London Borough of Merton Council
Merton Civic Centre, London Road
Morden
SM4 5DX

8 December 2014

LETTER BEFORE CLAIM

TO:
London Borough of Merton Council

THE CLAIMANT:
Ms Tracy Breakell, 13 Manor Gardens, London SW20 9AB

REFERENCE DETAILS:
Planning application numbers 13/P2192, 14/P4189, 14/P4301 and 12/P0418

AARHUS CONVENTION
Please note that this is an Aarhus Convention claim based upon the infringement of the public's right to be informed of information concerning the environment and their right to participate in the decision-making process.

DETAILS OF THE MATTER BEING CHALLENGED
Merton Council's failure to adopt a screening opinion for planning application 13/P2192 as required by The Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

Please note that screening opinions are also required for applications 14/P4189 and 14/P4301 within three weeks of their registration. If screening opinions for these applications are not adopted within the time-limit, then these will be included in the challenge.

Background

Planning application 13/P2192 is a "subsequent application" forming part of a "multi-stage" application for Schedule 2 development (the original application being 12/P0418).

The original planning application (12/P0418) was for the redevelopment of a former hospital site including its car park. Existing buildings on the eastern part of the site 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 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.

Application 12/P0418 was submitted to Merton Council in February 2012. It included a request from the developer for a screening opinion from the Council, as Schedule 2/Annex II development (urban development project exceeding 0.5 hectares). A negative screening opinion was adopted by the Council in March 2012, but was not placed on "Planning Explorer", where it could be viewed by the public, until July 2014.

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

In October 2012 a complaint on behalf of over 50 local residents was submitted to the Council alleging that the application had not been considered properly 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). The LGO investigation is still ongoing.

A Decision Notice granting conditional planning permission was issued by the Council in December 2012, however it was not uploaded to Planning Explorer until September 2013.

The Decision Notice contains 50 conditions, a significant number of which require further approval from the Council before different "phases" of the development can proceed.

Over the following months, a number of subsequent planning applications were submitted to the Council in order to discharge these conditions. None of these were issued with an updated screening opinion, therefore any grants of permission for development to proceed have been made unlawfully:

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 so no longer pre-commencement (see application 13/P0855)]

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 to date

14/P4189 (Discharge of conditions 18, 46, 49 for Site 1), submitted November 2014, not yet discharged

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

In April 2014, I 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 direction. 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 me and the Council uploaded a copy onto Planning Explorer. In August, a Senior Planning Manager from the National Planning Unit responded to say that the Secretary of State "declines to issue a screening opinion in this case".

On 28 August I submitted a request to Merton Council to adopt a revised Screening Opinion for planning application 13/P2192 under Regulation 9 of the TCP(EIA) Regulations 2012. There has been some correspondence since that date, but the Council has failed to confirm whether or not it intends to produce a Screening Opinion for application 13/P2192. An up-to-date Screening Opinion will also be required for applications 14/P4189 and 14/P4301, which were submitted recently.

The ongoing failure of the Council to adopt an updated 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.

Building work began on Site 1, the health care centre, in February 2013. It is now almost complete. 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.

Planning Legislation

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.

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 (for example size), location (sensitive ecological areas in particular) and potential impact (surface affected, duration). 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 implement Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

Regulation 3 prohibits the grant of planning permission or subsequent consent without consideration of the environmental information:

> 3(1) applies —
>
> (a) to every application for planning permission for EIA development received by the authority with whom it is lodged on or after the commencement of these Regulations;
>
> (b) to every application for planning permission for EIA development lodged by an authority pursuant to regulation 3 or 4 (applications for planning permission) of the General Regulations on or after that date;
>
> (c) to every subsequent application in respect of EIA development received by the authority with whom it is lodged on or after the commencement of these Regulations; and
>
> (d) to every subsequent application in respect of EIA development lodged by an authority pursuant to regulation 11 of the General Regulations on or after the commencement of these Regulations;

Regulation 3(4) provides:

> "The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

Regulation 3 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).

Regulation 9 states:

> **Subsequent applications where environmental information not previously provided**
>
> 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).

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

GROUNDS OF CHALLENGE

There are three grounds of challenge:

1. The failure to adopt a screening opinion for application 13/P2192 (and any other subsequent applications) 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 further environmental information has become available.

