

FIRST CLASS POST AND EMAIL

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Democracy, Law & People Directorate
The Burys,
Godalming,
Surrey
GU7 1HR

Our Ref: 015892/6/PS/
Parminder Sanghera
Your Ref: Lewis Jones

30 June 2026

Lewis.Jones
John.bennett

JUDICIAL REVIEW PRE ACTION PROTOCOL LETTER

Dear Sirs

Re: Our Client – Barney Doherty
Planning Application WA/2026/01044
Pitch 1, Land North of Lydia Park, Stovolds Hill, Cranleigh

The Claimant

Barney Doherty

The Defendant

Waverley Borough Council.

Reference Details

See above.

The Details of the matter being challenged

The Defendant's decision of 26 June 2026 to decline to determine the application WA/2026/01044 – by invoking s70c of the Town and Country Planning Act 1990.

The issue

An application for planning permission was submitted on behalf of the Claimant Mr Doherty. The application was for the Change of use of land to provide 1 gypsy pitch comprising 1 mobile home and 1 touring caravan; erection of 1 day room with associated parking hardstanding. That application (WA/2025/00495) was appealed for non-determination on 10 June 2025.

The Defendant issued an Enforcement Notice (EN) dated 22 April 2025 ref: EN/2025/02 in respect of the development of the land. The EN stated the following:

Without planning permission:

“(i) The material change of use of the Land to a residential caravan site for occupation by Gypsies and Travellers. And all the associated development facilitating the material change of use, which includes:

i) The erection of fencing on the Land;

ii) The erection of an outbuilding;

iii) The installation of services;

(ii) An engineering operation comprising the laying of hardstanding within the area outlined in red on the attached plan.”

The requirements of the notice are:

“1) Cease the use of the Land as a residential caravan site

2) Remove from the Land:

(i) All mobile homes/caravans and touring caravans

(ii) All structures

(iii) All domestic paraphernalia

(iv) All services provided for the purposes of residential accommodation

(v) All fencing and gates

3) Remove the hardstanding (including that constructed over and within an ordinary watercourse) in the area outlined in red on the attached plan.

4) Remove from the Land all resultant materials arising from compliance with step (3) above.

5) Restore the land to its condition before the breach took place.”

The Claimant to lodged an appeal against the EN at the same time as the s.78 appeal for non-determination (10 June 2026). The EN appeal is proceeding under ground (g) only. The appeals are due to be determined by Inspector Steen in September 2026. The s78 appeal is to be heard by way of a Public Inquiry and the EN appeal by way of Written Representations.

The Planning Inspectorate (PINS) set down a timetable for the submission of documents and Proofs of Evidence for the Inquiry and Proofs were to be lodged with PINS by 10 February 2026. Dr Murdoch, the Claimant’s Planning Consultant, submitted Proofs of Evidence in relation to Flooding (Mr Quigg), Ecology (Mr Coe) and Landscape (Mr Crandon).

The Defendant challenged the submission of these proofs. The Defendant states this material should have been submitted when the planning application was made rather than in connection with the s78 appeal. The Defendant's position is that the material should not be accepted as it amounts to a substantial change to the proposal and this is contrary to the principles established in Bernard Wheatcroft Ltd v SSE [1982] JPL 37.

Submissions have been provided to the Inspector by both parties, and we await a determination from the Inspector. Without prejudice to the submissions made on behalf of the Claimant in relation to this issue, Dr Murdoch was instructed to submit another application for planning permission for the Claimant. This application included the evidence on Flooding, Ecology and Landscape. The application was received by the Defendant on 6 May 2026 given a reference number - WA/2026/01044 and validated on 4 June 2026. Therefore the 8 week deadline to determine the application would have been 30 July 2026, with consultation comments due by 5 July 2026. On 26 June 2026, the Defendant made a decision to invoke s70c and decline to determine the application.

“70C Power to decline to determine retrospective application

(1) A local planning authority in England may decline to determine an application for planning permission for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission, a “pre-existing enforcement notice” is an enforcement notice issued before the application was received by the local planning authority.”

The Defendant's decision of 26 June 2026 stated: ***“The local planning authority **DECLINE TO DETERMINE** the application under Section 70C of the Town and Country Planning Act 1990 (as amended) for the following reason:***

1. The application relates to development of land to which a pre-existing enforcement notice relates and seeks permission for the retention of matters specified in the enforcement notice as constituting a breach of planning control.”

It is clear from the Defendant's decision of 26 June 2026 that it is invoking s70c due to the pre-existing EN. The case officer – John Bennett has also drafted a report with a recommendation to decline to determine and that recommendation was accepted by Joanne Hollingdale.

No consideration has been taken in relation to the evidence put forward by the Claimant on Flooding, Ecology and Landscape, or the purpose behind the provision of such evidence, and it has simply declined to determine the application purely because it has the power to do so.

