

[REDACTED]

From: [REDACTED]
Sent: 25 November 2019 17:10
To: Charlotte White
Cc: [REDACTED]
Subject: [REDACTED]
Attachments: [REDACTED]

Dear Charlotte,

You may be aware that we received a cache of correspondence between SBC and its advising partners and the applicant earlier today following a FOI request. I attach an email from the applicant's team dated 17th October 2019 which provides a response to our email of 10th October in relation to missing bat emergence surveys (see below). It appears that their email may have formed the basis of Paragraph 6.224 of the Committee report, along with the PEAOct19.

The email contains a serious error which leads to the wrong conclusion, and SBC's reliance on it would therefore be incorrect. The email states that no bat activity was recorded during the after dark survey of the buildings to the west and so the value of the block (Building 7) was downgraded from low to negligible. This is an incorrect statement. I refer you to Paragraph 2.16 of the PEA July 2019 version, which states: *"Two foraging common pipistrelle bats were heard by surveyors and record foraging in the church yard and back gardens off Herbert Grove from 21.36 (30 minutes after sunset) "* A similar statement exists at Paragraph 3.24 of the PEAOct19 (extract attached).

As you will know, there are a number of buildings along Herbert Grove that fall within the Site (including the ones that were being surveyed on the night the bats were recorded). It is misleading to categorically state that the Site was devoid of bat activity when actual reporting states otherwise. It undermines the evidence (or lack thereof), on which the Council may have relied to draw its conclusion on this matter. In any event, we note that that the applicant is drawing conclusions about bat activity over the entire the Seaway site, despite only surveying one area of it (the far west).

As for the experience, I note that the October 2018 surveyor held a higher level licence, and their results are confirmed by [REDACTED] ecologist, as you will have seen.

[REDACTED] also raises concerns that SBC did not undertake a preliminary bat roost survey of the former Rossi Ice Cream factory before it was demolished, according to FOI records. However, It is noted that the applicant's team have identified the presence of bats in and around the Seaway car park, so it appears to be an error that the Council did not undertake roost surveys before the Rossi building was demolished. As set out in the BCT Guidance, damage or destruction of a roost is an offence as identified in the Habitats Regulations, and could be committed accidentally. Whilst the Rossi building is now long lost, to avoid future mistakes regarding accidental or otherwise damage to roosts, it is imperative that SBC refuse the current application as there are no bat emergence surveys for Building 7, the building has been classified as 'low' and the justification provided by the applicant to deviate from the guidance is absent or inaccurate.

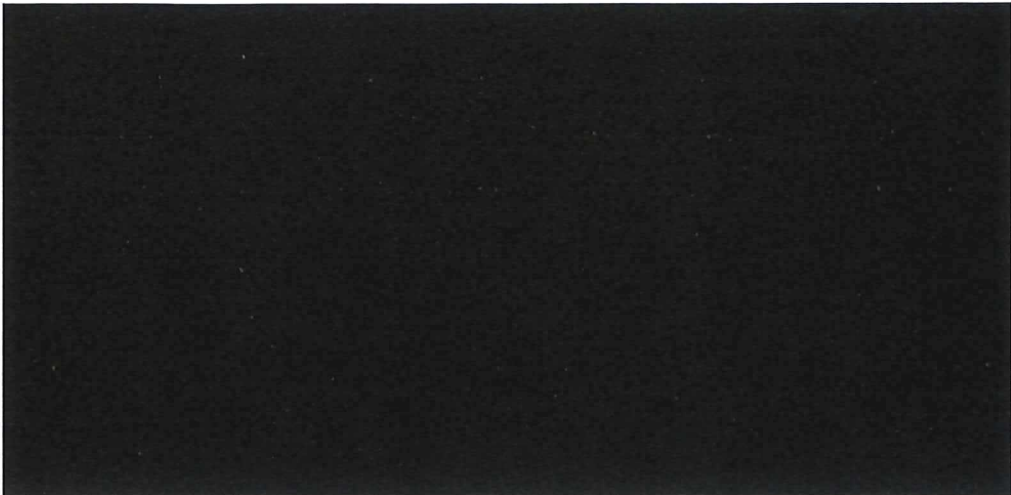
In addition to the guidance that I have referred to below, Clause 7.3 of the BS42020:2013 indicates that Preliminary ecological appraisal reports are inadequate to inform the planning process unless no further surveys or mitigation area required, to add to your arsenal that any decision to refuse the application on lack of survey information will be upheld by an Inspector.

I look forward to confirmation that you have now withdrawn Paragraph 6.224 and put forward a recommendation for refusal.

Please confirm receipt of this email.

[REDACTED]

Kind regards,



Dear Charlotte,

I write to regarding the ecology matter (further to my email below and our representations of 7th November 2019). First, I do not apologise for the length of the email. I want to be clear to you: this email will be forwarded to

. All parties can see the evidence, and draw their own conclusion regarding what SBC should be doing on 27th November 2019 when DCC considers the application. Indeed, I have done this because we want transparency in decision making: the reasons to refuse permission are fully justified and any other decision does not enable the Council to discharge its statutory responsibilities as set out in the Government's PPG and BCT Guidance. The details in this email are also designed to dispel at the outset any myths that might be perpetuated by the applicant's lobby team after my email is circulated. I have sent the email as a blind copy to external parties so their data can be protected if the email is published.

You have clearly set out in Development Control Committee's (DCC) Committee Report Paragraph 6.224 that clarification was obtained from the applicant regarding the ecologist surveys, and which you appear to accept at face value. Unfortunately, this appears to be a fatal mistake on the Council's part as the evidence supplied by the Applicant in October 2019 is contrary to guidance and remains unjustified. To the point, the Council should not have relied on the applicant's evidence before it drew the conclusion that Building 7 is of negligible bat roost potential. This is because the downgrade is not justified (indeed, there is no evidence submitted by the applicant which would warrant the change), and in fact the applicant's conclusions are incorrect given the building's features etc, as I'll set out below. Ultimately, the implications are that as no bat emergence surveys are forthcoming before the DCC meeting this Wednesday, so you must therefore change your recommendation to one of **refusal on a lack of information on the impact of the development on protected species (there are other issues which warrant refusal, but that is not relevant to this email but could form further justified reasons)**. I provide all the evidence of the reason for this below, so you (and DCC) will be fully confident that such a refusal will be upheld by an Inspector with any Planning Appeal.

