

From : Mr Reg Atkinson Chairman Bettws Newydd Opposition Group
The Old Mill,
Upper Bridge Street,
Newport, Pembrokeshire, SA42 0PL
Tel 01239 820889

To: David Prescott, Solicitor, Pembrokeshire Coast National Park Authority
Llanion Park,
Pembroke Dock, Pembrokeshire, SA72 6DY

21st April 2010

Dear Mr Prescott,

Please regard the remainder of this letter as comprising in a formal letter before action per a pre-action protocol for judicial review before the Administrative Court of the Queen's Bench Division.

1. To

Mr. Prescott
Solicitor for the
Pembrokeshire Coast National Park Authority
Pembroke Dock,
Pembrokeshire SA72 6DY

2. The claimant

Bettws Newydd Opposition Group
Chairman : Mr Reg Atkinson

The Old Mill,
Upper Bridge Street,
Newport,
Pembrokeshire, SA42 0PL

Tel 01239 820889

3. Reference details

With reference to the procedural handling of planning application **NP/10/033**
Development of a replacement dwelling house at Bettws Newydd Parrog Newport

4. The details of the matter being challenged

We hereby give notice of intention to challenge the procedure adopted by the Authority with respect to its decision earlier today to approve the above planning application, principally due to the incomplete, partial, misleading and materially inaccurate information provided to the decision making body of the Authority in the Officer's Report on that application.

5. The issue

- 5.1 In that Officer's Report the following statement appears @ para 7.12, under the general heading "Other Material Planning Considerations" as follows :

"In that context there are two matters that constitute the "fall-back" position and are relevant in this case :

The 2006 planning permission; and

The letter from the Authority to the applicant of 26th July 2007."

(emphasis added)

- 5.2 The significance of that second bullet point reference is subsequently elaborated on further @ paras 7.19 -20, as follows :

"7.19 The 2006 approval did not set the lower ground floor (slab) level and that is admitted to be a weakness of the permission that was granted. Nevertheless, it did require through condition 3 for the details of site levels and floor levels to be agreed in advance of development commencing. Those details were not sought in advance and it is clear that agreement was only sought when the levels had been established. Nevertheless, at a meeting in July 2007 some levels were established and agreed between the developer and the NPA and on 26th July 2007 this Authority confirmed in writing via the letter attached at Appendix 4 that "the development is being carried out in accordance with the approved drawings and that Condition 3 of the planning permission NP/06/076 (dated 17th October 2006) may now be discharged." That letter effectively established that the floor levels which by that date had been constructed were acceptable to the NPA and in accordance with the 2006 permission. Clearly, that meeting did not check the position of the property on the site as the footprint quite clearly did not match that of the permitted scheme, although this was not referred to in the letter and the proper interpretation and effect of the letter is a matter for consideration.

7.20 It must be concluded that there is a very real prospect that were the application to be refused and then taken to appeal the appointed inspector would give very serious consideration to not just the policy context, which in isolation militates against approval, but also to the "fall-back" position comprising the extant 2006 approval and the letter of 26th July 2007. In that latter context the differences between the two schemes, outlined in para 7.20 above, will be the main factor."

(emphasis added)

- 5.3 The Officer's Report then concludes with its recommendation @ paras. 9.3 - 9.4 that, in spite of the acknowledged fact that the development thereby permitted is not in conformity with the relevant policies of the development plan, but rather "*on the basis of*" the significance of the so-called "*fall-back position*" as a supervening other material consideration, planning permission should be granted, subject to conditions.

5.4 We note the history of the circumstances in which that letter of 26th July 2007 was generated, as set out in the Officer's Report, and in particular, your attention is drawn to the following facts stipulated therein that :

(i) the recitation confirms that the "*agreement*" obtained via the means of that letter, was only "*sought*" (by the developer) at a point in time after the development had already commenced, and

(ii) whereas, the planning condition, in furtherance of which that "*agreement*" is said to have been made, clearly required instead that it be made, and most certainly sought, "*prior to the commencement*" of that development.

5.5 In point of fact the exact text of that condition, not at any point actually set out in the Report, is as follows :

*" ... **prior to the commencement of any construction work**, site profiles of the external ground and internal finished floor levels shall be set out on site for approval by the National Park Authority."*

(emphasis added)

5.6 It follows that the exercise of function, by means of this letter, whereby the Officer of the Authority concerned, purported to confirm the proper fulfilment of that condition, was itself a clear breach of the express terms of that condition, and consequently unlawful. A local planning authority is not at liberty to simply ignore the clear and express terms of a planning condition, which it has itself previously attached to a consent, merely because it later finds it expedient in the circumstances to do so.

5.7 Furthermore, the courts have firmly established that, whilst it remains theoretically possible for a developer to gain a 'legitimate expectation', from the representation of a LPA Officer's letter, that a planning condition has been properly waived or discharged by that Authority ; nevertheless, that expectation can not be permitted to operate to the detriment of any legitimate third party interest, in particular the public's interests, in the lawful operation of the statutory planning code¹.

5.8 Here compliance with the statutory planning code required that, having already poured his concrete foundations *before* seeking the agreement of the Authority on site and floor levels, thereby irrevocably breaching condition 3 of his planning consent ; the only lawful means left, whereby this developer could then proceed, was to subsequently seek and obtain retrospective planning approval, pursuant to the provisions of s.73A of the 1990 Act, to effectively remove, or else appropriately change, that condition *ex post facto*. Something which he chose not to do, although he of course later tried to do so, without success, with respect to the several and many other planning conditions which he had merely previously ignored, a fact also not mentioned in the Report.

¹ See in particular the judgement of Keene L.J. in *Henry Boot Homes Ltd v Bassetlaw District Council* [2002] EWCA Civ 983. 2002 WL 31599673 @ paras 55-56

5.9 The effect of his failure to so proceed, and to rely instead upon the invalid and unlawful purported agreement to the proper 'discharge' of that condition, as set out in the Officer's letter, can consequently have had no effect whatever upon the likely outcome of any putative planning appeal, such as is as speculated upon by the Officer in the Report (as above @ para 5.2). Yet, alone be likely to have given cause for "*very serious consideration*" as that Report suggests.

5.10 Consequently, the effect of the Officer's Report in this respect has not only caused the decision making body, here in issue, to have taken into consideration a wholly immaterial matter; but more particularly, it has caused them to have an utterly false, and wholly misleading, consideration and appreciation of the true legal position with respects to which, the writing of this letter, placed them as an Authority.

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

- (a) That before formal written consent for this application be issued, the Authority takes the earliest possible opportunity to re-considered this matter in light of the appropriate, correct and lawful effect of the letter of 26th July 2007, as set out above.

7. The details of the legal advisers, if any, dealing with this claim

For the present this matter is being dealt with by ourselves as litigants in person.

8. The details of any interested parties

Asbri Planning Ltd.
(Robin Williams)
1st Floor, Westview House
Oak Tree Court
Mulberry Drive
Cardiff Gate Business Park
CARDIFF CF23 8RS

As Agent for the Applicant upon whom a copy of the Pre-action letter has been served.

9. The address for reply and service of court documents

As above @ 2.

10. Proposed reply date

Within 14 days of the receipt of this letter, or in any event at least 5 days before any final determination on this application is made by your Authority, by means of the issuance of a notice of decision.

Yours sincerely,

**Reg Atkinson
Chairman
BNOG**