Ground 1: Unlawful failure to adopt a screening opinion for application 13/P2192 (and other subsequent applications)

To date, application 13/P2192 has not itself been the subject of a screening opinion. Under EIA Regulation 9, Merton Council is required to adopt a screening opinion for this “subsequent application” and any further subsequent applications.

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).

In *Cooper v. HM Attorney General* [2010] EWCA Civ 464, Lady Justice Arden comments:

13. One of the aims of the EIA Directive is to bring direct public participation into decision-making where those decisions may have significant environmental effects. As Lord Hoffmann said in *Berkeley v Secretary of State for the Environment and another* [2001] 2 AC 603 at 615:

    "The [EIA Directive] requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an [EA]. And an essential element in this procedure is that what the Regulations call the "environmental statement" by the developer should have been "made available to the public" and that the public should have been "given the opportunity to express an opinion" in accordance with article 6(2) of the Directive. As Advocate General Elmer said in *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189, 2208-2209, para 35:

    "It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate

and that the decision as to whether consent is to be given shall be adopted on an appropriate basis."

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (*Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-5403, 5427, para 70), Advocate General Elmer made this point again:

"Where a Member State's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard."

16. Accordingly, public and democratic participation is an aim of the EIA process in its own right, and is to be treated as intrinsically valuable, over and above its contribution to informed decision-making. The European Court of Human Rights has also recognised that a person has a right under article 8 of the European Convention on Human Rights to be provided with information on environmental issues as this enables him to assess the risk to him of some proposed activity which may be harmful to him (see, for example, *McGinley and Egan v United Kingdom* [2000] ECHR 21825/93).

Without a 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, if necessary, will be adequate.

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

It may be argued that the screening opinion adopted for planning application 12/P0418, dated March 2012, could suffice for subsequent application 13/P2192, and that the failure to include a copy of it on the planning register for application 13/P2192 is merely a minor 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.

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.

2.1 Delay/failure to publish the screening opinion

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).

2.2 Deficiencies in the screening opinion

The original screening opinion was adopted shortly after the application 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.

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 mature, protected trees, overlooking/overshadowing, 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 would not be considered to be likely or significant.

Failure to consider relevant criteria

When establishing the criteria and/or thresholds in question, the Member States are required to take into account the relevant selection criteria listed in Annex III to the Directive (C-66/06, *Commission v Ireland*, paragraph 62; C-255/08, *Commission v Netherlands*, paragraph 33; C-435/09, *Commission v Belgium*, paragraph 53).

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.

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.

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. However, the screening opinion expressly excludes the need for this development to be considered under

criteria 2(c)(viii), whereas the impact on the historic surroundings clearly should have been addressed.

Failure to consider increase in usage

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”. The Transport Assessment document provided with application 12/P0418 reports anticipated patient appointments as ~275,000 per year. This amounts to about a fourteenfold increase in use.

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.

It is not clear from the Council’s screening opinion whether or not they agree 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*”, 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 they give no indication of the anticipated rise in traffic. The subsequent requirement for a S106 Agreement to cover the cost of survey and possible implementation of permit parking suggests that the Council did think that it was likely that traffic problems would arise.

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, of course, be additional traffic generated by staff, ambulances, delivery/service vehicles, etc.

Government 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. 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, especially considering that this location already breaches EU limits on traffic emmissions. Such an increase in traffic is bound to create associated increases in pollution levels – a complex environmental impact hazardous to human health.

The conclusions in the Council’s screening opinion that “*The proposals are unlikely to generate significant or harmful increases in traffic movements*”; 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 illogical and unreasonable. No reasons have been given for why the Council has come to this conclusion. No regard has been made to the precautionary principle or the degree of uncertainty about the impact (see *Loader v. SSCLG* [2012]).

In addition to the increase in traffic, the car park for the LCC is to be relocated in 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.

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.

Reliance upon future conditions/mitigation

The screening opinion suggests that there will be some environmental impacts but then 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 those impacts might be, 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.

The conditions alluded to have not, in any event, been included in the final grant of planning permission and therefore the impacts have not been mitigated.

In the case of *Cooperative Group Ltd, R v. Northumberland County Council* [2010] EWHC 37, at paragraphs 9 and 17, Judge Pelling gives a succinct summary of pertinent case law:

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.

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 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

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

1. Impact on the Conservation Area

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.

