IN THE HIGH COURT OF JUSTICE **Claim No. CO/4850/2018**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

BETWEEN:

LAKENHEATH PARISH COUNCIL

Claimant

-and-

SUFFOLK COUNTY COUNCIL

Defendant

CLAIMANT'S REPLY
TO SUMMARY GROUNDS OF RESISTANCE

Preliminary

1. This Reply is to be read together with the Claimant's Statement of Facts and Grounds ('**SFG**'). It is not intended to be a comprehensive rebuttal of the points raised in the Summary Grounds of Resistance ('**SGR**'). The absence of a specific rebuttal of a point made in the SGR should not be taken to indicate the issue is conceded.

Facts

2. The following factual matters require clarification:

   (a) Firstly, the Council repeatedly refers to the existing Lakenheath Community Primary School being "noisier"/ "worse" than the proposed New School (see eg SGR paras 3, 8, 24, 29, 38). This is not a fair description. As explained in the expert witness statement of Edward Clarke (admissible in accordance with the principle established in Lynch v General Dental Council [2003] EWHC 2987 (Admin) at [24]), whilst the existing school is subject to a slightly higher noise contour (72 vs 69dB(A)) and ambient noise than the proposed New School, unlike the proposed New School the existing school is not on a direct overflight route. It does not,

therefore, suffer from the high peaks of sudden over flight noise that will be experienced at the New School.

(b) Secondly, the Council seeks to create the impression that noise does not affect the operation of the existing school and seeks to present the school as generally performing well. To this end it refers to the OFSTED rating of the existing school as "good" (see SGR para. 3 and 17(iii)). This is misleading and potentially a failure regarding the duty of candour (see R (Huddleston) v Lancashire CC [1986] 2 ALL ER 941) since:

i. The OFSTED inspection relates to 2015 and is not up to date.

ii. More importantly, since the OFSTED inspection, the Council has issued a formal "Declaration of Concern" regarding the School's performance. See solicitor's 2nd Witness Statement dated 7 January 2019.

iii. A review of the governing body dated 25 September 2017 indicated that Lakenheath results for Key Stage 1 are predicted to be significantly (at least 10%) below national averages for children in all subjects and notably that "phonics results are predicted to be over 15% lower"

iv. A letter sent to Forest Heath District Council by the Head Teacher of the existing school in July 2016 expressly set out the difficulty the existing school faces as a result of aircraft noise. The letter puts this in the context of the health and wellbeing of children with reference to the WHO (2011) report which pointed to the negative effects of noise on learning and memory and the concomitant cognitive impairment resulting from this (see exhibit LF-2 to the 2nd Witness Statement of Lisa Foster, pages 25-27).

(c) Thirdly, only 228 of the homes referred to in paragraph two of the SGR have been granted planning permission. The remaining 375 are subject to a resolution but have not been granted. It follows that: (1) the decision to refuse consent for a New School, required to meet the needs of those living in the proposed housing, because of the unsuitability of the location for educating young children would be a relevant material consideration that would require consideration prior to the issue of consent (see R (Kides) v South Cambs [2002] EWCA Civ 1370; and (2) Any decision to

grant planning permission could be subject to challenge, especially if the best interests of the child and the public sector equalities duty have not properly been considered.

(d) Finally, the Parish Council is empowered to bring these proceedings in accordance with s 222 of the Local Government Act 1972. The decision to bring this claim was made for the promotion and protection of the interests of the inhabitants of the area pursuant to that power.

Ground 1: Best Interests of the Child/ Article 8

3. For the avoidance of doubt, the Claimant's challenge pursuant to UNCRC Article 3 is relied upon as a freestanding basis for challenging the Council's decision. It is not parasitic upon a breach of Article 8 (see the words "and/or" SFG paragraph 5).

4. As regards the substance of this ground:

(a) Nowhere does the OR refer to the health impacts of the proposed development upon children. Without doing so the Council cannot possibly have properly taken into account the best interests of the Child.

(b) As the Council accepts at SGR paragraph 28, the OR does not refer to the best interests of the child or the duty under UNCRC Article 3. Nor does the Council assert that the officer who drafted the report was aware of the duty. The Claimant requests that the Council disclose whether or not the officer who wrote the report was aware of the duty under UNCRC Article 3 at the time of writing the report. In any event, it is not the case that the report addresses the substance of the duty. The OR is clear that the decision to grant permission for the New School is predicated upon the desire to facilitate housing growth at Lakenheath (see OR paragraphs 14, 114-116, and 159) and that alternatives were dismissed on the basis of the proposed location of future housing growth and acquisition costs (see Table 1 row 5). There is no heading in the report which concerns the interests of children, nor anything which in substance considers their best interests. Certainly, there is nothing to suggest that the best interests of the child was a "primary consideration" such that "no other consideration must be regarded as more important or given greater

weight" as the duty under Article 3 UNCRC requires. On the contrary, supporting housing growth appears to be the primary (if not sole) consideration weighing in favour of consenting the New School (see paragraphs 158-161). The best interests of the child are ignored.

