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For the attention of  
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**URGENT**

Chief Executive  
South Lakeland District Council

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8 February 2017

Dear Sir/Madam

**RE: SL/2016/0413 Russell Armer application for 47 dwellings on land south of Underbarrow Road, Kendal**

We write with regard to the above planning application on land south of Underbarrow Road, Kendal ('the RA scheme') which was the subject of a resolution to grant permission by South Lakeland District Council ('the Council') at committee on 24 November 2016 subject to the signing of a S.106 planning obligation.

We also write further to the representations made by [REDACTED] and in particular our letter of 22 November 2016 setting out the concerns as a consequence of the assessment carried out by expert drainage consultant Mr J Taylor of Dossor MCA dated 11 November 2016 ('Dossor MCA 1') attached to our earlier letter of 14 November 2016.

Our letter of 22 November 2016 pointed inter alia to the legal issues that in our view would be likely to arise if the Council accepted the recommendation of the case officer set out in their officer's reports to committee ("OR1") which was published on the Council's website on 16 November 2016 that the RA scheme should be the subject of a resolution to grant and thereafter approved, without adequately addressing the concerns about the drainage scheme proposed.

The applicant's consultant RG Parkins submitted further evidence in a Memorandum (the RG Parkins' Memorandum) which sought to respond to the matters raised in Dossor MCA 1. This document whilst dated 18 November 2016 was not published on the Council's website until 22 November 2016 (2 days before the committee hearing).

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In addition Cumbria County Council in its capacity as LLFA and the District Council's Environmental Health officer submitted their response on 23 November 2016 which appeared to take into account the views expressed in Dossor MCA 1 and those in RG Parkins' Memorandum. Both appear to express satisfaction and confidence in the applicant's proposals despite Mr Taylor's comments.

On 24 November 2016, the day of the committee decision, an updated Officer's report (OR2) was published referring to the above.

On the same day an amended Drainage Layout Plan Drawing No K31324-A1-100 revision F (REV F) was also published.

It is this amended Drainage Layout Plan which causes us particular concern.

As set out in a second assessment from our client's expert adviser Mr Taylor's dated 17 January 2017 (Dossor MCA2) and attached, REV F shows significant changes to the proposed land drainage measures. These new measures directly affect [REDACTED] (as well as others adjacent to the southern boundary of the application site) but which have not been the subject of any form of public consultation let alone acknowledged as a material amendment, or the subject of consideration by the LLFA or the Council.

The RA scheme planning application originally included Drainage Layout Plan Drawing No K31324-A1-100 revision E (updated drawing to suit finalised layout and levels, 3rd May 2016) (REV E). That drawing showed a series of soil bunds located at the south eastern extent of the site and with arrows from the end of the adjacent highway directed towards, through and across the bunds, and out of the described site and into the existing property Robin Hill.

The Parkins' FRA Issue 02 dated 3<sup>rd</sup> May 2016 (which is the only FRA available) at Section 5.9 headed 'Designing for Local Drainage System Failure' states as follows:

*"Any overland flow from the site resulting from blockage or exceedance of the drainage system capacity would flow south east towards the open space/biodiversity area ..... the highest risk ... would occur from the hydrobrake onto the highway. Overland flow would then proceed in a southerly direction ... runoff would head to the low point on the site at its south eastern extent.*

*A series of berms are proposed to slow and store runoff .... with a final bund along the site boundary with Robin Hill ....*

*The overland flow route .... would be towards bunds located at the south east extent of the site ...."* (emphasis added).

This therefore appears to reflect REV E.

The RG Parkins' Memorandum published on 22 November 2016 at Section 7 under the heading 'Overland Flow' asserts:

*"Overland flow from the development could occur as a result of blockage or exceedance of the designed storage capacity .... overland runoff resulting from exceedance should all else fail has been considered. Bunds are proposed as detailed in the FRA. The proposal is for a series of bunds located in a greenfield area at the south east of the site and along the south boundary of the site" (sic).*

As set above however this is not what the FRA shows. The FRA is not based on a proposal nor does it take into account a scheme to have bunds along only the southern boundary.





The only way these new bunds are addressed is as set out above within RG Parkins' Memorandum. There is no evidence of any actual assessment as to the effect of this new and amended proposal at all.

Mr Taylor in Dossor MCA 2 not only highlights that these significant new measures appear to have been overlooked but also goes on to explain why they are unsatisfactory and raise further issues and risks.

Nothing within OR2 , especially given the point in time at which REVF was submitted, suggests that this change and its affect was picked up or even recognised.

To this extent, the Council's decision of 24 November 2016 to resolve to grant permission on this matter alone failed to recognise this significant amendment and which approach fails the test in Wheatcroft ( see Bernard Wheatcroft Ltd-v-SSE [1982] JPL 37; and SEA Estates Ltd –v-Secretary of State for Communities and Local Government [2012] EWHC 2252 ). In addition, that decision failed to take account of a material consideration and as such risks a final decision that is unlawful if made without addressing such matters on delegated authority.

Such a final decision would clearly be unlawful in our view based on well-established legal principles and therefore challengeable by way of judicial review.

To be clear however it remains our clients' position that the concerns set out in our letter of 22 November 2016 also still hold.

As you will be aware, in principle, a resolution to grant or refuse planning permission may be revisited prior to issue of the decision notice, R-v- West Oxfordshire DC, ex parte Pearce Homes [1986] JPL 523. The extent of the duty to have regard to "any other material considerations" in this context was considered by the Court of Appeal in R(Kides)- v- South Cambridgeshire District Council [2003] 1 P&CR 19.

Kides established that following a resolution to grant it is incumbent upon a planning authority in order to comply with s.70 of the 1990 Act consider and take into "any other material considerations" that may have arisen in the interim before making a final determination. Whilst this case more specifically addressed circumstances where new factors arose actually after the resolution to grant, it is clear that the CA's guidance in Kides can relate to circumstances such as this where there has been a failure to recognise and address a very last minute and significant material consideration.

The guidance in Kides is that it is "*a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision.*".

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We note also that the Council has recently sought the applicant's agreement to extend the time finally to determine the application beyond 30 January 2017 in a letter to the applicant dated 30 January 2017.

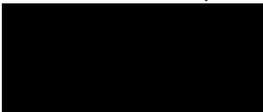
Conclusions:

Taking all the above into account we suggest that the Council should take the following action in order to avoid making an unlawful decision:

- (1) Require the applicant to withdraw the current application in accordance with the Wheatcroft principles.
- (2) In the event that the applicant decides not to withdraw the application refuse planning permission as soon as possible.
- (3) Ensure that the full details of any future proposal is the subject of proper assessment.
- (4) Ensure that the progress of a scheme on this site as proposed by Russell Armer or any other party is the subject of full public consultation.

We look forward to your response at your earliest convenience.

Yours faithfully



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