Brown Not Green Chesham Ltd 2 Deer Park Walk Chesham Bucks HP5 3LJ

"Protecting the Green Belt around Chesham" www.brownnotgreen.com

24 March 2020
SPECIAL DELIVERY & by Email to:
community@chilternandsouthbucks.gov.uk &
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Chiltern District Council
King George V House
King George V Road
Amersham
Bucks
HP6 5AW
F.A.O Compliments, Comments & Complaints dept (or Legal Services)

Sir,

Formal Complaint – of CDC Review Decision dated 3 December 2019

Our organisation has been attempting to register a complaint with the Council online. Your Compliments, Comments and Complaints website page states that comments must be confined to 2,500 characters. There appears to be no option to submit by email or upload supporting material. Our efforts to submit a summary complaint via this online form have been unsuccessful as the portal would only submit our text when the summary in the dialogue box was substantially below that text character limit. This was inadequate to recite our complaint which is now detailed herein and therefore I ask that this letter is joined with our brief online complaint submitted earlier today.

The substantive details of our complaint are as follows;

BNG wish to complain to the Council in respect of a Review Decision published by Chiltern District Council on 3 December 2019 regarding an Asset of Community Value (ACV). We believe Chiltern District Council's handling of the ACV review demonstrates **maladministration** and was **unfair** and **extraordinarily poor handling** of a major ACV site of interest to a large section of the Chesham community:

- The process deprived BNG, a local voluntary group, of adequate time to comment, and our request for more time was unfairly refused, particularly when what was being sought was evidence to demonstrate funds;
- We believe it was maladministration not to seek our views on what was an ancillary use, and we believe it was maladministration to not then take into

account our views in a way which demonstrates the caselaw had been adequately considered.

- We consider the decision that was issued, failed to deal fairly or at all with our representations and evidence. We believe the officer did not properly understand the issues in our representations.
- We believe the officer had already drafted her response, did not properly read or understand our representations, and did not fairly take them into account in reaching her decision. We consider this is predetermination or bias and that she did not consider our representations fairly and with an open mind;
- We believe the officer had or may have left herself insufficient time to consider our response, and in her haste then made amendments to a report she had already prepared; rather than properly considering what BNG wrote.
- We do not believe she considered or read the caselaw we cited and how it applied to the facts.
- The officer wrongly disclosed commercially sensitive and confidential information.
- The reasons are so poor that we cannot tell whether the officer has addressed our representations at all.
- There are errors of fact, and issues which demonstrate lack of critical thinking, which we believe resulted from the issues raised above.

The reasons for this are as follows;

1. On 29 April 2019, BNG, as a not for profit community organisation, made an application under Section 88 of the Localism Act 2011, nominating land at Lye Green NE of Chesham as an Asset of Community Value (ACV). The application was submitted with comprehensive information describing the communities habitual use of the land for various informal outdoor recreational uses for at least 3 decades and Statements of Truth from thirty members of the community together with an additional nineteen letters confirming as such.

2. Chiltern District Council after seeking clarification from BNG on various matters, confirmed that the Council accepted the ACV nomination on 5 July 2019 and announced the Council's decision that the land would now be added to the Council's list of Assets of Community Value.

3. It is notable that the Council's Decision Notice of 5 July 2019 stated in paragraph (g), that "*Whilst the land is currently used for agriculture, there is also "significant community use" of the land so this actual use is not ancillary to the agricultural*

uses but coexistent with it (as defined in the Banner Homes vs St Albans City and District Court of Appeal case 2018)."

4. BNG also noted that section 6 of the Decision Notice stated that any Right of Review in accordance with Section 92 of the Act can be requested by the land owner(s) within 56 days of the date of the Decision Notice "*or such longer period as the Council may agree in writing*". BNG calculated this 56-day period would expire on 30 August 2019. As no notice of a review or extension of timescale was received, nor any further correspondence by that date, BNG had assumed that there was now no possibility of the Decision being reviewed.

5. However, on 15 November 2019 (some 133 days after the ACV Decision Notice) BNG received an email from Ms Edwina Adefehinti, Locum Corporate Solicitor & Deputy Monitoring Officer at Chiltern District Council advising that the landowners had requested a review. Her email sought responses from BNG to nine specific points, within just 7 days including a request for evidence that BNG had access to sufficient funding to buy the asset either with or without planning permission. This was not fair; as the Council had known of this matter for nearly 100 days.

6. BNG requested more time asserting it was unreasonable to request proof of funds in 7 days given the ACV provided a moratorium of 6 months for any community group to secure funding. Also, BNG needed more information on the reasons for the review request.

7. BNG commented that Ms Adefehinti had not provided background to the landowner's request for a review of the ACV decision and therefore submitted a Freedom of Information request for this information.

