROs"). BHCC accepts that TROs will be needed. In the event of objections, which are inevitable, the likelihood is that another BHCC committee (or the Secretary of State) will need to make a determination as to the TROs.

It follows that VG3 has not yet received all the approvals required for it to be delivered.



It further follows that condition 5 is not yet satisfied (and may not ever be satisfied).

Conclusion on Conditions 1-5

None of the IC's Conditions 1-5 has been satisfied. Plainly, they are not going to be satisfied. The LEP cannot reasonably issue the Funding Agreement in such circumstances.

Freedom of Information Act 2000

The LEP has previously advised us that it is not subject to the provisions of the Freedom of Information Act 2000. However, on the other hand, it has disclosed documents to VGF pursuant to the Freedom of Information Act 2000.

Please confirm that, as we suspect, the Coast to Capital LEP is a body subject to the provisions of the Freedom of Information Act 2000.

ADR

VGF has very real concerns about aspects of the information provided by BHCC to the LEP ahead of the meeting and decisions of its Board on 22 January 2019, and about aspects of the LEP's own decision-making process. It would very much prefer not to be driven to send the LEP a formal judicial review pre-action protocol letter or to issue proceedings against it. Rather, it would welcome an opportunity to discuss further the contents of this letter and its wider concerns at a meeting of the IC or Board. Please confirm that the LEP would be amenable to such a discussion.

In terms of VGF's wider concerns, these include: the publication or otherwise by the LEP of BHCC's funding application for the 12-week period associated with LGF funding applications; the existence or otherwise of a LEP report (or LEP commissioned report) into the merits of BHCC's funding application; the DfT's requirements for transport projects eligible for LGF funding; the BCR for LGF funding; and the "Risk Register".

Conclusion

Please confirm that the LEP is amenable to ADR as proposed and that it will not be issuing a Funding Agreement for VG3.

We are copying this letter to Mr Hibberd and the ETS members.



Yours sincerely

Heidi Copland
Partner
For and on behalf of DMH Stallard LLP

CC:

