

## **SUMMARY**

1. Planning applications 13/P2192, 14/P4189, 14/P4301 and 15/P0121 are “subsequent applications” forming part of a “multi-stage” planning application for Schedule 2 development (the original application being 12/P0418).

2. The claimant wishes to challenge the ongoing failure of London Borough of Merton Council to adopt an updated screening opinion for planning applications 13/P2192, 14/P4189, 14/P4301 and 15/P0121, as required by The Town and Country Planning (Environmental Impact Assessment) Regulations 2011; the partial discharge of conditions under application 13/P2192 (various dates, but not yet fully discharged); the discharge of conditions under application 14/P4189 dated 29 December 2014; and any further discharge of conditions made without prior adoption of a screening opinion.

3. Merton Council’s failure to adopt a screening opinion appears to be an attempt to circumvent the regulations requiring that the environmental impact of the development is considered before such development can be permitted to proceed.

4. There are three grounds of challenge:

1. The failure to adopt a screening opinion for subsequent planning applications 13/P2192, 14/P4189, 14/P4301 and 15/P0121 is a breach of Regulation 9 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011;
2. The adoption of the negative screening opinion for application 12/P0418 was defective and the Council erred in law in deciding that an environmental impact assessment was not required, so Merton Council is now required to adopt a revised screening opinion for this development;
3. Even if the original screening opinion for application 12/P0418 was lawful, the Council has a duty to revisit that decision because subsequent environmental information has become available.

5. As a remedy, the claimant requests that the Court revokes the permission granted to application 14/P4189 and all partial permissions granted to application 13/P2192, and directs that no further development/use proceeds until:

1. A revised screening opinion has been adopted, taking full account of the environmental impact, in particular those impacts on the historic surroundings, traffic, air quality, noise, loss of light and privacy, protected species, and loss of trees; and
2. The appropriate environmental impact assessment procedures (including the agreement of Conditions implementing measures for mitigation) have been completed, should it be determined that EIA is required.

## **FACTS**

6. In February 2012 a planning application was submitted to London Borough of Merton Council for the redevelopment of the former Nelson Hospital site including its car park (planning application reference number 12/P0418). The site falls partly within, and partly adjacent to, a number of designated conservation areas, some parts of which are also covered by Article 4 Directions. Existing hospital buildings on the eastern part of the site (Site 1) would be demolished and replaced with a new “local care centre” (LCC) providing GP and other community health services, a pharmacy and café as well as 68 car parking spaces. Buildings on the western part of the site (Site 2) would be demolished and replaced with an “assisted living development” comprising private apartments for sale to people over the age of 70, along with extra communal facilities such as living, dining, laundry, on-site care assistants, etc. and 21 car parking spaces in the grounds. A site plan is available at page D1.

7. A number of reports and statements were furnished with the application, including an Archaeological Impact Assessment, Ecology Report (with bat survey), Flood Risk Assessment, Demolition Plan, Transport Assessment, Tree Survey and Landscape Statement but without the benefit of a Heritage

Statement, Air Quality Assessment, Daylight & Sunlight Assessment, Noise Assessment or Ground/Geotechnical Survey. The application also included a request for a screening opinion from the Council, as it constituted Schedule 2 development (urban development project exceeding 0.5 hectares) (pages E1-7).

8. A negative screening opinion (pages F1-3) was adopted by the Council in March 2012, but was not placed on "Planning Explorer", the Council's online record of planning applications where it could be viewed by the public, until July 2014. An environmental noise assessment (the Noise Survey, pages G1-11) was submitted in May 2012, but only uploaded in July 2014.

9. The Planning Officer's report, dated 6 September 2012, recommended the grant of permission subject to conditions and a S106 obligation. It stated, at paragraph 8.2 (see page H3):

The proposals fall within the scope of Schedule 2 development under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, being an urban project on a site, which exceeds 0.5 hectares. After consideration of the site characteristics and nature of the proposals, a Screening Opinion has been issued to the effect that the applicant is not required to submit an Environmental Impact Statement.

It also included a statement concerning noise at paragraph 7.25 (see page H2):

A Noise Survey carried out in May 2012, has assessed sound pressure levels from the car park during the day and roof chiller equipment at night. Results show that the anticipated outdoor sound levels from both sources are acceptable, being within established guidelines, and the proposal is not anticipated to give rise to significant or adverse increased noise levels to local residential dwellings.

(Note: The Noise Survey of May 2012 referred to above was subsequently released into the public domain in July 2014. It actually shows anticipated noise levels created by the project averaging over 50-55 decibels at neighbouring homes, in breach of World Health Organisation recommended limits for the protection of health and quality of life.)

10. Application 12/P0418 was considered by the Council's planning application committee in September 2012 when the committee resolved to grant planning permission.

11. In October 2012 the complainant, representing 56 local residents, wrote to the Council alleging that the application had not been considered properly, in particular the impact upon the conservation area and neighbour amenity, and requesting that the decision be reconsidered. Following a two-stage complaints process, the Council declined, so a complaint was submitted to the Local Government Ombudsman (LGO) in January 2013. The LGO investigation is still ongoing.

12. A Decision Notice (J1-10) granting conditional planning permission was issued by the Council in December 2012, however it was not uploaded to Planning Explorer until September 2013. It contains 50 conditions, a significant number of which require further approval from the Council before different "phases" of the development can proceed.

13. Over the following months, a number of subsequent planning applications were submitted to the Council in order to discharge these conditions. None of these applications have been issued with a screening opinion to date:

12/P3064 Prior approval granted for demolition of Site 2, 14 Jan 2013

13/P0277 Discharge of conditions 6, 26, 28, 30 for Site 1 only, 12 March 2013

13/P0402 (Discharge of conditions 5, 7, 8, 13, 18, 22, 46, 48, 49 for Site 1), March 2013  
[Conditions 18 and 46, 49 changed by non-material amendment 13/P0855 to become pre-occupation instead of pre-commencement]

13/P0403 (Discharge of conditions 2-6-15-23-34-39-44 for Site 1), March 2013

13/P0447 (Discharge of condition 4 for Site 1), March 2013

13/P2192 (Discharge of conditions 4-5-6-7-8-9-13-15-18-22-23-24-26-30-34-42-44-50 for Site 2), submitted July 2013, partial discharge of conditions 4, 7, 9, 16, 22 and 34 to date

14/P4189 (Discharge of conditions 18, 46, 49 for Site 1), submitted November 2014, discharged 29 December 2014

14/P4301 (Discharge of conditions 24, 25, 47 for Site 1), submitted December 2014, not yet discharged

15/P0121 (Discharge of conditions 5, 6, 8, 21, 24, 25, 32, 47 for Site 2) submitted 15 January 2015, not yet discharged

14. Building work began on Site 1, the health care centre, in February 2013. It is now almost complete and use is due to begin April 2015. Although the pre-commencement conditions for Site 2, the assisted living development, have not yet been discharged, building work has been underway for several months - including the majority of the groundworks, piling and foundations.

15. In April 2014, the claimant wrote to the Secretary of State for Communities and Local Government, to explain that there did not appear to be a screening opinion for the original application 12/P0418, and to request a screening opinion/direction for subsequent application 13/P2192 under Regulation 4(8)(b) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. By July 2014, staff at the National Planning Unit had managed to obtain a copy of the Council's original screening opinion – a copy was sent to the claimant and the Council uploaded a copy onto Planning Explorer. On 20 August, a Senior Planning Manager from the National Planning Unit responded to the claimant to say that the Secretary of State “*declines to issue a screening opinion in this case*”.

16. On 28 August the claimant submitted a request to Merton Council to adopt a revised screening opinion for planning application 13/P2192 under Regulation 9 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and in light of the failings of the original screening opinion and the emergence of new environmental information. There has been some correspondence since that date, but the Council has failed to confirm its intentions.

17. The discharge of conditions for application 14/P4189 on 29 December 2014 in the absence of a screening opinion indicates that the Council does not intend to adopt an updated screening opinion.

## **LEGAL FRAMEWORK**

### **Directive 2011/92/EU**

18. Directive 2011/92/EU, as amended, known as the EIA (Environmental Impact Assessment) Directive, requires that an environmental assessment be carried out by the competent national authority for certain projects which are likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location, before development consent is given.