(c) It is notable that the SGR, like the OR, nowhere refers to the health impacts of noise, at the levels anticipated at the New School, upon children. Nor, however, does the Council refute the truth of those impacts - given the weight of scientific evidence and WHO guidance, any attempt to do so would be futile. The Council conspicuously fails to engage with this prominent aspect of the Claimant's claim, presumably because it has no good answer. It is true that the facts of Dennis are not identical, not least because that case did not concern a place in which children at a formative stage are educated. As the High Court held in Sutton "it is important… to recognise that the ambit of the private life of [a child] is a wide, encompassing… psychological and physical integrity; personal development and the development of social relationships and physical and social identity". It is precisely these that the noise conditions at the New School will negatively impact, not least given the importance of outdoor play to the early years curriculum as explained in the letter from the School to the District Council (LF-2, 25-27).

5. Both limbs of Ground 1 are at least arguable.

Ground 2: PSED

6. In responding to this ground, the Council does not assert that it took into account the PSED. Notably, it does not anywhere suggest that any particular regard was had to the impact of noise at the proposed New School on children with Special Educational Needs. This was a matter specifically pleaded in the Claimant's SFG at paragraph 25.

7. At its highest, the Councils case is that the OR "took full account of the noise effect on children as did the applicant the education authority". This does not come close to discharging the PSED. As the 2nd, 6th, and 8th principles in Bracking make clear the PSED requires a proper and conscientious focus on the statutory criteria. General regard to issues of equality is not the same and is not sufficient to meet the duty.

8. Dealing specifically with the Council's submissions in turn:

(a) As to SGR paragraphs 33-37, the Claimant does not dispute that the Council considered certain guidance documents on noise. It is also beyond dispute that the Council found that the New School did not comply with the standards set in relevant guidance. The outdoor noise levels at the proposed school far exceed recommended levels. Crucially, the Council did not go on to consider the health effects of this on children at the school, nor the way in which this would negatively impact upon children with Special Educational Needs. Given that the early years curriculum is heavily dependent on outdoor play this is a serious omission. Mere reference to guidelines which are not in any event satisfied is no answer to the PSED.

(b) As to SGR paragraph 38, the fact that the applicant was the Council itself is irrelevant. The submission that "the committee were entitled to rely on the expertise of those promoting the school that the provision of a new quieter school at Lakenheath was desirable for them to fulfil all their educational duties to all in society" (SGR paragraph 38) is wrong in law. As the Court of Appeal made clear in Bracking at [26] under the third principle, "the relevant duty is upon the… decision maker personally. What matters is what he or she took into account and what he or she knew."

9. The Council's SFG do not engage with, and do not answer, the Claimant's second ground which exceeds the test of 'arguability'.

Ground 3: EIA/ Alternatives

10. This ground is not, as the Council argues "arid". The EIA presented a number of alternatives which the developer rejected for various reasons including the relationship of the location to that proposed for future housing growth and the cost of acquiring the land for development. The consideration of alternatives did not assess the environmental effects of those alternatives, as the CJEU has made clear was required see C-416/17 Holohan at [69].

11. This has substantive consequences. It means individuals consulted and the committee were not aware of the potential relative environmental benefits/ disbenefits of other sites. This is precisely the purpose of the requirement to consider alternatives. Had the members reaching a decision on the proposed development been appraised of the relevant environmental effects of developing the

school at another site, it might have reached a different decision.

S 31(3C)/(2A) Senior Courts Act 1981

12. The Council relies upon s 31(3C)/(2A) of the Senior Courts Act 1981 under the heading discretion. For the avoidance of doubt the two are not the same.

13. Neither is an appropriate basis for refusing relief/ permission in this case. The Court must exercise great caution in second guessing, according to a high standard of probability and on an entirely hypothetical basis, what the outcome would have been if the conduct complained of had not occurred (see R (Williams) v Powys CC [2018] 1 WLR 439 at [72] and R (KE) v Bristol City Council [2018] EWHC 2103 (Admin), [140]. This is a case where, if the claim succeeds, the hypothetical decision under s 31 would have been made on the basis of materially different information and advice from the actual decision. In such circumstances, as the Divisional Court explained in Law Society v Lord Chancellor [2018] EWHC 2094 (Admin) at [141] "it would be wrong in principle for the court… to make a judgement expressed as a high likelihood".

Aarhus

14. The question of whether a Parish Council is a member of the public for the purposes of the Aarhus Convention and is entitled to costs protection under CPR 45.41(2) was recently considered by John Howell QC (sitting as a deputy judge of the High Court) in CO/3900/2018 Crondall PC v SoSHCLG (exhibited at LF-2, 29-36). For the reasons he sets out in that case, this claim is an Aarhus Claim.

15. Any variation to the default costs cap would render this litigation prohibitively expensive.

Conclusion

16. For the reasons set out above, and in the Claimant's SFG, the court is respectfully requested to grant permission for judicial review.

Charles Streeten
Francis Taylor Building

7 January 2019