



**PRIVATE AND CONFIDENTIAL**

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Please ask for: Julie Parkin

Date 8th February 2024

Our Ref: PL/00809/JP

Your Ref: WHI00001

Dear Madam

**Re: Proposed claim for judicial review of the consultation into the revised Armada Way Scheme**

**1. The Claimant**

The proposed claimant is Alison White (“the Claimant”).

**2. The Defendant**

Plymouth City Council (“the Council”).

**3. Reference**

Local planning authority reference PL/00809/JP

**4. Details of the Matter Being Challenged**

The Council’s alleged failure to carry out a fair consultation into its proposals for Armada Way (“the Revised Scheme”).

**5. Response to the Proposed Claim**

For the summary reasons set out below the Council contests the claim in full and invites your client to reconsider whether any claim is appropriate.

Your letter before action raises four grounds of challenge. They are addressed in turn below after some general observations which relate to the proposed challenge.

### General observations

The Armada Way project is the largest of the Better Places public realm improvement schemes in the city centre and forms an important element of the Transforming Cities Fund (TCF) programme of works, which is funded in the main by the TCF grant from government matched by Local Authority contribution. The Council considers that the Armada Way project also supports the strategic objectives set out in the Plymouth Plan for a healthy city, a growing city, and an international city. Specifically, the Armada Way scheme directly supports the delivery of the following Plymouth Plan policies: HEA 1, HEA 5, HEA 6, HEA 7, GRO 1, GRO 4, GRO 7, GRO 8, INT 3 and INT 6. The Council believes this scheme will be transformational for the city centre, acting as a significant catalyst in promoting the long-term economic and environmental sustainability of the city centre. This has been reiterated with numerous partners and statutory consultees. The new scheme seeks to address a number of fundamental overarching objectives set out in the draft report to Cabinet.

In light of the importance of the upcoming decisions, the Council contracted specialist consultancy ECF to conduct an extensive 6 week consultation, which took place in Autumn 2023 running between 17 October 2023 and 28 November 2023. The full ECF report is in the public domain and available, for example, as appendix D to the draft report to cabinet. The consultation included consideration of written responses, interviews, and workshops. The raw data from the survey has been published and is publicly available.

The Council also chose to put the matter before the Growth and Infrastructure Overview and Scrutiny Committee (“GIOS”) precisely so that the consultation and resulting decisions were open and transparent and had the benefit of pre-decision scrutiny and comment from GIOS, prior to a decision being made by Cabinet on 19 February 2024. The GIOS meeting of 22 January 2024 was webcast and remains available to view online.

The GIOS meeting had the benefit of an officer report containing a number of recommendations, the first of which was that GIOS should give consideration to the outcome of the “Let’s Talk Armada Way” consultation and engagement exercise of October/November 2023. It also had the benefit of seeing the full draft report to Cabinet.

### Ground 1 – The costs of the Revised Scheme

The Council provided sufficient material for meaningful consultation responses on the scheme as a whole, and it was clear from the nature of the scheme and various reports (including officer reports) already within the public domain that the costs of the scheme were commensurate with its nature. The facts and events relied upon in your letter do not detract from the detailed reporting of this issue of cost within the Council’s reports.

Nor is some of the factual reporting in your letter accurate or complete. For example, as to para 21, more species were altered than simply one tree - and the Council added new tree species, and therefore more diversity, into the mix. The removal of the two east-west footways and changing the

granite tone are significant, as is the retention of the extra two trees as a proportion of those being translocated.

The reports published by the Council were accurate at the time they were made. Of course, costs on any project of this nature are liable to change over time as cost bases alter and knowledge of circumstances attending the project improves, as well as the stage at which any previous proposal was stopped or halted. Those are the essential reasons for the change here. In terms of general background to the increased project costs the COVID-19 pandemic, Brexit and the Ukraine War have, in the Council's experience, all had an effect on project costs. The updated and detailed cost of the Revised Scheme has only been released now that a tendered price has been put to the Council. The previous scheme was stopped before the tendered scheme was put forward, and the new cost has received significant cost increases, as well as a much higher risk allocation from the contractor due to the underground conditions that have been encountered during Old Town and New George Street works which have caused considerable cost increases in relation to those projects. (For reference, on that project the anticipated cost was circa £7M, but it now stands at £16.7M). This potential risk and additional cost was included in the fees from the contractor for delivering the Revised Scheme, as were the effects from the more general changes in background described above.