19. An assessment is obligatory for projects listed in Annex I of the Directive, which are considered as having significant effects on the environment. Other projects, listed in Annex II of the Directive, are not automatically assessed: Member States can decide to subject them to an environmental impact assessment on a case-by-case basis or according to thresholds or criteria. The process of determining whether an environmental impact assessment is required for a project listed in Annex II is called screening.

### **The Town and Country Planning (Environmental Impact Assessment) Regulations 2011**

20. The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 implement Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

21. Regulation 3 prohibits the grant of planning permission or subsequent consent without consideration of the environmental information. It applies if, but only if, the development is “likely to have significant effects on the environment by virtue of factors such as its nature, size or location” – see Regulation 2(1). Whether it would be likely to have such effects is a matter for decision by the local planning authority, taking into account such of the criteria identified in Schedule 3 as are relevant to the development – see Regulation 4(6).

22. Regulation 2(1) defines a “subsequent application” as an application for approval of a matter where the approval—

(a) is required by or under a condition to which a planning permission is subject; and  
(b) must be obtained before all or part of the development permitted by the planning permission may be begun;

“subsequent consent” means consent granted pursuant to a subsequent application.

23. Regulation 9 states:

9. Where it appears to the relevant planning authority that—

(a) an application which is before them for determination—

(i) is a subsequent application in relation to Schedule 1 or Schedule 2 development;

(ii) has not itself been the subject of a screening opinion or screening direction; and

(iii) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these regulations; and

(b) the original application was not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations, paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1).

24. Regulation 23(1) requires that a copy of the screening opinion (and the statement of reasons) should be included in the planning register.

### **The screening process**

25. When considering whether a project is likely to have significant effects on the environment, the decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. (*Loader, R (oao) v. SSCLG* [2012] EWCA Civ 869, para 43).

26. In the case of *Cooperative Group Ltd, R v. Northumberland County Council* [2010] EWHC 37, Judge Pelling gives a succinct summary of pertinent case law at paragraph 9:

9. In order to adopt a negative screening opinion – that is an opinion that Regulation 4 will not apply even though a proposed development falls within a description within Schedule 2 - the LPA must have sufficient information about the project to be able to make an informed judgment as to whether it is likely to have a significant impact on the environment – see *R(Jones) v. Mansfield DC* [2003] EWCA Civ 1408 *per* Dyson LJ at Para. 39. Whether there is sufficient information will depend on the particular circumstances. There may be uncertainties that make it impossible to conclude that there is no likelihood of significant environmental effect but in other cases there may be sufficient albeit incomplete information that enables a decision to be made as to the likelihood of significant environmental effect – see *Younger Homes (Northern) Limited v. First Secretary of State* [2003] EWHC 3058 (Admin) *per* Ouseley J at Para. 60. It is not permissible to decide to adopt a negative screening opinion on the basis that information as to environmental effects will be provided in the future – see *R(Lebus) v. South Cambridgeshire DC* [2003] EnvLR 17 *per* Sullivan J at Paras. 13 and 39 and *Younger Homes per* Ouseley J at Para. 34. Where prospective remedial measures have been proposed for a scheme that but for such measures would have significant environmental impact then if the nature, effectiveness and availability of the proposed remedial measures are plainly established and uncontroversial that may justify the adoption of a negative screening opinion but otherwise an EIA will have to be conducted – see *Gillespie (ante) per* Laws LJ at 46.

## FOUNDATIONS

### **Ground 1: Unlawful failure to adopt a screening opinion for applications 13/P2192, 14/P4189, 14/P4301 and 15/P0121**

27. To date, applications 13/P2192, 14/P4189, 14/P4301 and 15/P0121 have not, themselves, been the subject of a screening opinion. Under EIA Regulation 9, Merton Council is required to adopt a screening opinion for these “subsequent applications”.

28. Where a Member State defines general rules for determining whether projects falling within Article 4(2) of the EIA Directive must be made subject to prior assessment of their effects on the environment before consent is given, the infringement of those rules necessarily constitutes an infringement of the combined provisions of Articles 2(1) and 4(2) of the EIA Directive, (see C-83/03, *Commission v. Italy – Fossacesia*, paragraph 20).

