

Somerfield House, 59 London Road  
Maidstone, Kent, ME16 8JH

T: 01622 680431  
F: 01622 681430  
E: LeeMay@brachers.co.uk  
DX 4806 Maidstone 1  
[www.brachers.co.uk](http://www.brachers.co.uk)

Date: 11 March 2021

Your Ref:

Our Ref: 96/409/KD/WIL3224.000057

Mr J Freeman  
Head of Planning  
Swale Borough Council  
Swale House  
East Street  
Sittingbourne  
Kent  
ME10 3WX

By Email: jamesfreeman@swale.gov.uk

Dear Sir

## Extension of the Border (The Street) Conservation Area

We have been instructed by the William Barrows Charity ("the Charity") and A Hinge and Sons Ltd ("Hinge and Sons") to write to you in connection with the proposed Borden (The Street) Conservation Area extension which is to be considered at a meeting of the Council's Cabinet on 17<sup>th</sup> March 2021.

Our purpose in writing to you is to highlight deficiencies in the consultation exercise which has been undertaken by the Council and to put the Council on notice that should the extension to the conservation area be approved at the meeting on 17<sup>th</sup> March then our clients may bring judicial review proceedings in the High Court seeking an order to quash that decision.

### The Consultation Exercise.

We understand that consultation on the proposed Borden (The Street) Conservation Area extension and the proposed conservation area appraisal and management plan, ran from Monday 5 October 2020 until Sunday 15 November 2020. Representations received by the Council during that period were reported to the Local Plan Panel meeting on 18 February 2021. At that meeting it was acknowledged that there had been a surprisingly low level of response to the consultation and it was accepted by officers that certain landowners had not been consulted, the minutes record that:

*"Officers needed to investigate why principle landowners had not received consultation letters."*

Nevertheless, the Panel resolved to recommend to Cabinet that the proposal be accepted. As a result, consideration of the matter was moved on to the Council's Cabinet for a decision on 17<sup>th</sup> March 2021. The Panel further resolved that any comments from landowners who had not been originally consulted would be considered at the Cabinet if received in time.

It is clear that the consultation responses received prior to the panel meeting were a factor in the evolution of the proposal. The resolution includes the following statement:

<<DOCREF>>

*“That the changes to the review document proposed by officers in response to the representations received during the course of the public consultation be supported and agreed by Cabinet.”*

Both the Charity and Hinge and Sons are owners of land which is within the proposed extended Conservation Area. They also both own land and property which is within the existing conservation area. Nevertheless, neither was consulted on the proposal. We have examined the schedule of consultees which is published on the Council’s website in connection with the proposal and note that the Charity is listed as a consultee (via their agent George Webb Finn of Sittingbourne), but no consultation letter was actually received by them. We also understand from our clients that they have identified others who should have been consulted but were not, including persons on the consultation list.

The extended Conservation area would also encompass one of the main access roads to Hinge and Sons’ Home Farm which is in excess of 12 ha of agricultural land. By including the road in the conservation area our client could in the future be restricted from improving or widening this road which could have a commercial implication.

Neither of our clients were aware of the proposal until the day before the Panel meeting on 18<sup>th</sup> February. Meaning that they were denied the opportunity to make representations to the Panel before it considered the matter and made its recommendation to Cabinet.

This was raised with the Council by the Charity’s agent (Mr Stuart Mair) at the time and subsequently in a letter to you dated 23<sup>rd</sup> February 2021. He requested that the consultation exercise should be re-started. In an email reply from the Council’s Director of Regeneration (Emma Wiggins) of the same date it was stated that:

*“I have considered the points you make in your letter and whilst I am sympathetic to your position, I nevertheless do not consider that the circumstances justify starting the public consultation exercise all over again, as you have requested. I have no reason to believe that any other interested parties were not made aware of the review work and subsequent public consultation on this last October and you are now being given the opportunity to make any comments you have on the review document known to us”*

In line with the recommendation from the Panel to the Cabinet, Ms Wiggins invited our clients to make representations on the proposal by the 12<sup>th</sup> March in order for them to be considered at the Cabinet meeting on 17<sup>th</sup> March. A period of 17 days, clearly well short of the 6 weeks afforded to others.

### The Duty to Consult

It is acknowledged that there is no statutory duty for local authorities to consult in respect of conservation areas in advance of their designation or extension.