8. Ms Adefehinti responded on 22 November advising that she did not accept the need for more time for BNG to respond; and that she now required BNG's responses to her nine specific questions by Friday 29 November. Further emails were received from the Council in response to the FoI request attaching letters, lengthy statutory declarations and evidence from the landowners and their agents/lawyers.

9. However, the question of ancillary use was noted by BNG as being claimed by the landowners but was not directly being raised in the previous nine questions from Ms Adefehinti. When BNG responded on 29 November, BNG provided considerable information on the issue of "ancillary use" including case law and

commentary in response to other decided cases that had been recited by the landowners when making their review requests. Specifically, BNG demonstrated that the community use was not "ancillary" but a separate actual use.

10. BNG's letter of response was comprehensive and ran to 18 pages and was supported by plans & additional photographs and evidence of observation logs of community use of the land. This was all sent by email marked with request for both read & delivery receipts. The read receipt received indicated that Ms Adefehinti did not open the BNG response until 18.06 pm on Saturday 30th November.

11. A separate password protected email attaching the financial information that the Council had requested was also sent to Ms Adefehinti at the same time, and which BNG stressed contained commercially sensitive and confidential information that was not to be shared or published without BNG's prior written consent.

12. Astonishingly, on Tuesday 3 December at 13.17 pm, i.e. only 1.5 working days after BNG's response had been opened (on a non-working day outside working hours) BNG received an email from Ms Adefehinti attaching a lengthy typed Decision Notice from the Head of Legal Services at the Council advising that the ACV status and the earlier ACV Decision in July was revoked. A formal Section 91 Notice dated 10 December 2019 was subsequently received in the post on 11 December. "Ancillary use" was the fundamental justification recited in the Review Decision[1] and BNG do not believe the officer properly considered this issue, or its ramifications, or the caselaw on it.

13. The Review Decision makes:
    a. **No summary** of the representations from the nominators made on 29 November 2019, although they are listed as received. There is **no indication** that their contents were considered, let alone properly considered.
    b. No reference **at all** to the observation logs or new photographs provided by BNG on 29 November which demonstrated that community use of the land involved up to circa 300 local people per day using the land and was continuing. In contrast the Review Decision asserts, without justification, that the community use is merely "occasional".[2]

[1] This is in **stark contrast** to the original Listing Decision in July recited previously herein at point 3 above with no explanation why such a contrasting view has been deduced.
[2] Paragraph 11.3.2 of Review Decision dated 3 December 2019 – again with no explanation to define "occasional" or why the previous Decision concluding, "significant community use" was now wrong .

c. **No** reference to **<u>any</u>** of the rebuttable arguments advanced by BNG in their letter of 29 November regarding ancillary use, nor to **<u>any</u>** of the decided cases which clarified the issue of ancillary use, **nor** to the case law critique by BNG of those cases that had been advanced by the landowners as authoritative or indeed to **<u>any</u>** of BNG's response letter other than openly referring to the sum of cash BNG had available. Ms Adefehinti had not sought representations on this key issue (which suggests she did not understand it was key) and did not address BNG's representations or caselaw. Specifically, there is **no reference** to the caselaw cited by BNG on ancillary use, instead she relies on ***Trustees of Sundorne Estate v Shropshire CC*** and ***Bay Trust v Dover,*** neither of which are helpful to understanding the position in this case of competing uses, unlike the caselaw referred to by BNG which is not addressed at all. She fails to apply ***Banner Homes*** in the context of this case where there are competing uses, from desire lines as opposed to public footpaths, where the public footpaths are not fenced, and the level of scale. That she was wrong is also clear from more recent caselaw but we are concerned here primarily about her process which we believe demonstrates **maladministration**

d. Makes a **wrong reference** to the sum of cash which was the **incorrect figure[3], and** was contrary to BNG's express request that such information was commercially sensitive and needed to be kept confidential[4], Ms Adefehinti failed to consider adequately or at all, BNG's case that much more money than the cash level recited could be raised – i.e. that the actual figure[5] demonstrated in 7 days was a **floor not a ceiling**[6] and that CDC's approach was not consistent with the statutory scheme and caselaw which we set out – **none of this is addressed**.

e. **No reference** to any of the evidence which supports BNGs case, such as the landowner's/land manager's statements admitting they had seen people on