There is no doubt that DCC must refuse the application on the lack of bat emergence surveys alone. For example, the Government's Protected Species Checklist (as attached) is clear that without the emergence surveys, the decision falls under Category F: *"Inadequate survey. Request this is done properly as in question 3 or refuse application."* It is supported by the Government's Planning Practice Guidance (PPG), which states: *"You can refuse planning permission, or ask for a survey to be redone..."* (PPG Chapter: 'Protected Species: How to Review Planning Applications – As a Planning Authority use Natural England's standing advice to review planning applications that might affect protected species'). It goes on to state: *"Use Natural England's guidance (known as 'standing advice') to help you decide whether to reject or approve an application if a protected species could be affected. You need to take standing advice into account when making your planning decision."* Under the checklist for 'Making a Decision' within the same PPG section, it is clear that the proposal fails all criteria (no additional surveys carried out,



no confidence a licence can be granted, no mitigation or compensation plans put forward, etc). You can be wholly confident that the scheme's refusal is justified by the PPG and other guidance, and will be upheld by a Planning Inspector at Appeal (who will take their responsibilities towards protected species very seriously given EU and UK law on the matter). Indeed, without changing the current recommendation, the report could be conceived as being misleading noting the evidence that we have already submitted, and additional information that we submit to you with this email. So the conclusion that can be drawn is that DCC would be falsely informed when making their decision if our information below is not supplied to them. There could be substantial negative consequences arising.

We can draw this conclusion because [REDACTED] own ecologist, who holds Natural England Levels 3 and 4 bat licences, has conducted an independent survey of the building (see attached report). You will see that that the report clearly concludes that the building should be subject to further emergence surveys because it remains classified as a building which hosts 'low' potential for a bat roost (and the evidence to support that conclusion is supplied). You will see by their report that they state on Page 3: ***"There was potential for bats to roost within the roof void and/or behind the wooden fascia of Building 7, and the building was considered to have low roost potential. Demolition of this buildings is planned as part of the proposed development and therefore further surveys on this building are required in advance of planning."***

Furthermore, there are other reasons as to why you should withdraw Paragraph 6.224 of your report and alter your recommendation to one of **refusal**, which can be summarised as follows:

- The PEA November 2018 incorporated survey results from a high bat licenced ecologist. It clearly drew the conclusion that the building's bat roost potential was 'low' and further emergence surveys would be required before any planning permission could be granted.
- The PEA October 2019 includes references to a May 2019 building survey, but which contains no documentary evidence that justifies that a downgraded potential exists, in direct conflict with Bat Conservation Trust (BCT) guidance (details below).
- Building 7's features that the applicant's team identified that exist and warrant further investigation have not changed.
- The absence of external evidence is not sufficient justification to warrant the downgrading of the potential, according to the BCT guidance.
- No internal survey of the building has been recorded. As the building has been abandoned, there can be no certainty that bats are not roosting within the building.
- Sufficient connectivity exists between the building and wider foraging routes for common bat species, noting the presence of vegetation in the rear gardens of Hartington Road that links the northern and southern parts of the site and wider foraging areas.
- It is not possible to conclude that there is no bat activity on another part of the site from the data collected during the May 2019 surveys, as the ecologists were located in immediate proximity to Buildings 1 and 3, and at some distance from Building 7. Bats will be using the extremities of the site due to the unattractive surface level car park in the middle, as acknowledged by the Applicant's team, and no evidence is supplied that would demonstrate the ecologists were surveying the eastern side of the site at the relevant times. In any event, the May 2019 survey results demonstrates that **bats are present** in the vicinity (I come to this again below with a PPG reference on how to deal with this).
- So, to draw that conclusion that bats are not active on the whole of the site, formal bat activity surveys of the entire site would be required and forms the outcomes of multiple surveys between April/May and September/October. No evidence of such surveys has been presented, and we suspect that these have not been carried out.
- In any event, you already have the evidence that two ecologists (from the same firm) who have formed differing opinions regarding the potential surveys that should be prepared, with the more qualified person stating that the building hosts 'low' potential and further surveys are required. You therefore must err on the side of caution and require such surveys before any application is determined, according to the PPG.
- In fact, with [REDACTED]'s report, you now have confirmation the two more qualified ecologists who have visited the building have confirmed in their view the building's potential is 'low' and which bat emergence surveys are required before the Council can conclude that there is no likelihood of impact on protected species by the proposed development, in accordance with the NPPG and Circular 05/2006. This cannot be ignored or brushed aside.



Without such bat emergence surveys, the only conclusion you can draw is that the application should be **REFUSED** according to relevant guidance, which the applicant's team appears to be asking you to deviate from without providing any good reason to do so.

I set this out in more detail, for your benefit. Following our objections in October 2019, the Council had received a revised PEA from the applicant's team, and published this on the application website on 23rd October 2019. It is referred to as the PEAOct19. This contains a number of changes, primarily focused around 'Building 7', a former toilet block building located in the south-eastern corner of the site, and to which our comments below primarily related. These can be summarised as follows:

- Added reference to a new surveyor [REDACTED], a Natural England Level 1 bat worker) in Para 2.6, who has supposed carried out a further survey of the toilet block on 29th May (no evidence or details of the survey are supplied within the report).
- A new paragraph was inserted for the description for Building 7 and its potential on Page 11, which indicates that upon the further May visit, the toilet block is no longer considered to host 'low' potential for a bat roost. Hence no surveys were required in May.

[REDACTED] holds strong reservations as to why this information was not provided at the outset with the July revision of the PEA following the May 2019 surveys carried out by the applicant's team (referred to as PEAJul19), on which our objections below have been submitted. The evidence would have clearly been available in July when the applicant prepared an update to the PEA, and indeed, the Figure was altered at that time, but without any accompanying text within the report to explain why it had changed. It appears to be a substantial omission. More to the point, [REDACTED] also notes that there is no evidence (e.g. survey notes or photographs) attached to the PEAOct19 that complements the primary changes to it. We come to this again below, but it does raise questions on why the Case Officer can be confident that what is reported is accurate and justified.

Before discussing the reasons that justify our position, I take the opportunity to set out the relevant guidance, as you may not be familiar with it. The Bat Conservation Trust's 'Bat Surveys for Professional Ecologists Good Practice Guidelines (3rd Edition)' (referred to as the 'BCT Guidance') is most pertinent (I note that the applicant's team has sponsored the document, so you would expect them to adhere to it). The key paragraph is Paragraph 5.2.9, which states:

"Where the possibility that bats are present cannot be eliminated or evidence of bats is found during a preliminary roost assessment, then further surveys (such as winter hibernation (Section 5.3), presence/absence (Section 7.1) and/or roost characterisation (Section 7.2) surveys) are likely to be necessary if the impacts on the roosting habitat (or the bats using it) are predicted. The ecologist should consider the further surveys needed (if any), their logistics (resources, emergence survey locations, timings), and any potential health and safety hazards reported.