It is worth pointing out that as well as the substantial increases in cost that have taken place as a result of the delays to the progress of changes to Armada Way as a result of your client's litigation, the Council's current experience (below) is that such costs continue to rise on a month-to-month basis. Construction contract price inflation is running at an estimated 17.5%.

The figures that were provided to the GIOS Committee during its meeting on 22 January 2024 were not available at the time of the consultation. All costs were based on the previous scheme and were increasing month by month. The Revised Scheme was only finally costed, with risk pot allocations and spend to date (also increasing monthly significantly) prior to the report to the GIOS Committee being drafted. Costs were being worked up on the new design following its agreement for consultation on a plan which was due to be consulted upon. As is typical in these kinds of projects the material and assumptions underpinning the figures are commercially sensitive and include a large amount of information which is still subject to ongoing review of the risk and other assessment.

Insofar as it implied that the Council was wrong to refer to the £36.7M figure as a likely maximum figure this is not accepted. In the Council's view it is very unlikely to go up further given that the risk allocations in the price were placed high and based on a worst case scenario. However, given the nature of Plymouth city centre, as has been found in OTS NGS project and Civic Square, there cannot be any guarantee of what is beneath the ground. It is not equivalent to building a new public realm project on virgin ground, but in fact the opposite. The inability to give a guarantee is consistent with the recommendation given by GIOS that recommendation 6 of the draft report to Cabinet, should be amended by adding the words "*provided to always use best endeavours to keep within the maximum spent limit*". The full recommendation as proposed therefore now reads:

*"That the Leader approves changes to the Capital Programme up to a maximum of £22,786,229 to finance the revised Armada Way scheme to enable the implementation of the final scheme design, subject to confirmation of the final construction contract. In addition to the already approved £14,001,458 this gives a*

*maximum spend allocation of £36,787,687 to finance Armada Way, provided to always use best endeavours to keep within the maximum spend limit”*

It is quite clear that respondents overall did not feel materially hampered by the level of cost information supporting the consultation. In the thematic assessment of the consultation responses, the issue of project cost per se was not prominent. Nor, importantly in light of the point raised in your letter, was any significant criticism (numerically) made by respondents about the level of information being provided about the likely costs. The only numerically significant response relating to the cost of the project was the potential level of maintenance costs going forward. This is a factor the Council had and continues to take into account. The approach has been explained within the officer reports.

## Ground 2 – Translocation of Retained Trees

It is important to place this issue in context.

First, this issue concerns the potential movement by translocation of four category C trees which have been assessed to be of low value. Of the 20 original trees considered for translocation 15 are incorporated in the final design and one has since died.

Second, it is one of a significant number of issues canvassed by the consultation which seeks to ensure that the transformation of Armada Way takes place in a way that significantly benefits all of the users of Armada Way whilst also having the various benefits that have been described at length in the officer reports supporting the scheme. The key principles and objectives of the Revised Scheme are set out at para 6.1 of the draft report to Cabinet. The analysis of the consultation responses in the draft report to Cabinet divides those main consultation issues into 11 topics for consideration.

Third, the Revised Scheme proposes 50 more trees than there were on Armada Way (before the felling). The new trees will all be 3.5m to 8m high when planted, to give immediate environmental benefits and a canopy to provide cover.

Fourth, the planting of new trees which will thrive in a harsh urban environment has always been a fundamental objective of the Armada Way scheme.

Fifth, throughout the consultation there were news stories regarding elements of the scheme, for example on the SuDs / trees / heritage. All of these were published on the “Let’s Talk Armada Way” website and were promoted on social media and in the Council’s e-newsletter. However, none of this information was new. It was a deep dive into information already available. On 15th November 2023, additional information on nature and greenery, translocation and the play village was uploaded to the project website, including YGS’ November 2023 report. An email was sent to all respondents to advise of the new information and offer the opportunity for respondents to re-submit their feedback. Respondents were advised that only information from new submissions they chose to make would be included in the final analysis. ECF have confirmed that 12 re-submissions were received throughout the consultation period. It is therefore entirely incorrect to suggest that these changes were not publicised, and that respondents were not duly informed. Indeed, a number took the opportunity given to them to make updated submissions.