29. Under Article 10 EC [Article 4(3) TEU] the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of the EIA Directive.

See judgement of the European Court of Justice in *Wells* (C201-02) [2004]:

64. As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13).
65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
66. The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

30. Without a timely, fully reasoned and properly considered screening opinion, the public has been denied the opportunity to determine whether the Council has taken all relevant environmental issues into account, to be informed of any environmental effects which may impact upon them, and to consider whether any proposed mitigation will be adequate.

31. Development on both parts of the site is proceeding ahead of the discharge of conditions. If this project is, in fact, EIA development, then it would be proceeding unlawfully. By ignoring the requirement to adopt an up-to-date screening opinion, and allowing the development to proceed without discharge of the conditions, the Council is enabling such development to proceed in breach of the EIA Directive.

32. Case C-98/04 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, concerned the potential for situations to arise where the town planning legislation may allow a project to be implemented without prior environmental assessment or consent in breach of the EIA Directive. Paragraphs 33 and 34 of the Opinion of Advocate General Ruiz-Jarabo Colomer state:

33. If those responsible for monitoring the lawfulness of town planning do not react on learning that a facility is operating without an assessment of its effects on the environment having been carried out, or, where its scale is evident, do not require its assessment, they are tacitly consenting to it and, thereby, contravening the directive. The fact that, by reason of the passage of time and in the light of the principle of legal certainty, it was not appropriate to take enforcement action, does not make conduct which was previously on the margins of the law 'lawful'; it merely precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society. That conclusion does not preclude those harmed by the unlawful conduct from obtaining compensation on other grounds such as the responsibility of the State in breach to safeguard property rights, which the position of the United Kingdom Government would undermine.

34. In short, the obligation on the Community Member States to adopt the rules necessary to achieve the result sought by the directive is binding on all public authorities under the third paragraph of Article 249 EC, so that national legislation which allows the administration to take no action and allow a project awaiting consent and assessment of its effects on the environment to be implemented without those assessments being made infringes Articles 2(1) and 4 of the directive, as the United Kingdom Government accepts.

## **Ground 2. Defective screening opinion adopted for planning application 12/P0418**

33. It may be argued that the screening opinion adopted for planning application 12/P0418, dated March 2012, could suffice for subsequent applications, and that the failure to include a copy of it on the planning register for each subsequent application is merely an administrative error. However, a revised screening opinion is urgently required, due to a number of deficiencies in the original screening opinion:

1. It failed to conform with procedural requirements of the EIA Regulations, including the failure to be made available to the public and the failure to consider relevant criteria required by Schedule 3;
2. It was substantially deficient due to the lack of consideration of important environmental effects; the failure to consider the fourteenfold increase in use of Site 1 and the consequential implications of such an increase; the failure to give adequate reasons for the decision; and the reliance upon future, unspecified mitigation to control environmental impacts.

### **(a) Delay/failure to publish the screening opinion**

34. The screening opinion was not made available to the public until July 2014, contrary to EIA Regulation 23, thereby denying the public the opportunity to challenge the screening opinion or the decision to grant planning permission (for which the screening opinion would have been a material consideration).

35. Withholding the Decision Notice, the screening opinion and the Noise Survey until long after planning permission had been granted not only breaches the Council's common law duty of fairness (*R(Edwards & Pallikaropoulos) v Environment Agency* [2006] EWCA Civ 877), but undermines the principles of the Aarhus Convention, which describes its objectives in Article 1 as follows:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

### **(b) Deficiencies in the original screening opinion**

36. The original screening opinion was adopted shortly after application 12/P0418 was submitted, before the receipt of consultation responses from statutory consultees and without the benefit of a

noise survey, ground survey, air quality assessment and other environmental assessments. In addition, there does not appear to have been any determination of the baseline conditions, such as existing air quality and noise levels.