[3] The officer considered that the evidence was of "loan or donate up to £1.3m". This is wrong.
[4] because it would impede BNGs ability to negotiate for the land if details of their finances were made public.
[5] The actual figure is not set out here because BNG continues to assert confidentially about the details of its finances. It will be apparent to a reviewing officer of this complaint.
[6] i.e. that the representations indicated how much the company can raise (BNG's response expressly stated that "*BNG is not constrained in its constitute to borrow money…"*and further information was given at paragraph 8.8 that if the landowners could borrow money, a solvent organization can do so), and (ii) no consideration of crowd-funding despite sizeable sums being raised and (iii) there is no consideration that this evidence was obtained in a handful of working days and (iv) no consideration appears to have been given to "*we would also need to consider the nature of the permission gained and how the community might envisage securing the current community uses of the land for the future in a way which permitted us to raise money"*, instead the Review Decision wrongly states "*have noted the fact that the nominators seem not to wish there to be any development on the Green Belt…. ".* which fails to understand the evidence submitted, i.e. *if planning permission were granted*, which BNG resists, but *if* it were granted BNG <u>would</u> give consideration to <u>some *very limited*</u> development on the site if planning permission was gained to raise more funds to enable purchase of the land as a whole in order to preserve the majority of it for community interest.

the land, and making statements which were plainly wrong such as; "*Although I note the owners have always put up borders by way of fences and gates around the land,"* and "*…but in any event would not be possible while the fields were under cultivation or when animals were present"*, which is not true on the photographic evidence demonstrated (and the adverse possession claims).

14. BNG gave serious consideration to making a judicial review challenge as the above shows. Although BNG believed itself to have good grounds to challenge, we were unable to raise the necessary contributions in cash required to fund this litigation within the limited time available, which was also over a holiday period, and given the need for BNG to prepare for the Local Plan examination too which was consuming community funds, and time, so BNG determined instead to consider making a complaint so that the officer's conduct and the decision can be investigated. We have done so as soon as we can now that the Local Plan Examinations have recently been paused.

15. This Review process was unfair for the reasons set out, but we must emphasize:
    - the unfairness of the considerable extension of time afforded the landowners to consider a Review and to submit evidence to the Council, yet the very limited period of time given to BNG, the lack of notice of any Review and not sharing the landowner's representations until requested;
    - The unfairness in how our representations were not dealt with: the complete lack of commentary in the Review Decision to any of the points made by BNG in its comprehensive response, giving the strong appearance that the officer had no regard to our evidence, or was biased when combined with the issues about timing ;
    - Ms Adefehiniti's failure to seek our comments on the key issues about ancillary use of the land; whilst we did address this issue, combined with the complete failure to reference any of our caselaw or arguments, suggesting Ms Adefhiniti did not understand this point, and / or failed to consider our representations;
    - The lack of adequate reasons;
    - The only reference made to BNG's letter of response was the inappropriate and wrong recital of the cash sum.

16. BNG's submissions on the issue of ancillary uses were clearly right, see the decision of the FTT in ***Oliver's Battery Limited v Winchester City Council*** CR/2019/0001 determined on the 29 November 2019 *after* BNG were required (wrongly and

unfairly) to submit their representations, but *before* CDC's Review decision. This was a case about a 46-acre greenfield site with public footpaths and bridleways circling the boundary, and some informal tracks, and where the land had been set aside for "greening practices beneficial for climate and environment" as part of the EU set-aside programme. The activities were dog walking "around and across" the fields, walking, cycling and running along paths and "across the fields". The Tribunal upheld the activities as "*clear examples of the recreational and sporting interests*" envisaged by the Act which was based on desire lines and not only on PROW, as well as finding and that agricultural use "remains *a current actual use of the Land that is not ancillary"* That decision refers to other cases where the Tribunal has considered what "ancillary" means, including ***Dorset County Council v Purbeck District Council*** CR/2013/0004, ***Idsall School v Shropshire Council*** CR/2014/0016 and ***The General Conference of the New Church v Bristol City Council*** CR/2014/0014. The Tribunal consistent with BNG's view, explains, "*The Tribunal's approach in other cases has included consideration of the dictionary definition of "ancillary" which is "supplemental or subordinate". Where a building or land has more than one use, neither the quantum of the use nor the status of the user will necessarily be determinative of which is ancillary. In some cases, there may be a clear primary use of land, such that use for any other purpose may be ancillary. In other cases, there may be a relevant functional relationship between two or more uses that indicates a subordinate relationship. Each set of circumstances must be considered on its own facts. There will not always be one primary purpose for land to which every other use must of necessity be ancillary".*

17. Accordingly, BNG is making this complaint in order to have;
    a. a full investigation of the officer's conduct, to fully determine whether and the extent to which BNG's concerns as outlined above are justified;
    b. an apology;
    c. an explanation from the Council as to what steps it will take to redress the unfairness caused and how, including whether the decision will be withdrawn for further proper consideration;
    d. an agreement by the Council to compensate BNG for reasonable costs of resubmitting its S.88 Application so that the evidence (together with further evidence that is now available) can be properly considered by the Local Authority.

BNG now await the Councils response to the above complaint and the concluding four points.

Yours faithfully,

Phillip J Plato FInstD DipSurv MRICS
Director – Brown Not Green Chesham Limited.

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