The Council provided sufficient material for meaningful consultation responses on this issue. A specific question was asked about translocation. The responses raised concerns about the justification for tree removal, the likely survival of the trees, the maintenance of the trees translocated, reduction of canopy cover, loss of mature trees, and cost. Accordingly, the consultation was capable of, and did, encompass all of those issues.

The material did identify the risk to trees through translocation; it has appeared consistently that the Claimant may have differing views about those risks which are apparent from your letter, but the canvassing of different views and taking them into account is part of the consultation process. Respondents were informed in the consultation materials that “Translocation is a complex process which is not undertaken lightly, and it carries some risk of failure.” They were also informed that whilst the Council would work really hard to ensure that the trees would survive the process, if any did not survive, the Council would replace them with a semi-mature tree. YGS’ November 2023 report, uploaded on 15th November 2023, provided further information in respect of the six individual trees. The Council does not accept, on the totality of the advice it has, that translocation will lead to death of any or all of the four trees, but that is one potential result of translocation. This is recognised in the Council’s commitment to replant a semi-mature tree for each of the translocated trees should they not survive. Such planting will occur within the city centre to help enhance long-term canopy coverage. Nor does the Council accept that it has not addressed the potential cost of translocation. It is unsurprising that the Council did not have at the consultation stage a fully worked up engineering scheme in relation to the SUDS and there was no requirement for that to be in place (with the attendant cost etc) before a lawful consultation could take place. Detailed technical drawings for the drainage system will be produced for the construction phase as would normally be expected.

The fact that the Council has been able to redesign the Revised Scheme so that only four, rather than six, trees are proposed to be translocated is a prime indicator of the consultation process working. The Revised Scheme has been further changed to its present form so that those further two trees may be retained. That further revision has not been without its own cost. The scheme was subject to considerable change in order to keep tree T118 - Whitebeam, including a structural redesign to provide a better and safer pedestrian and cycle experience. The other tree now retained has occurred at the loss of 3 proposed new trees, a different balance at the gateway to the scheme, and a redesign of the scheme levels. The four trees now proposed to be translocated are currently located at critical points of the Revised Scheme design. This is shown on the schematic plan of the proposed SUDS network. The rationale for translocation in relation to each of those four trees is set out in the draft report to Cabinet in para 6.80. The incorrect suggestion that the consultation relied on misleading information is addressed at paras 10.10 to 10.13 of the draft report to Cabinet.

However, at all events, some consultees have been supportive of that approach, and the responses to the consultation demonstrate that respondents understood the issues being raised under the consultation.

### Ground 3 – SUDS Scheme

The Council provided sufficient material for meaningful consultation responses on this issue.

The overall benefits of the SUDS scheme are well understood and not rehearsed here; they are not challenged by your letter. In short, the city centre itself is identified as a Critical Drainage Area, reflecting that the post-war combined sewer system is 'at capacity' and therefore there is a requirement to use water smartly. This is a significant challenge when dealing with an area of this scale and complexity and requires removing surface water from the combined sewer system, releasing a huge amount of capacity to allow for mixed use, residential led development in the city centre. Reducing the amount of surface water entering the combined sewer system through capturing rainfall that hits Armada Way will also reduce pressure downstream, ultimately reducing the volume of water currently discharged into Plymouth Sound during heavy rainfall events. The scheme has been designed to slow down, and store large volumes of water using surface SUDS infrastructure such as rain gardens and the reedbeds, which will themselves act as exceedance roots in exceptional rainfall events, as well as providing for storage of large volumes underground in refurbished storage tanks.

The proposed system will be an exciting and innovative system which combines a SUDS network with an ornamental, continually running stream without having to use chemicals. It is an intelligent system with a very large capacity to reduce the pressure on the critical drainage zone which the city centre basin sits within.