Since the original screening opinion was issued, it has come to light that the statutory consultees, English Heritage and GLAAS, were not consulted; no Heritage Statement was supplied by the applicant; Merton's Conservation Officer was not fully consulted and her opinion was withheld from planning committee members. 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. 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."*

English Heritage's *PPS5 Practice Guide (in point 178)* 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."

It is indisputable that the 9m high x 90m wide "assisted living" building is larger in scale than the previous building facing the John Innes Conservation Area. The Conservation Officer's statement confirms that she considers the approved building has a more dominant impact than the previously existing building. 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 was not commented on, so it is possible that this will also impact on the conservation area too.

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.

2. Noise
A Supplementary Noise Report, conducted in May 2012, was not placed in the public domain until July 2014. It shows anticipated noise levels created by the project that will breach World Health Organisation recommended limits for the protection of health and quality of life, even with acoustic fencing in place. This would normally be considered a statutory noise nuisance. This does not accord with the Environmental Officer's comments recorded 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".

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 Report shows that the anticipated noise level will be significant, even with the inclusion of "acoustic fencing".

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.

3. Protected species
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), 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".

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.

4. Impact on neighbour amenity
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.

The “assisted living” part of the development fails to meet BRE guidelines and Council Planning Policy 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, which indicates that there will be significant environmental impacts from loss of privacy and loss of light, both of which can be detrimental to quality of life and health.

5. Demolition and Construction
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.

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.

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.

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?

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.

DETAILS OF ACTION THE DEFENDANT IS EXPECTED TO TAKE
To issue a new, updated screening opinion for planning application 13/P2192.

DETAILS OF ANY INTERESTED PARTIES
NHS South West London, 120 The Broadway, Wimbledon, London SW19 1RH
McCarthy and Stone Retirement Lifestyles Ltd, Emerald House, 30-38 High Road, Byfleet, Surrey KT14 7QG

If you consider there is a further interested party who should be served with documents in relation to the proposed proceedings, please provide your reasons and details of the party.

DOCUMENTS AND INFORMATION THAT YOU SHOULD PROVIDE WITH YOUR RESPONSE

You are asked to provide the following information within 14 days in accordance with the Judicial Review pre-action protocol.

You are reminded that in responding to this letter you must comply with your duty of candour. This duty requires due diligence in: a) investigating what material is relevant to this claim; and, b) disclosing that material where it is relevant or assists the Claimant, including on some as yet unpleaded ground. A failure to comply with the duty of candour when providing your response to this letter may result in costs sanctions.

Accordingly, in your response, you are asked to confirm that you have investigated what material is relevant to this claim and to disclose that material in or with your response. In addition, I would ask you to ensure that copies of the following documents are provided with your response in compliance with your pre-action protocol duties:

1. On a number of occasions I have visited the Council offices and asked to view planning application documents in the planning register. Each time I was directed to a computer

terminal from where I could access “Planning Explorer”. When I explained that documents were missing from Planning Explorer, and asked if there were any other files that I could access, I was told that there were no other files and that everything was held electronically on Planning Explorer. Please confirm whether Planning Explorer is, in fact, the planning register?

2. If Planning Explorer is not the planning register, please explain where (and in what form) the register is held, and how it can be accessed by the public.

3. Please explain where other planning files/records holding information concerning these planning applications (such as correspondence between the planning department and consultees) are held, can they be viewed by the public, and if so, how?

4. Mr Milligan’s email to me of 30 September 2014 states that an Environmental Statement was submitted with planning application 12/P0418. Please confirm if this is, in fact, correct, and if so, please provide a copy.

5. Have “baseline” measurements of background noise levels been recorded for the roads surrounding the application site since February 2011? If so, please provide a copy of that information.

6. Have any other environmental assessments/surveys/reports concerning the site and/or its immediate surroundings been prepared since February 2011 which have not been included in the files for this development on Planning Explorer? If so, please provide copies.

7. What has the Council used as the “baseline” number of patients using the former Nelson Hospital when considering these applications?

DETAILS OF ANY OTHER DOCUMENTS THAT ARE CONSIDERED RELEVANT OR NECESSARY
Please provide copies of all correspondence that the Council has had with English Heritage concerning these applications.

ALTERNATIVE DISPUTE RESOLUTION (ADR)
This matter is not considered suitable for an alternative form of resolution. If you disagree, please provide your reasons and your proposals.

ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS
13 Manor Gardens, London, SW20 9AB

PROPOSED REPLY DATE
On or before Monday 22 December 2014

Yours faithfully,

Tracy Breakell