"If the structure has been classified as having low suitability for bats (see Table 4.1), and ecologist should make a professional judgement on how to proceed based on all of the evidence available.

"if sufficient areas (including voids cracks and crevices) of a structure have been inspected and no evidence found (and is unlikely to have been removed by weather or cleaning or be hidden) then further surveys may not be appropriate. Information (photographs and detailed descriptions) should be presented in the survey report to justify this conclusion and the likelihood of bats being present at other times of the year estimated. If there is a reasonable likelihood that bat roosts could be present, and particularly if there are areas that are inaccessible for survey, then further surveys may be needed and these should be proportionate to the circumstances (see Section 2.2.5).

"If not suitable habitat for bats is found, then further surveys are not necessary. In this scenario, it is necessary to document how this decision has been reached; photographs and details descriptions should be made available as evidence of a robust survey and assessment."

Our main concern is that the PEAOct19 alterations that indicate that Building 7 has 'negligible' potential for a roost is **NOT** supported by any documentary evidence within the report and which would normally be required with such a conclusion. The approach that has been adopted by the applicant's team is without doubt contrary to the BCT



Guidance regarding such a situation, as referred to above. This is especially pertinent when the original surveying ecologist is a Natural England Level 2 licenced bat worker (i.e. has more experience) and is licenced to use endoscopes as part of the preliminary roost survey, whilst the May 2019 survey was carried out by members who does not hold such advanced licences. It is also pertinent that the building's relevant features have not been changed in any of the three versions of the PEA that would suggest a downgrade to the potential is warranted, and there is no evidence that the building was internally inspected to confirm the absence of bats, noting the building is abandoned so without regular disturbance, it could become an attractive place for bats to roost. Indeed, as you'll see from our report, there are certainly reasons as to why the building was initially identified as hosting 'low' potential for a bat roost.

Some other points of relevance:

- There is a claim that the building is isolated with hardstanding located between it and any suitable bat foraging habitat. This clearly ignores the presence of suitable trees and other vegetation located at the rear of the properties that face onto Hartington Road, and which provides a reasonable link to wider foraging routes including northward along Queensway to the railway line, or along the Seaway Car Park trees to the church yard, where bats were recorded as foraging during the May 2019 site visit. The bats could have easily travelled along the rear of the gardens of Hartington Road and along the line of trees that face the Queensway and Chancellors Road to get to the church yard, and would explain why they were recorded to have arrived at the church yard sometime after sunset (as we set out in our objection below).
- A lack of bat activity has been cited. It is unclear how the ecologists could have concluded this, as during the May visit, they were located adjacent to Buildings 1 and 3, so at some distance from Building 7, and with their devices facing the two buildings that they were surveying. It is likely that with vehicle movements and other noises may have intervened, and so there can be no conclusive evidence that bats are not active in the vicinity of Building 7 during the May 2019. Indeed, the evidence of the ecologists clearly demonstrates bats were active in the vicinity, so the opposite is true from the evidence provided to you by the applicant. Furthermore, no bat activity surveys of the whole of the site have been carried out.
- Also cited is the fact that no external evidence was found on the building. We are surprised that they are relying on this position because the BCT Guidance is clear on this point in Paragraph 5.2.4.1 (External Surveys), where it emphasises the point that: ***"Sometimes bats leave no visible sign of their presence on the outside of a building (and even when they do, wet weather can wash evidence away)."*** Indeed, the same guidance is repeated with the equally high emphasis in Paragraph 5.2.4.2 (Internal Surveys). No justification has been provided that would enable the ecologist to rely on this against BCT Guidance.
- [REDACTED] notes there is no evidence that the applicant's team has undertaken an internal survey of the building. BCT Guidance in Paragraph 5.2.1 states: ***"A Preliminary Roost Assessment is a detailed inspection of the exterior and interior of a structure to look for features that bats could use for entry/exit and roosting and to search for signs of bats. The aim of this survey is to determine the actual or potential presence of bats and the need for further survey and/or mitigation. In many situations it is not possible to inspect all locations where bats may be present and therefore an absence of bat evidence does not equate to evidence of bat absence."*** It is clear from the BCT Guidance that if no internal inspections have been carried out, a precautionary approach is necessary and emergence surveys must be carried out. As noted above, bats are present in the area. It would be incorrect to conclude there are no bats at the building simply because no external evidence was found.

The Council is effectively being asked to deviate from standard guidance regarding bat emergence surveys by the Applicant's team without the latter supplying the Council with any evidence to do so. We are completely unclear why you would take their information as face value given the substantial omissions, unless you are looking at the commercial realities of a lease arrangement which falls outside of planning matters. The PPG section on Protected Species states: ***"Use Natural England's guidance (known as 'standing advice') to help you decide whether to reject or approve an application if a protected species could be affected. You need to take standing advice into account when making your planning decision"***

Use an expert, such as your local authority ecologist, to help you apply the standing advice to planning decisions if you're not a wildlife specialist." Unless you are a qualified expert, the PPG is clear that you will need to rely on one to determine whether the PEA submitted by the Applicant is valid and justified. I am not aware that SBC has obtained evidence from an independent qualified ecologist to verify the applicant's PEA, even though [REDACTED] has raised substantial concerns regarding the evidence presented through the application process (perhaps you could have

[REDACTED]

asked Essex County Council's team, who are copied into this email, or Natural England for more advice). This puts DCC's decision at risk if it is anything but **REFUSAL**.

Regardless, the BCT Guidance is equally clear on this point at Paragraph 4.3.8, which states: "**Where further surveys and mitigation are required, the preliminary ecological appraisal report in isolation will not be adequate for submission to the LPA in support of a planning application. The report will only be adequate for this purpose if there is need for further surveys and mitigation.**" It is clear that a further Phase 2 bat survey report is necessary before the Council can consider sufficient evidence has been supplied to enable the Council to deviate from BCT Guidance. This is repeated in the PPG, which states: "**You only need to ask an applicant to carry out a survey if it's likely that protected species are:**

- **present on or near the proposed site, such as protected bats at a proposed barn conversion**
- **affected by the development, such as the effect of a wind turbine proposal on protected birds"**

We already know that bats were found in the churchyard within the vicinity of the site, as I mentioned above. They are near to the site, and therefore the Council's position to not request additional surveys would be clearly against such guidance and which justification must then be supplied. Without such evidence, the Council must follow the PPG and BCT Guidance as otherwise it could render any decision invalid because DCC would not have considered all material considerations appropriately. This is particularly true when the Council employs no ecologists inhouse to carry out an independent verification of the evidence, and which the reliability of the applicant's evidence has been heavily questioned by others.

The Council cannot impose a Condition to require the provision of Surveys after permission is granted.