Nevertheless, it is established law that where it is the policy of a public body to consult on matters then there is raised a legitimate expectation that consultation will indeed take place. See Trillium (Prime) Property GP Limited v London Borough of Tower Hamlets [2011] EWHC 146, in which Trillium was not consulted about a designation of a conservation area affecting a property which it owned.

The following extract from the Council’ website makes it clear that it is indeed the Council’s policy to consult in these situations:-

*“Public consultation is required where the local planning authority wishes to designate a new conservation area, de-designate an existing conservation area, alter the boundaries of an existing conservation area, or it seeks to introduce additional control in the conservation area by means of a special mechanism called an Article 4 Direction. Public consultation is also required when character appraisal management strategy/plan documents are produced for particular conservation areas to help ensure that the documents properly capture the key characteristics of the area that lend it a special character, the issues affecting the special character and appearance of the area have been correctly identified, and that the management strategy/plan put forward to address these issues is appropriate.”*

This statement, together with the earlier, flawed consultation exercise, has created a legitimate expectation that the Council will consult all affected landowners.

Furthermore, in paragraph 28 of its advice note "Conservation Area Appraisal, Designation and Management" Historic England advises that owners should be consulted:

*"by consulting local communities and owners on new designations, and when appraising and reviewing conservation areas consideration can be given to relevant information that either might present, helping to ensure decisions are robust. Local communities and owners will also be helpful in providing proactive assistance in identifying the general areas that merit conservation area status and defining the boundaries."*

### Prejudice to our Clients

The Council's failure to carry out an adequate consultation exercise has caused prejudice to our clients, and potentially to others who should have been consulted.

The following requirements for a proper consultation were adopted by Hodgson J in R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168.

- (i) Consultation must be made at a time when proposals are at a formative stage.
- (ii) Sufficient reasons for the proposal must be given to allow intelligent consideration and response.
- (iii) Adequate time must be given for a response.
- (iv) The product of the consultation must be conscientiously taken into account in finalising proposals.

Given that the proposal has already been considered by the Panel and a recommendation for adoption has been made, the proposal has moved on from the formative stage. The Council's offer to consider representations made to it by 12<sup>th</sup> March 2021 is not sufficient to remedy this deficiency. Member's minds at Cabinet will already be strongly influenced by a recommendation from a Panel tasked with considering the proposal. A consideration which was made following a flawed consultation in which not all of those with a legitimate expectation of consultation were in fact consulted. This is a breach of requirement (i) above.

Even if the opportunity to make representations by 12<sup>th</sup> March is sufficient to remedy the deficiencies in the consultation exercise vis our clients (which is not accepted) it still leaves open the possibility that there are others who should have been consulted but who were not. The Council is on notice that at least some of the consultees were not consulted. But, so far as we are aware, the Council has not made any effort to contact the consultees to ascertain whether they received the consultation letter. This is a denial of the legitimate expectation in its entirety.

Further, the consultation portal has been closed and the Conservation Area review documents are no longer available to access on the Council's website. Accordingly, any person wishing to make representations at this stage, including our clients, are at a significant disadvantage. Those being consulted late will not have sufficient information available to them for consideration. This breaches requirement (ii).

Our clients have been given a truncated period of consultation which is insufficient to give a fully considered response. This is a breach of requirement (iii). Nevertheless, our clients have engaged a planning consultant to consider the proposal and, in the limited time available and with the information that have been able to obtain they have produced the attached letter which is being sent to the Council in response to the request for representations by 12<sup>th</sup> March.

### Remedy

The flawed consultation process can only be remedied by the Council carrying out a fresh 6 week consultation on the proposal. All interested parties should be notified of the proposal and all responses to that consultation should be reported to a new Local Plan Panel. As indicated above, a failure to do so will make any decision to extend the Borden (The Street) Conservation Area susceptible to legal

challenge by way of judicial review. This is without prejudice to any other grounds for challenge which might be identified following a fuller consideration of the Council's decision making process.

Accordingly, we request that you:

- (i) confirm that the proposed extension will not be reported to Cabinet on 17<sup>th</sup> March 2021;
- (ii) that a fresh consultation exercise will be undertaken; and
- (iii) that the consultation will include all land owners and other affected parties within both the existing conservation area and the proposed extended area.

Yours faithfully



**Brachers LLP**