

Thanet District Council
PO Box 9
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Your Ref

Our Ref

HEF/ADW/165443.0001

Date

9 December 2016

By Email Madeline.Homer@thanet.gov.uk; cc Tim.Howes@thanet.gov.uk

Dear Sirs

Proposed claim for judicial review - Planning Committee meeting 14 December 2016

1. This is a pre-action letter under the Judicial Review Pre-Action Protocol.

The Claimant

2. RiverOak Strategic Partners Ltd, 50 Broadway, London SW1H 0BL (“**RiverOak**”).

The legal advisers dealing with this claim

3. Bircham Dyson Bell LLP, 50 Broadway, London SW1H 0BL and Suzanne Ornsby QC, Francis Taylor Building.

The details of the matter being challenged

4. The matters being challenged are:
 - a. The decision, the date of which is unknown, by an officer, whose identity is unknown, made on behalf of Thanet District Council (the “**Council**”) to withhold from the public and the press copies of the report or reports (the “**Withheld Information**”) which exist relating to item 7, identified on the relevant agenda as “change of use appeals – Manston Airport”, which is to be considered at the Council’s Planning Committee meeting scheduled for 14 December 2016 (the “**Meeting**”); and
 - b. the proposed decision recommended in a report entitled “Exclusion of Public and Press” (the “**Exclusion Report**”) that the Planning Committee resolve, on 14 December 2016, that the public and press be excluded from the Meeting prior to and during the Council’s consideration of item 7.

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5. The agenda for the Meeting and the accompanying Exclusion Report were published on 6 December 2016.

The details of any interested parties

6. Stone Hill Park Limited of Innovation House, Innovation Way, Discovery Park, Sandwich, Kent CT13 9FF (formerly Lothian Shelf (718) Limited) (“**Lothian**”).

The issue

7. In May 2015, Lothian, which owns the Manston Airport site, submitted applications for changes of use in respect of four buildings within the site, from sui generis/aviation use to general industrial and storage or distribution use. The Council rejected all four applications; Lothian has appealed those decisions (the “**Appeals**”). The Appeals are currently scheduled to be heard by way of a public inquiry commencing on 24 January 2017. RiverOak has been granted status as a Rule 6 party, and is therefore treated as a main party at that inquiry. The abandonment of Manston Airport for aviation uses and its development for alternative uses is a highly controversial matter upon which many interested parties wish to be heard.
8. RiverOak is preparing to apply for a Development Consent Order which would enable it to acquire the airport site and revive its use as an airport; consequently, it opposes the Appeals.
9. Item 7 relates to the Appeals.
10. In the Exclusion Report an officer of the Council has recommended, under s100A(4) of the Local Government Act 1972 (as amended) (the “**Act**”), that the public be excluded from the discussion of item 7, on the basis that it is likely to involve the disclosure of “exempt information”.
11. The Council has identified item 7 as disclosing exempt information under Paragraph 3 (‘Information relating to the financial or business affairs of a particular person’) and Paragraph 5 (‘Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings’) of Part 1 of Schedule 12A of the Act.
12. The Council has also decided, in accordance with s100B(2) of the Act, not to allow public inspection of the Withheld Information, on the basis that the part of the meeting which relates to item 7 is likely not to be open to the public.
13. With regard to the Withheld Information, at paragraph 4.1 of the Exclusion Report, the Council states that: “*disclosure of the information contained within the report would certainly prejudice the Council’s case and increase the risk of costs being awarded against the Council in respect of the planning appeal to which the information relates*”. The Exclusion Report then asserts at paragraph 4.2 that the public interest is therefore served by non-disclosure.
14. Clearly this “explanation” is wholly inadequate. There is no explanation as to why, whilst the Council’s interests may be served by withholding the information, the public interest is also served by that information being withheld. The Council’s interests are not synonymous with



the public interest. Indeed given the level of interest in this matter and the numerous interests of those engaged with it, it is difficult to see how any decision other than one to disclose the information could be rational.

