Hazelpits, Ulcombe Road, Headcorn – judicial review – possible appeal

1. This note is to assist the PC and parishioners understand whether to apply for permission to appeal (PTA) to the Court of Appeal in this case.

2. To remind those who are not so familiar with the case, the PC says there should have been environmental impact assessment (EIA) before planning permission was granted on this large housing site. EIA is required when there are likely to be significant environmental impacts. Significant in this context means "a real possibility". We pointed out to the Secretary of State (SS) who (as the National Planning Casework Unit) was asked to make a direction about this, that the Kent County Council (KCC) had serious concerns about cumulative traffic impact on the A224 and A272 road corridors, manifesting itself in the south and south eastern approaches to Maidstone and Maidstone itself. Correspondence to this effect was sent to the SS.

3. When we first went to judicial review (JR), the High Court said that the KCC was concerned about traffic congestion in Maidstone. We appealed and the Court of Appeal said it was arguable that it was as we said. However the High Court recently decided that the KCC's concerns related to Maidstone and/or developments closer in to Maidstone than Headcorn. The SS did not therefore have to take into account the concerns that we had raised, as these did not relate to the site at Headcorn.

4. We believe that conclusion is wrong for two reasons. One is a matter of law, that the SS never explained what conclusions he drew from the material that was provided to him. The Court cannot as a matter of law infer that he regarded them as irrelevant. Secondly, as to their relevance, we say that the High Court's assessment of the facts was simply wrong (and unfair). The detail of these points is in the grounds of appeal already provided.

5. We did those with some care in order to ask the High Court for PTA. This is normal though not usually done in such detail. However we were keen to see the response from the Judge by way of reasons for (usually) refusing PTA.

6. The reasons she gave do not "stack up". The main point remains, as before, what KCC's concerns related to.

7. The Judge said she did not accept that "*the correspondence from Mrs Cooper of Kent County Council, which was annexed to Dr Ker's representations, could or should have been read by the Secretary of State to refer to concerns about the cumulative environmental impact of increased traffic on the A274 generated by this development in Headcorn. Her concerns clearly related to proposed developments situated much closer to Maidstone, and the impact of increased traffic on the A274 within the Maidstone Urban Area. Mrs Cooper's concerns, as set out in the contemporaneous correspondence, did not refer to developments 15 km away from Maidstone in the "rural service centre" of Headcorn".*

8. We believe that this is plainly wrong on the evidence. It is difficult to challenge findings of fact on appeal, but we believe this one flies in the face of the evidence and is wrong for other reasons set out in the application for PTA made, including as explained there that the Judge's next observation that *"it was significant that Kent County Council did not oppose the application for planning permission at this site in Headcorn. I observed at paragraph 59 that it was open to Kent County Council at any time to notify the Secretary of State or Maidstone BC that its position had changed or that it wished to make additional*

representations about the impact on the A274, but it never did so" appears to misunderstand what EIA is for, and the constraints on KCC in objecting to developments on traffic grounds.

9. The Judge then goes on to say that *"The authorities establish that there is a high threshold to overcome in order to succeed in a legal challenge to an EIA screening direction by the Secretary of State …. Where it is alleged that a potential cumulative effect was left out, the court will "need to be satisfied that the authority responsible for the screening decision was aware, or ought to have been, of the potential cumulative effects; that the screening opinion could not reasonably have been negative if those potential effects had been considered; and that this was, or should have been, apparent to the authority at the time" …"* and that we did not meet those criteria. In our view it is strongly arguable that all those conditions were met in this case. The SS was clearly made aware of the point; and had he considered them, he would have been bound to regard the effects as significant.

10. The fundamental legal problem (cf. assessment of evidence) is that the Judge assumed, without any evidence from the SS, that he dismissed the concerns as irrelevant (and was entitled to do so without explaining why). As we argued in our first ground of appeal, it is not open to the Court to do this.

11. There is also an important point arising in relation to costs. Normally awards of costs are not appealable, but in this case the Judge took what we believe to have been an unlawful approach as to the award of costs incurred from (in effect) the original JR permission hearing before Holgate J. There was clearly one issue and no need for separate legal representation to Maidstone BC (MBC) and the SS. She did not consider House of Lords authority to the effect that there should only be one award of costs (in practice here the agreed £13,000 PCO cap split according to the Court's discretion).

12. The point actually arises because we were forced to challenge the SS's screening direction separately from MBC's decision and/or at least have two defendants even if we had had one set of proceedings (which would theoretically have been possible though exceedingly difficult to organise). Legal points thus arise which may be of interest to the Court of Appeal and would be of wider importance namely (i) the appropriate way to deal with awards of costs in proceedings which have been consolidated like these ones were; and (ii) whether or not it is necessary to challenge a screening direction separately as was done here.

13. Proceeding on from here is relatively simple: we need (i) to amend the grounds of appeal mainly to include the above costs- and procedure-related points; (ii) do a skeleton; (iii) prepare a short appeal bundle. All needs to be lodged by 23 May (with a fee of £528). If we are rejected on paper "that's it": the rules have changed since last time so that you have no right to an oral hearing. If we are granted PTA, then we would recommend proceeding. One would expect the PC's liability for opponent's costs to be limited to £10,000, although we would argue for less (but we would need to look at your reserves, our present costs arrangements, etc. to show that it was too expensive otherwise). NB there is no risk to opponents' costs in applying to PTA.) We are prepared to continue working on a basis that will be affordable for the PC.

Richard Buxton
7.5.17