You may be tempted to suggest to DCC that a condition could address the matters. I want to make it clear that this would be against guidance. I also want to ensure the applicant's lobby team does not mis-represent the correct approach.

Our ecologist's letter is clear that it states that further surveys would be required as they would inform mitigation measures necessary. The Council cannot impose a condition to any permission that requires the submission of the surveys and the eventual submission of mitigation (which could require planning permission to implement), because 'exceptional circumstances' according to Circular 05/2006 Paragraph 99 do not exist (the applicant's team has not presented any evidence of such circumstances, and missing a survey season is not an 'exceptional circumstance'). Any condition imposed would fail the tests of the NPPF, as it would not be 'precise'. The Council also has a requirement that they be fully confident that Natural England would issue a licence in the future of a bat roost is found, noting any licence must comply with the 3 legal tests set out in the PPG. You have made no assessment of the 3 legal tests in your report, so DCC would be blindly making the decision without reference to the correct approach. In fact, the PPG clearly states: "**You'll need to agree any mitigation or compensatory measures as part of the proposal. To make sure that mitigation measures are effective when granting planning permission you may have to consider**" imposing a planning condition or planning obligation. However, you cannot ensure any mitigation could be effective if you are not able to ascertain whether bats are in fact on site or not, hence it would be inappropriate to secure such surveys by way of condition.

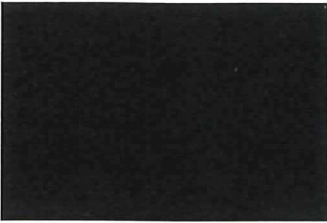
It states under 'Making a Decision' that you can grant planning permission if:

- an appropriate survey was carried out by a qualified ecologist at the time of year specified in the standing advice – **Further survey not completed.**
- a wildlife licence is likely to be granted by Natural England – **unknown, as an assessment against the 3 legal tests cannot be carried out without further surveys.**
- Mitigation plans are acceptable – **none submitted as species surveys not carried out across whole of site.**
- Compensation plans are acceptable when mitigation isn't possible – **same, no mitigation plans presented because species surveys were not carried out.**
- review and monitoring plans are in place, where appropriate – **no plans to review.**
- all wider planning considerations are met – **approach completely contrary to PPG and BCT Guidance and the recommendations that further survey of the building is necessary according to the applicant's original submission and [REDACTED] recent report.**

We look forward to receiving confirmation that you have submitted a change to the recommendation in the report and you now recommend that the application is **REFUSED**.

I would be grateful if you would kindly confirm receipt of this email, noting the 'missing emails' point. Of course, I would be happy to discuss with you the evidence presented in the above email on in the attached as required.

Kind regards,



From: [Redacted]
Sent: 10 October 2019 00:33
To: Charlotte White [Redacted]



Dear Charlotte,

Straight to the point, it is come to light that the Applicant has failed to complete all relevant bat emergence surveys, and therefore the application cannot be determined before this information is submitted. The information can only be collected between May and August, and therefore it can only be provided next summer. Any decision before this is provided is likely to result in a successful legal challenge because the Council cannot be certain to have discharged its statutory duties. I set out the reasons for this below.

As set out in the email below, you may recall that we objected to the Applicant's proposals on the basis that there was a lack of ecology information (bat emergence surveys), and which are required in order for the Council to discharge its responsibilities regarding protected species (I come to this again below). We were clear that the Council should have invalidated the application due to a lack of ecology information, given it would take many months before the information could be provided. We were disappointed that you did not do this, even though it was clearly contrary to your own Local Validation List. That said, we are where we are now, which brings me to the current point.

The original Preliminary Ecological Appraisal (PEA) Report (November 2019) indicated that they surveyed the site on 19 October 2018 by [Redacted]. At Paragraphs 3.22 and Paragraph 4.10, it was identified that Buildings 1 (29 Herbert Grove), 3 (1&3 Herbert Grove), and 7 (public toilet block) had LOW value for roosting bats, and thus should be surveyed (see attached extracts). We indicated in our objection letter (see Page 8 of our Cover Letter dated 7th February 2019) that further bat emergence surveys will be required. Figure 3.1 indicates the Building 7 was of 'low' potential, along with Buildings 1 and 3 and therefore a survey should be carried out within the recognised period of 'May-August' according to the relevant guidance.

The Applicant has now submitted a revised PEA, dated 26th July 2019. A number of key points:

- Paragraph 2.12 confirms that a bat roost emergence survey was carried out on the evening of 29th May 2019 on Buildings 1 and 3 (1-3 and 29 Herbert Grove). No record was noted of any survey or examination of Building 7.
- Paragraph 3.22 confirms that the same Buildings 1, 3 and 7 are still assigned LOW value to roosting bats.



- Paragraph 5.8 indicates that “The site was of limited overall value to protected species, with interest relating predominantly to the potential value of Buildings 1 and 3 (see Figure 3.3) to building – roosting bats, all of which were assessed as being of Low potentially according to current best practice guidelines for assessing building for their bat roost potential. Follow-up bat activity survey has been completed that confirms bat roost absence from both buildings.”

Again, there is no mention of a survey for Building No 7, the toilet block. The absence of emergence survey information is a substantial omission and which means the Council cannot be confident of discharging its responsibilities related to protected species until this survey is completed. I come to this again below.

- Indeed, the update PEA’s Figure 3.3 sets out which building locations have value to roosting bats, and which require further surveys. The record on this drawing has been changed to refer to ‘negligible’ although the description in revised PEA Paragraph 3.22 remains the same as it was recorded in the original PEA (see attached extracts). It is wholly misleading change therefore, and its LOW value requires the requisite emergence surveys.
- We note that [REDACTED] was the same ecologist who undertook both the 19th October 2018 survey and the 29th May 2019 surveys, and is a Natural England Level 2 licenced bat worker, so capable of identifying relevant roosts.
- Importantly, the PEA was substantially updated in July 2019 without any change to Building 7’s description and features, so this would strongly indicate that the potential for bat roosts remains.
- **A survey of the building is therefore required to be conducted between May and August (optimal) or April/September (sub-optimal) 2020 before the Council can determine the application.**
- [REDACTED] notes that in Paragraph 2.16 that the surveys recorded 2 bats foraging in the church yard and back gardens of Herbert Grove, and 30 minutes after sunset (which suggests they may have come from elsewhere). Indeed, as these did not emerge from Buildings 1 & 3 which were being surveyed at the time, their roosts are likely elsewhere. Noting the identified potential of Building 7, it is not unreasonable to conclude that these bats possibly came from the toilet block (which if the ecologist had surveyed it, they would have known for certain, but in the absence, it cannot be excluded given it has features that would support bat roosts). Approving its demolition of these buildings as part of this application without relevant emergence surveys would be an unreasonable risk to take.