15. Moreover, the fact that the information contained in the Withheld Information may prejudice the Council's case and increase the risk of costs being awarded against it, does not, in itself, explain why the information falls within either paragraph 3 or 5 of Part 1 of Schedule 12A of the Act. The Council has failed to explain how this information relates to either (i) the financial or business affairs of a particular person or (ii) information in respect of which a legal professional privilege claim could be maintained in legal proceedings. It must provide rational and clear reasoning why the relevant information is "exempt information" pursuant to the Act. Failure to do so renders the decision unlawful.
16. Furthermore, there is no explanation in the Exclusion Report of why the totality of the Withheld Information constitutes exempt information in accordance with the categories referred to above. The Council's use of the Act to effect a blanket exclusion of the public from every aspect of the Council's deliberations regarding these Appeals is plainly unlawful.
17. Any decision taken by the Council in respect of the Appeals following a deliberation process from which the public is excluded entirely and in respect of which all substantive information is withheld is procedurally unfair. RiverOak's interests are potentially affected by the outcome of any consideration of the Appeals, and it will have been prevented from understanding the matters that are now being raised in relation to the Appeals, and from making any appropriate representations in relation to those matters, as will all other interested parties.
18. We refer to Sullivan J's comments in *Saunders v Tendring DC and Barratt Homes Ltd* [2003] EWHC 2977 (Admin) (a case in which a council excluded the public from part of its considerations regarding a planning appeal, with the effect that the local objectors' appointed representative, Mr Kirkman, was unable to make representations):

"64. [...] The provisions of sections 100A(4) and 100B(2) do not apply in a vacuum. In deciding whether and how to operate those provisions, which confer a discretion, a local planning authority must not lose sight of the underlying requirement that what is done should be procedurally fair to the applicant for planning permission and to third parties who support or oppose the development.

65. Whatever the scope of paragraph 12, it was manifestly unfair to deal with the defendant's safety objection (insofar as it was dealt with at all) solely in a confidential report which was considered in closed session from which the public, including Mr Kirkman, were excluded. I do not suggest that the procedure adopted was deliberately unfair, but that was the practical effect of the way in which the subject matter was split between the public and the confidential reports. In effect, the merits of the defendant's earlier objection to 77 dwellings on the site were dealt with (insofar as they were dealt with at all) behind Mr Kirkman's back. His opportunity to make representations was limited (understandably given the amount of business with which the Development Control Committee had to deal), but he could not hope to make effective

representations if a major part of the case against the development on the merits was not referred to at all in the public part of the proceedings.”

19. In short, the Council must explain clearly why all the information is exempt information, why it is in the public, rather than the Council’s, interest to withhold that specifically identified exempt information, and why overall the approach being taken by the Council is procedurally fair to all interested parties.

The details of the action that the defendant is expected to take

20. The Council is expected to:

- a. release the Withheld Information to the press and public:
 - i. in its entirety; or
 - ii. failing that, excluding only specific elements which can properly be considered to be “exempt information” in accordance with the Act, providing a full explanation of its reasons for so classifying those elements;
- b. postpone the Meeting until the public has been given appropriate time to consider the contents of the Withheld Information, which must be no less than five working days from the date of its publication; and
- c. hold the Meeting in public:
 - i. in its entirety; or
 - ii. failing that, dealing in private session only with such elements as have been properly shown to relate to “exempt information” in accordance with the Act.

ADR proposals

21. RiverOak is willing to engage in discussions and negotiations with the Council as appropriate, though it reserves the right to proceed with its proposed judicial review should the Council fail to confirm by the deadline set out below that it will not, pending resolution of the issues set out above, proceed with the Meeting on 14 December 2016.

The details of any documentation / information sought

22. Please provide:

- a. a copy of the Withheld Information in its entirety; or
- b. failing that, a copy of the Withheld Information less any specific elements which can properly be considered to be “exempt information” in accordance with the Act, providing a full explanation of your reasons for so classifying those elements.



BIRCHAM DYSON BELL

The address for reply and service of Court documents

23. Bircham Dyson Bell LLP, 50 Broadway, London, SW1H 0BL (quoting reference HEF/ADW/165443.0001).

Proposed reply date

24. Given that the scheduled date for the Meeting is 14 December 2016, please reply to this letter by 12 noon on 12 December 2016 confirming whether the postponement of the Meeting is agreed.

25. If postponement is agreed, please provide a substantive response to the issues set out above within 14 days of the date of this letter.

Yours faithfully

A handwritten signature in black ink that reads 'Bircham Dyson Bell' in a cursive script.

Bircham Dyson Bell LLP

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