Similar systems have been implemented elsewhere on a smaller scale, but not on this scale. That is all. There is no reason to think (and the Claimant does not appear to allege) that such a scheme cannot be successfully implemented.

The schematic plan of the proposed SUDS network does show the 3 underground tanks. They are not small but have a combined volumetric capacity of 150 cubic metres. The schematic indicates the main runs of the infrastructure, but the detail of the SUDS scheme will require considerable redesign and adjustment and re-running of calculations based on the changes to the Revised Scheme itself, and particularly, the reduction in volume of water retention areas.

#### Ground 4 – Bias for the Revised Scheme

The Council was entitled to choose a reasonable basis for consultation. That has been done. It is not a good complaint in law to say that the Council might have designed the consultation differently; or might have approached how questions were framed from a different angle.

The Council has already made clear that it will take into account in making its decisions in relation to the Revised Scheme the criticisms levelled at the consultation by your letter of 18 December 2023. These matters are set out, along with the Council's responses, in section 10 of the draft report to Cabinet. For the avoidance of doubt, it will also take into account the matters raised by this pre-action protocol letter. The discussion in section 10 addresses, for example, the complaint about the approach to quantitative and qualitative mechanisms within the consultation. It also addresses the early improvements that were made in relation to the consultation portal.

#### **Conclusion on the proposed grounds**

For those summary reasons the Council does not accept the criticisms made in your letter. The putative grounds of challenge are without merit.

## **6. Proposed Action**

As to the requirements contained in your letter:

- (a) The Council has, and will continue through its reporting, to put an appropriate level of cost detail relating to the Revised Scheme into the public domain.
- (b) The Council does not propose to isolate for separate assessment and cost-benefit consideration the proposed translocation of the four trees.
- (c) As for (a) above.
- (d) There will not be a further consultation in relation to the Revised Scheme unless Cabinet so decides. There is no current proposal to carry out a further consultation.
- (e) This point does not presently arise.
- (f) It follows from what has been said above that the Council will not pay your client's costs.

## **7. Further Information requested**

The Council does not propose to provide the items requested, which are in any event far too broad. Any application for disclosure on the stated basis will be resisted. The documents are not necessary for the Claimant to pursue a claim based on above heads of claim should she choose to do so notwithstanding the clear answers the Council has given above.

## **8. Delegation to the Service Director for Strategic Planning & Infrastructure**

Sir Ross Cranston ordered the Council to file and serve a witness statement from Mr Barnard "explaining the circumstances whereby the Defendant's instruction to stop the works in compliance with the injunction was not given until 1.03 am on 15 March 2023". This is precisely what he did in his second witness statement of 31<sup>st</sup> March 2023. Mr Barnard's third witness statement, dated 18 April 2023, was to correct an error in his first witness statement. It is not unknown for a witness to make a mistake in a witness statement and Mr Barnard followed the appropriate course in correcting it as soon as he reasonably could and apologising to the Court and to the Claimant. Your pejorative allegation that he subsequently also "misled the court" by withholding information is also not accepted.

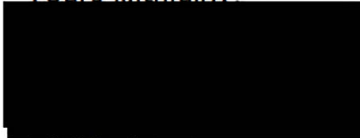
The Council is well aware of the allegations the Claimant has made in the application to commit, being an application which the Court has declined to consider at this stage and which it may decide not to entertain at all (quite apart from the Claimant's need to obtain permission to proceed in respect of the claim of interference with the administration of justice). As the Council has made clear it intends to defend the application and rejects the allegations of contempt. These are, and remain, allegations. Nor is there, or has there been, any determination that the felling of the trees was "unlawful," as you assert.

Given Mr Barnard's senior role it is clearly appropriate, should Cabinet so decide, for certain decisions to be delegated to him, whether in consultation with the relevant Cabinet members (as the proposal is worded) or, indeed, without need for consultation. The challenge is meritless.

**9. Address for correspondence and service**

Please use the address and reference noted above, marked for the attention of Julie Parkin.

Yours faithfully,



Julie Parkin  
Senior Lawyer