Indeed, on the above basis, a precautionary approach regarding the presence of a bat roost in the toilet block is required. Indeed, this is set out clearly in ‘Circular 06/05: BIODIVERSITY AND GEOLOGICAL CONSERVATION – STATUTORY OBLIGATIONS AND THEIR IMPACT WITHIN THE PLANNING SYSTEM’. It states at Paragraph 99:

“It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted. However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development. **Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, before the permission is granted.** In appropriate circumstances the permission may also impose a condition preventing the development from proceeding without the prior acquisition of a licence under the procedure set out in section C below.”

There are no exceptional circumstances in this scenario. There was clear evidence that a survey was required for Building 7, as identified in the original PEA (Paragraph 4.10). The building’s description was not changed between the original PEA and revised PEA, despite there being numerous other changes between the two reports. The same ecologist, who is bat licenced, identified the potential. The omission of the survey by the Applicant’s team is not an exceptional circumstance. The Council must therefore conclude that there remains a need for this survey, and the



change to Figure 3.3 in the revised PEA must be treated as a substantial error. On the above basis, the Council cannot categorically state that they would be able to discharge its statutory obligations with respect to protected species and enable them to grant planning permission for the development until they have evidence of the bat emergence survey for Building 7. The survey cannot be undertaken until next May at the earliest.

The error arising from Figure 3.3 raises substantial questions regarding the PEA's accuracy and evidence as the change is not substantiated by the written evidence (so the reason for the change is unclear).

In this circumstance, the Council has no professional ecologists that can verify either PEA's data and has not sought consultation from Essex County Council's ecologists. It would be wholly prudent and appropriate of the Council to independently engage a certified ecologist to verify the whole of the evidence within the PEA given this substantial oversight between the two versions of the PEA (in the same way as the Council has now engaged a landscape architect following [REDACTED] concerns). Any other action (i.e. granting of planning permission without the additional survey) would likely result in a legal challenge given the Council would have failed to comply with Circular 06/05, and which the Council would not be able to professionally defend.

Indeed, I have copied in both [REDACTED] ecologists, who I am sure would agree with [REDACTED] that there is a precautionary need to delay any decision until the Applicant has completed the relevant emergence in the correct period and verified its PEA data on the whole. Since Southend has no in-house ecologists, Essex County Council is the closest relevant statutory consultee.

Returning to my point that the application has insufficient information to determine it on ecology grounds, the Council must either refuse the application now due to a lack of information on ecology, or deem that the application is invalid and take action to force the application's withdrawal. It would be wholly unreasonable to hold an application in abeyance (although we'd argue there are many other reasons to refuse permission until this survey can be completed) given the blight that will occur to residents and land owners of the surrounding properties whilst the application remains on hold for what is another 7-8 months until the next survey season.

There are also question marks regarding ecology matters in EIA terms noting the outstanding risk to habitats.

I formally request that you provide me with a response as to what action the Council will take with regards to this substantial error, prior to making any decision on the application.

I will write you again shortly with our other objections to the EIA Screening Opinion Request and planning applications. However, as you'll see from those errors, and others we have already identified, it is becoming increasingly clear that the Council may want to fully re-think its relationship with Turnstone Southend Ltd at the earliest opportunity, since such basic errors are being committed.

I would be willing to discuss this further as required.

Kind regards,

[REDACTED]

From: [REDACTED]
Sent: 28 February 2019 10:56

[REDACTED]

Dear Ms White,

Simply following up on the email below and our ecology objections to the above. According to the application website, the above application is still under consideration. I am very surprised by that this noting the lack of ecology information makes it invalid.

As we wrote in our ecology objection, the application should be withdrawn, as it fails to provide necessary ecology information (bat emergence surveys, as acknowledged in the submitted Preliminary Ecological Appraisal's Paragraph 4.10) in accordance with Item L10 of your adopted Local Validation List. The applicant is unable to provide this information before the statutory determination date, which is 16th April 2019, but emergence surveys can only be taken in May 2019 (and since two surveys are required, and must be taken at least two weeks apart, the information will not be ready until late May at the earliest). This is confirmed in the Planning Practice Guidance Page: <https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications>, under the Table: 'When to carry out a survey' and look for 'Bats (Summer Roosts): May to mid-September.

It is such a fundamental error in the application, so if you have not yet made this request to invalidate the application, please would you kindly explain why you have not done so. Indeed, there is even a statutory process that enables you to take such action. It is set out in the Town and Country Planning (Development Management Procedure) Order 2015 (DMPO, as amended) Section 11(5), which states: *"Where, after sending an acknowledgement as required by paragraph (2), the local planning authority consider that the application is invalid, they must as soon as reasonably practicable notify the applicant that the application is invalid."*

We strongly believe that any action other than a request to have the application withdrawn as invalid (e.g. allowing the applicant to extend the period to determination) renders any decision likely to be legally challengeable. This is for two reasons:

- Your local validation list is clear that such surveys are required before an application can be considered valid. It is obvious from the above dates that the applicant has no way of providing this information within the statutory determination date. The Planning Practice Guidance is clear on this:

"The local list is prepared by the local planning authority to clarify what information is usually required for applications of a particular type, scale or location. In addition to being specified on an up-to-date local list published on the local planning authority's website, information requested with a particular planning application must be:

- *reasonable having regard, in particular, to the nature and scale of the proposed development; and*
- *about a matter which it is reasonable to think will be a **material consideration** in the determination of the application.*

These statutory tests are set out in section 62 (4A) of the Town and Country Planning Act 1990 (inserted by the Growth and Infrastructure Act) and article 11(3)(c) of the Town and Country Planning (Development Management Procedure) (England) (Order) 2015.

Paragraph: 040 Reference ID: 14-040-20140306"

Impact on protected species is always a material consideration (there is a legal requirement of the authority in this regard). Indeed, if you follow the Government's Protected Species Checklist for planning applications (see attached), you'll see that you have to answer 'No' to Question 3. Your options are to ask for the surveys, which would take you beyond the determination time period (which you can't do, obviously), or refuse the application. I take this opportunity to remind you that the damage or destruction of breeding or resting places for bats is a criminal offence that is subject to either a prison sentence or unlimited fine (<https://www.gov.uk/guidance/bats-protection-surveys-and-licences>), hence we are seeking formal evidence that there are no bats within the buildings to be demolished before the application has been determined.

The application as it stands cannot be seen to fall within the spirit of the Town and Country Planning Act 1990 Section 62 or the DMPO. To continue to process the application without such evidence before you seems to disregard the purpose of adopting validation lists, unless you can kindly explain why an exception should be granted in this case to simply allow an extension. It would also make a complete mockery of the

consultation period that has just recently closed as the Council willing engages in this knowing there is key information missing. Otherwise the actions of the Council are highly questionable and possibly subject to a legal challenge.