37. It fails to address all the potential significant environmental impacts (such as impacts on the historic surroundings, impact on protected species (i.e. bats), loss of many mature trees (some of which were protected by conservation area status, others by specific Tree Preservation Orders), impact on loss of light, privacy etc). Of those impacts that are considered, there is only the most superficial information, without any specific detail about the anticipated effects (positive or negative, magnitude, suggested mitigation, etc.), and it fails to give reasons why those impacts are not considered to be likely or significant.

**(i) failure to consider relevant criteria required by Schedule 3**

38. EIA Regulation 4(6) determines that:

Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development, the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

39. Schedule 3, paragraph 2, lists those locations where particular regard should be made to potential environmental effects. This includes at 2(c)(viii) landscapes of historical, cultural or archaeological significance.

40. The proposed development falls partly within, and partly adjacent to, a number of designated conservation areas, some parts of which are also covered by Article 4 Directions, with a number of listed buildings within the close vicinity. However, the screening opinion (in section 2(c), see page F2) expressly excludes the need for this development to be considered under criteria 2(c)(viii) of Schedule 2, whereas the impact on the historic surroundings clearly should have been addressed.

41. Paragraph 3 of the screening opinion considers each of the criteria with regard to particular factors as required in Schedule 3, paragraph 3 (a)-(e), but confusingly fails to consider the factors listed under Schedule 3 (3)(c) magnitude and complexity of the impact, instead replacing these factors with others listed in the remainder of Schedule 3.

**(ii) failure to consider increase in use and consequential increase in traffic, noise and pollution**

42. At no point does the Council appear to have considered the massive anticipated increase in use of the Local Care Centre. Before its closure, the Nelson Hospital was treating approximately 20,000 patients per year (figures taken from SW London Primary Care Trust document *The Nelson Local Care Centre Outline Business Case* document (dated May 2009), which states: "Currently [2007/08] there is an outpatient service on the Nelson site only seeing 20,000 patients per annum", see page L2). The Transport Assessment document provided with application 12/P0418 reports anticipated patient appointments as ~275,000 per year (M). This amounts to about a fourteenfold increase in use, which is likely to cause corresponding increases in traffic, noise and pollution as a result.

43. The letter from the applicant requesting a screening opinion from the Council states that, although 50% of patients currently travel to the site by car, this number is expected to fall to 44% travelling by car and therefore there will be a "net reduction" in car trips compared with the existing situation. This is clearly absurd. The Transport Assessment has either assumed that the Nelson Hospital was already treating ~275,000 patients per year, or they have failed to take account of the anticipated increase.

44. It cannot be determined from the Council's screening opinion whether the Council has taken the increase in use of the site into consideration or not, or whether the Council agrees with the applicant's conclusion on the effect on traffic. The screening opinion states "*The proposals are unlikely to generate significant or harmful increases in traffic movements*", without proffering any reason for this conclusion, but then goes on to say "*The key impacts of the proposals on the immediate environment would appear to arise from traffic movements associated with the development*". This latter statement

indicates that the Council does not agree with the applicant's conclusion, but gives no indication of the anticipated change in traffic. The subsequent requirement for a S106 Agreement to cover the cost of survey and possible implementation of permit parking also suggests that the Council did think that it was likely that traffic problems would arise.

45. If we use the applicant's assessment of anticipated car use by 44% of patients, this equates to 121,000 patients travelling by car each year, or ~500 per working day. Assuming two car journeys per patient appointment (to and from the LCC), this equates to ~1,000 car movements per day being generated by patients visiting the site. There will also be additional traffic generated by staff, ambulances, delivery/service vehicles, etc.

46. Department for Transport traffic counts for the stretch of the A238 (Kingston Road) relevant to this development estimate the annual average daily flow (AADF) for all motor vehicle movements at ~17,000 per day. See <http://www.dft.gov.uk/traffic-counts/cp.php?la=Merton#countpointstable> . So the patient-generated traffic attending the LCC part of the site would increase the AADF for Kingston Road by ~6%. This is a significant increase in traffic which must be expected to create associated increases in pollution levels (a complex environmental impact hazardous to human health), especially considering that this location already breaches EU limits on traffic emissions.