It should also be noted that Parliament's intention was to provide local planning authorities with extra powers to prevent repeat planning applications being used as a mechanism to delay enforcement action.

s70c is a discretionary power and not something which local planning authorities must invoke when faced with the position this Claimant is in. There is no issue of delay in this matter as the Claimant would wish to appeal any refusal of planning permission and have the s78 appeal joined with the current appeal which is to be heard in September 2026.

By simply invoking s70c the Defendant is foreclosing its mind of the possibility of a planning permission being granted by an Inspector appointed by the Secretary of State. The Defendant has failed to take obvious relevant matters into consideration.

There are also Article 6 factors to be taken into consideration. Article 6 provides:

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”

On the facts of this case, the use of the power to decline to determine is insufficiently justified and disproportionate. This is, we submit, a matter that the court can decide for itself. A relevant Article 8 consideration which the Defendant has not addressed is the impact on the Claimant’s Article 8 rights of shutting him out from having his application determined when the matters relied on by the Claimant could support a different outcome.

This case is to be distinguished from **R (Wingrove) V Startford-on-Avon DC [2015] EWHC 287 (Admin)** given that the Court held that the planning application submitted by Mrs Wingrove was designed to delay further enforcement proceedings that were then pending, that Claimant having been prosecuted repeatedly for breaching extant Enforcement and other Notices:

*“4. The claimant is no stranger to enforcement action in relation to her occupation of Fox Farm. In 2005 an issue arose as to the stationing of caravans on the land and the sub-division of a dwelling to create two separate dwellings. Ultimately, an enforcement notice was issued in relation to the dwellings. It was complied with some time later. In 2006 the Council referred the claimant’s tipping of work materials on the land to the Environment Agency, which prosecuted her and, on her pleading guilty she was fined £1250 at Rugby Magistrates Court. In April 2010, the Council prosecuted her at Leamington Magistrates Court for non-compliance with a planning contravention notice and in 2010 she was fined £250. Later in 2010 the Council became concerned about the change of use of the land and later issued an enforcement notice, with which the claimant complied.
...*

14. The third application for retrospective planning permission, on 21 March 2014, was in the same terms as that quoted for the second application. In submitting it on the claimant’s behalf, Framptons said in the covering letter that it was to be hoped that in consequence of its receipt,

“a decision to prosecute against non-compliance with the enforcement notice will be held over.”

...

16. The decision letter was accompanied by an officer's report, which contained further reasoning. The report reiterated that if the claimant had wanted the planning merits to be considered it should have appealed the enforcement notice. It added:

"There has been no pre-application discussion on the merits of the development ahead of submitting the planning application. It is therefore hard to judge the applicant's motivation for making it; however, given that the notice now needs to be complied with in order to avoid criminal proceedings, it is likely that a strong motivation will be the applicant's desire to maintain occupation of the units, whilst avoiding further proceedings. The applicant may believe that submitting a planning application is likely to persuade the Council to put any further proceedings on hold whilst the planning merits are considered."

The Claimant's situation is to be distinguished from Mrs Wingrove's. This Claimant has never had a determination on the site in question. His personal circumstances have never been taken into consideration.

At paragraph 30 in *Wingrove*, the Court identified the mischief against which s70C was directed:

"Section 70C confers a wide discretionary power on local planning authorities to decline to determine a retrospective planning application for a development, subject to an enforcement notice. The legislative history of section 70C demonstrates that Parliament's intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development. It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed. Since delay is the bugbear against which the section is directed, a claimant's actual motives to use a retrospective planning application to delay matters is clearly a consideration in favour of a decision to invoke section 70C."

In contrast to the position in *Wingrove*, in this case, the Claimant's planning application was not submitted to avoid or delay enforcement proceedings. It has been submitted due to the stance taken by the Defendant in relation to the evidence on Flooding Ecology and Landscape. It is a pragmatic resolution to an unnecessary dispute.

At paragraph 31 of *Wingrove*, the Court held:

"There may be factors pointing against exercising the discretion in section 70C to decline to determine an application which for a local planning authority to ignore would open their decision to a public law challenge."

The Defendant has failed to take these matters into consideration and therefore its decision is open to a public law challenge.

We now move on to consider what factors may support such a public law challenge. The case of **R (O'Brien) v South Cambridgeshire DC [2016] EWHC 36 (Admin)** is relevant here.