- The Council is the landowner, has strong financial interest in the outcome of the application, and thus has a strong responsibility to ensure that there is no actual or perceived favouritism with regards to the processing of the planning application. From my our experience, it is extremely rare for Councils to continue processing such applications without requisite ecology information, particularly that which cannot be provided within the statutory determination period for the application, and this follows legal authorities on the matter. As such, if you do not take action, I think that it is extremely imperative that you explain in writing why this application warrants special treatment not in accordance with standard practices and your own validation list. We note that Council's own failings with regards to biodiversity surveys for the same site (see below).

There are already question marks regarding validation. Here, I draw your attention to the fact that the application was submitted on 7th December 2018 and only validated on 15th January 2019. It is usual that an application has been held for validation for such a long period of time, noting that there are still obvious mistakes with validation. Can you explain the delay?

As a separate, but not completely unrelated issue, the submitted Preliminary Ecological Appraisal with the Seaway Car Park application indicates that there is a potential for bats at 29 Herbert Grove. We are quite concerned that the Council has failed in its own duties to ensure that there was no harm caused to protected species with the removal of the immediate adjacent former Rossi Ice Cream Factory, which used to site within the application site and was removed to facilitate the development subject to the above application (the link between the demolition and this application has been confirmed by the Council in writing). We have reviewed the information with the application Ref: 17/00902/DEM, and following a Freedom of Information Request, we understand that no ecology information has been prepared prior to the demolition taking place. Indeed, the officer's report for that application makes no reference to Biodiversity. As removal took place between August and November 2018, and the PEA for the Seaway Car Park development was undertaken around the same time and clear notes that there is potential for bats on the adjacent site, we are unclear how the Council could be 100% certain that they have complied with the Wildlife and Countryside Act 1981 as well as The Conservation of Habitats and Species Regs 2012 without evidence of a protected species survey taken place during the correct time. As such, we urgently request that you investigate the omission of biodiversity information with the demolition of the former Rossi Ice Cream factory, and halt any processing of the Seaway Car Park planning application (notwithstanding our point that it is invalid) until the Council can confirm it has not taken actions to facilitate that development without due care to protected species. We will be contacting the relevant authorities to alert them to the potential offence under the Countryside and Wildlife Act and Habitats Regulations.

I look forward to receiving notification that the Seaway Car Park application has been made invalid. In the meantime, I would be more than happy to discuss anything set out in the above, or our objection letters, including at a meeting.

Kind regards,



From 
Sent: 07 February 2019 23:58







Dear Ms White,

Please find attached our objection regarding ecology in relation to the above application.

I would be grateful if you would kindly confirm receipt.

Regards,



[REDACTED]

From: [REDACTED]
Sent: 26 November 2019 11:49
To: Charlotte White
Cc: [REDACTED]
Subject: RE: Seaway Development EIA Screening Request (Ref: 19/1706/RSE) - Seaway Development is EIA Development
Attachments: FW Automated Reply
Importance: High

Dear Charlotte,

Further to my email below I attach a copy of the automated confirmation email received from Planning Casework Unit (PCU) following submission of our request yesterday.

We have also been notified that our request has been allocated to PCU Team A with [REDACTED] (Senior Planning Casework Manager) being our current case officer.

We will provide any relevant updates as soon as we hear from the Government on this matter.

Kind regards,

[REDACTED]

From: [REDACTED]
Sent: 26 November 2019 09:07
To: Charlotte White [REDACTED]

[REDACTED]

Subject: Re: Seaway Development EIA Screening Request (Ref: 19/1706/RSE) - Seaway Development is EIA Development

Dear Charlotte,

I can confirm that [REDACTED] submitted the request yesterday to the relevant Government casework team. I will forward the receipt as soon as I can speak to our EIA Technical Director, probably later today.

In the meantime, I attach a copy of the letter setting out the request for your records. I can send the Appendices on a CD by post if that is relevant to you.

We assume that you will also provide DCC members with an update and the risks according to Roskilly, etc.

I note that this email will be shared with relevant parties to ensure equal and fair dissemination of information.

Kind regards,

[REDACTED]

[REDACTED]

From: Charlotte White [REDACTED]

Sent: Tuesday, November 26, 2019 8:35:58 AM

To: [REDACTED]

Subject: RE: Seaway Development EIA Screening Request (Ref: 19/1706/RSE) - Seaway Development is EIA Development

CAUTION: This email originated from outside of [REDACTED]

Dear [REDACTED]

I confirm receipt of your email. The wording of your email is slightly unclear. For the avoidance of any doubt please can you confirm whether a screening direction has been sent to and received by the Secretary of State. Please can you confirm whether you have received an acknowledgement and/or confirmation of receipt from the Secretary of State and if so please can you forward me a copy of this as soon as possible.

Thank you.

Regards,
Charlotte

Charlotte White – Development Control Team Leader | Planning and Building Control Group

[REDACTED]

 [Twitter@southendbc](https://twitter.com/southendbc)

 [Facebook.com/SouthendBCOfficial](https://www.facebook.com/SouthendBCOfficial)

 [Flickr.com/southendbc](https://www.flickr.com/photos/southendbc/)

 [Instagram.com/southendbc](https://www.instagram.com/southendbc)

Please note: Any opinion given in this correspondence is that of an officer of the Council. It does not necessarily reflect the view that might be taken by the Council itself. Consequently any opinion expressed will not bind the Council.

[REDACTED]

Sent: 25 November 2019 18:38

To: Charlotte White

[REDACTED]

Subject: RE: Seaway Development EIA Screening Request (Ref: 19/1706/RSE) - Seaway Development is EIA Development

Importance: High

Dear Charlotte,

I have become aware of the attached advice from Town Legal through a recent FOI request. We are pleased that Town Legal's advice has agreed with our position, given the Applicant acknowledges in their own EIA Cover Letter that there will be significant landscape effects with the proposed development, particularly on residents of Herbert

[REDACTED]

Grove. So the purpose of this email is to let you know that today an EIA Screening Direction has been requested by the Secretary of State (SoS), as forewarned by Town Legal.

For the benefit of those copied into this email, the advice of Town Legal states on 9th October that: *“Concluding that only a local area, or an area of local importance, will be affected **does not mean that the effect is not significant within the context of the Regulations. If effects are significant, they cannot be considered to be insignificant (in the meaning of the Regulations) just because they are experienced only locally.**”* The email chain is attached.