47. The conclusions in the screening opinion that "*The proposals are unlikely to generate significant or harmful increases in traffic movements*" and that air quality is not expected to "*materially worsen*"; and that "*the impact of the proposals can reasonably be dealt with by planning conditions if required*", are not consistent with such a large increase in use, so one must conclude that this factor was not taken into account. No reasons have been given for why the Council has come to these conclusions. No regard has been made to the precautionary principle or the degree of uncertainty about the impact.

48. In addition to the increase in traffic, the car park for the LCC is to be relocated to an area behind the health care buildings directly alongside residents' gardens. These gardens previously enjoyed a relatively quiet and pollution-free environment which will be completely altered by the relocation of the car park. No assessment of the potential change in noise levels or air quality has been made to date.

49. The proposed assisted living development will introduce new exposure (of elderly residents) into an already polluted area - the entrance to the health centre car park will be situated adjacent to a number of apartments. The potential impact upon these residents' health should also have been considered.

### **(iii) lack of reasons and reliance upon future conditions/mitigation**

50. The screening opinion concludes that there will be some environmental impacts, primarily as a result of traffic movements associated with the development (para 3, page F2) which will cause effects on noise and air quality in the local area. It does not give any indication of the magnitude of these effects, apart from stating that they are not expected to be significant, nor are any reasons given for such conclusions.

51. It goes on to suggest that those impacts could be reasonably dealt with by conditions attached to the planning permission "if required". It does not give any particular detail of what conditions could be implemented, whether those conditions would remove the environmental risk or just mitigate for the impact and what that mitigation might be.

52. The claimant considers that the Council could not have been certain that there was no likelihood of significant environmental impacts at the date of the original screening opinion. It did not consider all the relevant criteria, critical factors such as the increase in usage, nor all potential significant effects, and it assumed that the imposition of conditions would be able to mitigate any potential effects without considering what these conditions might be. A screening opinion requiring a full environmental assessment should have been adopted.

### **Ground 3. Emergence of new environmental information and the requirement for re-assessment of the screening opinion**

54. Articles 2(1) and 4(2) of the EIA Directive are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second [subsequent] stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location (C-290/03, *Barker - Crystal Palace*, paragraph 49, operative part 2).

55. If a council came to the belief during the course of making the decision that the proposed development might have significant effects on the environment, it would be open to the council to require an environmental statement at that stage (*R (Mageean) v Secretary of State* [2012] Env LR3, per Sullivan LJ), *Renfree v Mageean*, [2011] EWCA Civ 863, para 20.

56. Since the adoption of the screening opinion for application 12/P0418, the following environmental issues have emerged:

#### **(a) Impact on the conservation area**

57. In the original screening opinion no consideration was given to the environmental impact on the surrounding heritage landscape and architecture, either visually, physically or from the increase in traffic, noise and pollution, contrary to the requirements in Schedule 3 of the EIA Regulations.

58. Since the original screening opinion was issued, it has come to light that the statutory consultees, English Heritage and GLAAS, did not receive the notification of the application from Merton Council and hence were unable to comment on it (see email from English Heritage, page N1); no Heritage Statement was supplied by the applicant; Merton's Conservation Officer was consulted only on an early version of the development, not the final submission, and her opinion was withheld from planning committee members.

59. Following a complaint to the Local Government Ombudsman, the Conservation Officer provided a statement to the LGO giving her retrospective opinion of the "assisted living" building which will be built on Site 2, adjacent to adjacent to Manor Gardens, a cul-de-sac of homes within the John Innes Conservation Area (P1-2). In it she states:

*"The approved building presents an unrelieved, continuous elevation along Blakesley Walk, having a **more dominant impact** on the character of Manor Gardens."*

60. English Heritage's *PPS5 Practice Guide* (in point 178, see page Q2) states:  
*"It would not normally be acceptable for new work to dominate the original asset or its setting in either scale, material or as a result of its siting."*

61. It is indisputable that the 9m high x 90m wide "assisted living" building (Site 2) will be much larger in scale than the previous building facing the conservation area. The Conservation Officer's statement confirms that she considers the approved building has a more dominant impact than the previously existing buildings. Therefore, following English Heritage's guidelines, it appears that there is likely to be a significant impact upon the historic environment from the "assisted living" part of the development. The Local Care Centre part of the development (Site 1) was not commented on, so it is possible that this will also impact on the Conservation Area.