Firstly, at paragraph 23 of *O'Brien*, the Court made clear the extremely limited ground (singular) of challenge in that case:

*“The Claimant sought judicial review of the Defendant’s decision of the 10 April 2015 declining to determine the Claimant’s application for planning permission dated 28 March 2015. **The Claimant did not seek to challenge the decision on the grounds that it involved an unlawful exercise of discretion, applying usual public law or “Wednesbury” principles.** Rather, the sole ground of challenge in the claim form was that, on a proper interpretation of Article 13(1)(b) of the Order, the power conferred by section 70C of the 1990 Act (as introduced into that Act by the 2011 Act) did not apply where the enforcement notice relied upon was issued before the 6 April 2012.*

At paragraph 33 of *O'Brien*, the Court held:

*“...Circumstances where it may be appropriate to exercise the discretion and determine the application for planning permission include situations **where there has been a relevant change in the development plan, or where there has been a change in other material planning considerations,** such that the unauthorised development might now be granted planning permission. The exercise of that discretion will be subject to judicial review on the usual principles of public law. **If there were circumstances where a local planning authority exercised the discretion and refused to determine an application for planning permission in circumstances that were unlawful, an individual would be able to seek judicial review of that decision.**”*

The failure to consider changed material considerations supports a public law challenge to a s70C decision is discussed again at paragraph 44 of *O'Brien* :

*“The planning authority has a discretion to do so (for example, where the development plan has changed, **or other material planning considerations have changed,** so that the underlying planning merits may be different and it may be appropriate to grant planning permission for the unauthorised development).”*

Thus, grounds for a public law challenge based on a Defendant’s failure to consider whether material considerations have changed is thus supported by both *Wingrove* and *O'Brien*. Clearly, the Court accepts that considering whether material considerations have changed involves a different exercise than considering the determining the “full planning merits” of a proposal per paragraph 31 *Wingrove*.

Moving on chronologically, the case of *Banghard* (handed down in September 2017), we can see that the issue of delay is again raised: “*Cranston J [in O'Brien] refused the judicial review. The following two passages are the most important for present purposes:*

“21. In an illuminating article on the history of the relevant legal provisions, Professor Michael Purdue suggests that although an application for retrospective planning permission might appear unnecessary when the enforcement notice can be appealed, it might still be made for tactical reasons: Professor Michael Purdue, "Reform of the Enforcement of Planning Control: Where Are We Now?" [2012] J.P.L. 795. **Section 70C, he states, was directed at the problem of delay under the existing provisions.** Of the situation where an application for retrospective planning permission is made where enforcement action has already been taken, Professor Purdue writes:

"The purpose must be to prevent a retrospective applications being made just to delay enforcement..."

In terms of Wednesbury principles, *Banghard* is clear that LPAs:

“must still exercise that discretion rationally and to achieve the purposes of the statute. It cannot simply use s.70C because it is quicker and cheaper than determining the application and thus risking a further appeal.”

The statutory purpose of avoiding delay is again raised at paragraphs 28 and 33 in *Banghard*:

“...it is important to have closely in mind the purpose of s.70C and ensure that it is not used in a way that is clearly unfair to an applicant for permission and is outside **the statutory purpose....to ensure that effective enforcement action cannot be avoided or delayed** by those in breach of planning control...”

The next case to consider s70C - *Chesterton*, where once again the use of that power to avoid delay in enforcement proceedings is discussed:

“The decision letter informing the claimant of the defendant’s refusal to consider the application recited the text of section 70C, and continued:

“The purpose of s70C is to prevent retrospective applications being used to delay enforcement action...”

This continues at paragraph 33 in the section entitled “*The Statutory Provisions*”:

“Sections 70C, and 174(2A)-(2B) are both concerned with **curbing opportunities for delay in enforcement.**”

Paragraphs 41- 42 also discuss the issue of delay:

*“The object of the provision is not to prevent the merits of an unauthorised development from being considered at all, but **to avoid delay in enforcement...***

Where section 70C is engaged, *Cranston J* explained in Wingrove (at para 30) that it conferred “a wide discretionary power” but added:

*“The legislative history of section 70C demonstrates that Parliament's intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development. It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed. Since **delay is the bugbear against which the section is directed**, a claimant's actual motives to use a retrospective planning application to delay matters is clearly a consideration in favour of a decision to invoke section 70C.”*

Paragraph 69 of *Chesterton* also deals with delay:

“Secondly, the statutory objective of stopping applicants who have undertaken development in breach of planning control from gaming the system by tactical appeals and retrospective applications is not achieved by asking only whether the planning merits of a proposal have already been determined.”