The Applicant’s team have already stated that there would be substantial effects on local receptors (see the penultimate paragraph of the attached extract of Carter Jonas’s report), which states: *“Whilst the LVIA identified substantial level of visual effect to a limited number of private receptors, on the whole...”* It tries to downplay the effects identified as insignificant on the whole, but that position is against your legal advice referred to above. It was also previously reported in 2017 when the applicant previously sought an EIA Screening Opinion.

More importantly, the Council’s EIA Screening Opinion states in Paragraph 6.121 (see attached extract) that there would be *“The LVIA submitted indicates that visually the impacts of the development in this regard would be limited with only substantial impacts identified to a small number of very local receptors...”* In Paragraph 6.123 it states: *“The visual amenity impacts would be substantial but only to a very small residential population. Residential amenity impacts are different to the question of the likelihood of significant effects on the environment and are therefore not likely to be considered to be significant in the sense intended by the Regulations.”* Your own Committee Report states in Paragraph 6.81 that: *“However, this acknowledges that neighbours to the site are likely to have a substantial impact on current visual amenity due to the new buildings replacing current views.”* I also note that your own landscape consultant, Nicholas Pearson Associates, has stated that there would be ‘moderate to substantial adverse’ effects on residents of Chancellors Road according to the Committee Report, so it can be drawn that for the residents of Herbert Grove that this would be at least similar if not more (see Paragraph 6.131). Indeed, NPA’s conclusions at Paragraph 6.133 state: *“We also have identified that **there would be limited landscape or visual effects above ‘moderate adverse’ level...**”* So regardless of the level, there will be substantial effects and which would result in the development being EIA Development. There are other reasons why it should be considered as EIA Development (noise, daylight/sunlight, heritage impacts, etc).

I cannot understand why the Council would have issued the October 2019 EIA Screening Opinion against the external legal advice, which was clear and stated that regardless of whether its local or not, significant effects cannot be ‘insignificant’ under the Regulations. It is also against the advice of the independent landscape consultants, who have confirmed the effects of the development will be substantial. Having identified significant effects, the Council should have then concluded that the development **is EIA development** in October 2019, or at least revisited the EIA Screening Opinion and issued a revised version following NPA’s comments that indicate it is EIA Development now.

Noting the Council’s report, the applicant’s admission and the Council’s legal advice, today our request for a Screening Direction has been submitted as the application should have been accompanied by an Environmental Statement. It will include a copy of Town Legal’s advice to the Council, so the SoS can see that there are clear question marks about the Council’s Screening Opinion that warrants further investigation. Should the SoS agree that the development will cause significant effects (which we think is likely given what I refer to above), then the proposals will fall within the scope of EIA Development and according to the Regulations, this will require the submission of an Environmental Statement that will take some time to prepare (and prohibit the Council from granting permission without it according to the EIA Regulations 2017). This process is likely to include full re-consultation of the application, if not its total re-submission, lasting some 6 months or more (there is EIA Screening to go through). The SoS will take about 21 days to issue a binding EIA Screening Direction, although it is known for the SoS to take more time to review such matters before reaching a condition. The SoS may also be affected by purdah rules associated with the UK-wide General Election, which could further delay the issuance of any Direction. All told, it will be well after this Wednesday’s DCC meeting.

As such, any Committee before the Direction is made is wholly meaningless, unless the Council refuses to grant permission (which it is entitled to do), in which case, a lack of an Environment Statement should form a reason for refusal. Indeed, I want to draw your attention to recent case law that no permission can be issued before the Screening Direction has been issued when a request has been made. The Council would be at risk of being branded



as an 'unreasonable planning authority' if DCC proceeds to grant permission. The High Court judgment at 'The Queen on the Application of Silke Roskilly v Cornwall Council and Others' 2015 states at Paragraph 39:

"If the Secretary of State concludes in considering an application for a screening direction that the development is environmental impact assessment development then that is a conclusive determination that environmental impact assessment is required, and pursuant to Regulation 3(4) permission cannot be granted until the environmental information contained in an Environmental impact assessment has been taken into account by the planning authority. If the planning authority chooses to grant consent and prior to the resolution of a direction requested of the Secretary of State then they run the risk that if that direction is positive they will have granted a planning consent which is infected with illegality. It follows from this analysis that, were it necessary to do so, I would also have been minded to conclude that no reasonable planning authority, knowing at the time when they formed a resolution to grant planning permission that there was an outstanding request of the Secretary of State to make a determination on a screening direction, would proceed to grant planning permission without knowing the outcome of that screening direction process."

Taking the above, it is clear that there will be significant effects: it has been agreed by your legal advisor, your landscape consultant, the applicant and [REDACTED]. More to the point, your landscape consultant suggests that many of the impacts cannot be mitigated against and moderate or substantial effects will be caused by the proposed development going forward. If the DCC meeting takes place, the only conclusion that would avoid SBC being branded 'an unreasonable planning authority' is to refuse the application, and townscape impacts are one of many reasons to do this (as you will have seen from our objection letter).

With the above, I trust you will agree and revise your recommendation to **Refusal**.

I would be grateful if you would kindly confirm receipt of this email.

Kind regards,

[REDACTED]

From [REDACTED]
Sent: 11 October 2019 09:58
To: Charlotte White [REDACTED]

[REDACTED]

Subject: RE: Seaway Development EIA Screening Request (Ref: 19/1706/RSE) - Seaway Development is EIA Development

Dear All – please disregard the previous email. One email address was incorrect [REDACTED] and there was an error in the air quality section of the previous email.

[REDACTED]

[REDACTED]

Dear Charlotte,

To the point, the development is likely to be considered EIA Development and requires the submission of an Environmental Statement. You should conclude such as you have no evidence not to. We set out reasons for this below, but if the Council is unwilling to draw this conclusion for any reason, then our client will request a Screening Direction from the Secretary of State, who may take the same view as [REDACTED]. This will result in a further substantial delay to the planning application for the same development (Ref: 18/02302/BC4M). In fact [REDACTED] would argue the current application should be withdrawn because the submission of an Environmental Statement is too substantial and this would amount to a material change to the application so it should not be considered under the 2018 application.

Please find attached a report setting out the EIA considerations in relation to the Applicant's request for a new EIA Screening Opinion. It is an updated version of the report which you received on 27th August 2019 based on information submitted by the Applicant. Its conclusions are no different, however, and the development will likely give rise to significant effects and therefore should be considered EIA Development. I also attach specific commentary on landscape and heritage matters (prepared before Appendix 3 was provided, but which is unlikely to change the conclusions) that are relevant to the EIA matters, and complete the reports submitted to you on 20th September 2019.