62. Secondary impacts from noise and pollution, as a result of cars trawling the surrounding streets due to lack of on-site parking, are likely to affect the currently tranquil character of the Conservation Area too.

#### **(b) Noise**

63. A supplementary environmental noise assessment, conducted in May 2012, was not placed in the public domain until July 2014. It shows anticipated noise levels created by the Local Care Centre car park that will breach World Health Organisation recommended limits (no more than 50db) for the protection of health and quality of life, even with acoustic fencing in place (see page G10). This would normally be considered a statutory noise nuisance. This does not accord with the comments at paragraph 7.25 in the report to the planning committee which suggest that the noise levels are "*within*

*established guidelines*” and that “*the proposal is not anticipated to give rise to significant or adverse increased noise levels*” (see page H2).

64. The original screening opinion states that the impact from noise is considered to be “*primarily local*” and that it “*can reasonably be dealt with by planning conditions if required*”. However, the supplementary noise assessment shows that the anticipated noise level will be significant, even with the inclusion of “acoustic fencing” as mitigation.

65. In addition, not all noise sources have been assessed/included in the report. There will be additional noise from plant located on the roof of the Local Care Centre, from delivery/service vehicles, and at the entry/exit points where vehicles are likely to be queueing, accelerating and decelerating.

#### **(c) Impact on neighbour amenity**

66. As well as the significant increases in noise and pollution from traffic, there will be significant loss of privacy and light due to the proximity of the “assisted living” building to neighbouring homes which will impact upon residents’ quality of life.

67. The “assisted living” part of the development fails to meet Building Research Establishment (BRE) guidelines and Council Supplementary Planning Guidance separation distances, yet a Sunlight and Daylight Assessment to determine the extent of the impact has not been done. It also fails the BRE Obstruction Angle Test (see page R1), which indicates that there will be significant loss of light, which can be detrimental to quality of life and health.

#### **(d) Protected species**

68. The applicant’s bat survey indicates that five different species of bat use the site for foraging and commuting. They will be affected by loss of habitat and light pollution from the new car park. In their response to consultation (dated March 2012, pages S1-3), Natural England stated:

“On the basis of the information available to us with the planning application, Natural England is broadly satisfied that the mitigation proposals, if implemented, are sufficient to avoid adverse impacts on the local population of bats and therefore avoid affecting favourable conservation status”.

69. However, the final planning permission did not include a condition requiring such mitigation, therefore there are no assurances that there will not be any significant impact upon bats, a London Biodiversity Action Plan (BAP) priority species.

#### **(e) Demolition and construction**

70. This is not a standard building demolition. Both sites have large buildings containing asbestos and other waste materials. To date, over 10,000 tons of contaminated soil have been removed from the western part of the site, over 35,000 tons of concrete have been imported to the eastern part of the site, yet the foundations for the assisted living building are still to be completed.

71. Crushing machines have been used on site to crush the waste rubble for re-use as in-fill material, within very close proximity to residential homes, creating high levels of noise, dust and vibration.

72. No assessment has been made of the potential impact on neighbours. The original screening opinion indicates that these effects will be short-term and can be controlled by conditions. However, local residents have already endured this for almost two years, with an anticipated year or more to go. Current mitigation measures, such as attempting to damp down dust on the site with water, are not effective and there have already been a number of complaints made by neighbours.

73. The Council may consider these problems to be “short-term” in the life-time of the site, but they are not short-term relative to the life-time of the young children who live close by. It is known that airborne particulates can cause problems with lung development in the early years of childhood. In addition, the homes surrounding the site are over 100 years old – how will they be affected by another year of vibration?

74. Merton Council has a duty to reconsider whether this development requires a full environmental impact assessment. The evidence presented above supports the requirement for a full assessment.

**CONCLUSION**

75. There is strong evidence to support the assertion that this development is EIA development. In order to comply with the requirements of the EIA Directive the claimant requests that the development is prevented from proceeding until the environmental impacts have been properly assessed.

The claimant requests that the Court grants permission for judicial review.