Chesterton also addresses situations where the discretion to use s70C may be unlawful:

*“43. Cranston J recognised that in some cases there may be factors pointing against the use of the discretion conferred by section 70C, such as “where for legitimate reasons there has been a failure to appeal an enforcement notice and the development is plainly compliant with planning provisions”; if such considerations were ignored an authority's decision would be open to a public law challenge (Wingrove, para. 31). Other examples of circumstances in which a proper exercise of the discretion might require that the application for planning permission be determined were suggested by Hickinbottom J in R (Seventeen de Vere Gardens Management Ltd) v London Borough of Kensington v Chelsea [2016] EWHC 2869 (Admin), at paragraph 44: “where the development plan has changed, **or some other material planning considerations have changed, so that the underlying planning merits may be different.**”*

There is no issue of delay in this matter. Had the Defendant refused the application, an appeal could have been lodged with PINS and a request made to have the 2 s.78 appeals formally joined and heard at the same Inquiry in September 2026. Even now the Claimant is willing to undertake to appeal any non-determination/refusal within 7 days of the relevant deadline. The date for a non-determination appeal would therefore be 7 August 2026.

The case law in relation to s70C repeatedly stresses the need to consider whether planning considerations have changed. The Defendant has manifestly failed to consider that matter, and it is plain that the Defendant has failed to take into account relevant considerations in a *Wednesbury* sense. On the one hand the

Defendant is objecting to the evidence as new evidence and relying on the principles established in *Wheatcroft* and on the other hand declining to determine the planning application as ...*“the application relates to development of land to which a pre-existing enforcement notice relates and seeks permission for the retention of matters specified in the enforcement notice as constituting a breach of planning control.”*

The officer's report states: *“The planning merits of the enforced development have already been considered by the local planning authority when issuing the Notice. The appellant also has a live and imminent opportunity for the planning merits of the development to be tested through the s78 appeal relating to the WA/2025/00495 application. That appeal will be determined by the same Inspector who is dealing with the enforcement appeal. The Inspector will therefore have the opportunity to consider the planning merits of the development in a comprehensive and coordinated manner.”*

The Defendant did not have the evidence on Flooding, Ecology and Landscape when the EN was issued and are objecting to this evidence being relied upon in the current s78 appeal. If the Inspector accepts the submissions made by the Defendant, then this evidence may be excluded from the current appeals. If this occurs, the Inspector would not have the opportunity to consider the planning merits of the development in a comprehensive and coordinated manner as alleged by the Defendant as vital Flooding, Ecology and Landscape evidence would be excluded. The insidious approach of the Defendant in seeking to exclude consideration of relevant evidence in the extant appeals, whilst at the same time refusing to consider that obviously relevant evidence as part of a pragmatic and focused planning application is irrational and unreasonable.

This renders the decision open to legal challenge. For this reason alone, it is clear that the decision is legally flawed.

Consideration has been given to the Court of appeal's judgment in Moran v Medway Council [2026] EWCA Civ 484 and it is submitted that the circumstances surrounding this planning application can be distinguished from the circumstances in the *Moran* case. There has been no determination by an Inspector appointed by the Secretary of State of the planning merits in relation to the Claimant's pitch. Evidence submitted in relation to that appeal is being challenged by the Defendant under the *Wheatcroft* principles.

Consideration should also be given to the High Court's permission judgment in the case of Casey and Smith v Crawley Borough Council [2025] EWHC 887 (Admin) (attached herewith). At paragraph 27, Karen Ridge sitting as a Deputy High Court Judge stated: *“The Defendant's decision to decline to determine the second planning application did directly affect the question of the rights of the Claimants to a fair hearing/determination. I have concluded that it is arguable that the discretion was unfairly/irrationally exercised and I therefore conclude that it is also arguable that the decision unlawfully affected the Claimants' article 8 rights.”*

The Defendant's decision to decline to determine does affect the rights of the Claimant to a fair hearing/determination. This decision is therefore legally flawed and unfairly/irrationally exercised which has a resultant unlaw affect of the Claimant's Article 6 and 8 rights.

It is submitted that the application WA/2026/01044 should be determined without further delay and then if refused, for the opportunity of appealing that to the Secretary of State who may well form a different view as compared to the Defendant in this matter. It is therefore requested that the decision to decline to determine under s70c of the Town and Country Planning Act 1990 should be withdrawn and the application should be determined to allow time to appeal any refusal and make a request for it to be joined and heard with the current s.78 appeal. Even now the Claimant is willing to undertake to appeal any non-determination/refusal within 7 days of the relevant deadline. The date for a non-determination appeal would therefore be 7 August 2026.

The details of the action that the Defendant is expected to take

The Defendant is expected to withdraw its decision to decline to determine the application and proceed to determining the application without further delay.

The details of the legal advisers, if any, dealing with this claim

See above.

The details of any interested parties

None known of at this stage.

The details of any information sought

Copies of all files, memos, notes relating to the decision to decline to determine.

The details of any documents that are considered relevant and necessary

Please see above.

The address for reply and service of Court documents

See above.

Proposed reply date

Within 14 days of the date of this letter.

We look forward to hearing from you.

Yours faithfully,

Community Law Partnership

The Community Law Partnership.