In summary [REDACTED] view is that the proposed development should be found to be EIA development as it will give rise to significant effects, as follows:

- Landscape/townscape/visual impact – there are numerous errors with the LVIA report, including assessments of sensitivity or attempts to downplay effects, and so the approach fails to comply with relevant GLVIA guidance. The cumulative effects fails to assess filling and incremental change. The Applicant has already acknowledged that the development will give rise to substantial effects as you are already aware. The Opinion Statement argues these are local and not significant in the round, but there is simply no test for that approach. The question is whether it would give rise to significant environmental effects (anywhere or altogether), and that question on these grounds must be answered as 'yes'. An Environment Statement assessing those effects must be prepared. See Paragraph 69 of our [REDACTED] Notes on LVIA and Screening Statement attached to this email for more details, as well as our previous submission sent to you on 27th August and 20th September 2019.
 - Heritage - the proposed development has the potential to adversely affect a number of heritage assets in the area, both designated and non-designated ones. Indeed, the Heritage Assessment acknowledges on Page 4.35 that there will be 'considerable change' to the Conservation Area, which might well be classified as a significant effect (Paragraph 20 of the RPS Notes on the Heritage Statement). Furthermore, it acknowledges in Heritage Assessment Paragraph 4.32 that the 'biggest change' - which must be more than 'considerable', will arise from the Pier looking back at the development. The Heritage Assessment is not clear as to whether the building would be seen from the Conservation Area, but this is a 'is or is it not' (Paragraph 17 of the [REDACTED] Notes on Heritage Statement). It appears to fail to assess the cumulative impact of the development on heritage assets (see Paragraph 19 of [REDACTED] Notes in Heritage Statement regarding the historic townscape character). An EIA is required on heritage impact grounds alone, given the likely effect on listed buildings (the Pier, the Kursaal), the Conservation Area and locally listed buildings, and the cumulative effect on all of these assets arising from the proposed development.
 - The assessment of the impact on the views from the Pier both in terms of landscape/townscape/visual impact and heritage considerations is misleading/erroneous in both the LVIA and Heritage Assessment, noting both [REDACTED] and Historic England have raised substantial concerns regarding this. There are other conflicts between the two submitted documents, such as in relation to the long views of the Palace Hotel (see Paragraph 16 of the Notes on Heritage Statement).
 - There will be significant socio-economic effects with the proposed development. This is acknowledged in the planning application documentation, but which was not submitted to you as part of the EIA Screening Request application. See Page 8 of the Carter Jonas Cover Letter related to the planning application, along with the Economic Benefits Assessment and Addendums (Lambert Smith Hampton) submitted by the Applicant, which include references to the significant effects.
- [REDACTED]

- There could be a significant effect on the habitat of protected species, given the absence of emergence surveys regarding roosts at the toilet block (Building 7 in the Preliminary Ecological Appraisal). I refer to my email from yesterday on this point.
- There may be a significant effect arising from air quality, taking into account the cumulative effects arising from traffic generation from all allocated sites. [REDACTED] has only received a copy of the Air Quality Technical Note because it was not published on the website until Wednesday 9th October, 2019, so we will update this section shortly.
- The Habitat Regulations Assessment (HRA) fails to properly assess the impact of dog walking activities from hotel visitors, particularly in the winter time, which could add pressure to the European designated sites. The report inadequately demonstrates how it concluded that there would not be significant effects. Specifically [REDACTED] notes there are far fewer visitors to Southend in winter periods, the key period for the habitat and species, and so the extent of change arising from the hotel and increased visitors to close proximity of the European Site could substantially increase pressure and potentially have a significant effect. Without providing any details of a winter time visitor impact assessment, the conclusions of the HRA are questionable and a precautionary approach should be applied by the Council.

There may be other effects which are significant (e.g. noise). The appropriate Environmental Statement topics will obviously be determined at scoping stage, and will enable a full consideration of alternatives (e.g. to protect the TPO trees).

Based on the Applicant's own assessments as well as [REDACTED] own view, if the Council reaches any other conclusion than the proposed development is EIA Development which requires an Environmental Statement to be prepared to adequately assess relevant effects, our client will test the Council's view and seek a Screening Direction from the Secretary of State using much of the information provided by the Applicant as well as our own research (some of which is provided herewith). This will result in substantial delay to the processing of the planning application. It may also shed clear light on the Council's incorrect determination of the EIA Screening Request in November 2017, when they drew conclusions contrary to professional opinion without any basis (the substantial effects identified by the Applicant's landscape consultant at that time).

Indeed the whole purpose of undertaking a Screening exercise for Schedule 2 developments is because of the scale of development, there is a good chance it can give rise to significant effects. In the case of Turnstone's proposed development at Seaway Car Park, both the Applicant and [REDACTED] already agree that **there will be significant effects, so the logical conclusion is that these require further assessment under the EIA Regulations. The Council must conclude the same.** Whilst it is acknowledged that other similar Schedule 2 leisure developments (those located on the edge of towns) may not have such sensitive receptors so close to the development site (existing residential properties, heritage assets, European Sites, etc) and could be screened out, this is simply not the case here.

I formally request that you send me a copy of your Screening Opinion as soon as it is made public, so we can review and determine the next course of action (e.g. Direction request to the Secretary of State). I look forward to reading that you have finally confirmed that the development is EIA Development and an Environmental Statement is required. We can then all turn to the Scoping process. In the meantime, the planning application process should certainly be paused whilst this is concluded, but there is certainly an argument to state that the planning application should be entirely withdrawn until the EIA matter is wholly and adequately resolved (by the Secretary of State if necessary).

I would be more than happy to discuss anything found within this email at your earliest convenience.

Kind regards,

[REDACTED]

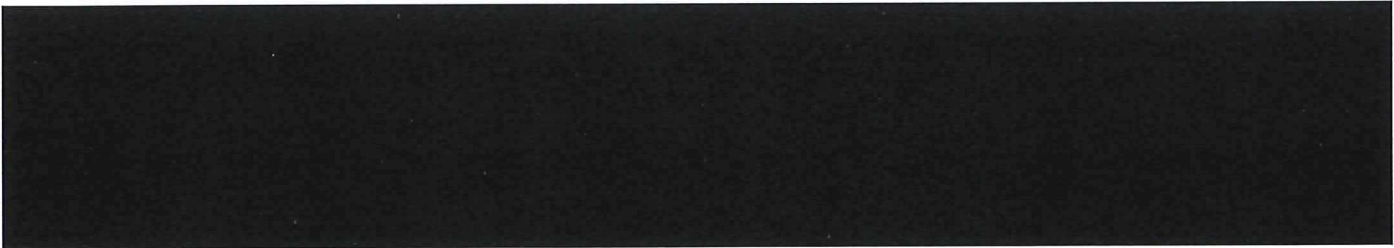
[REDACTED]



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[REDACTED]

From: [REDACTED]
Sent: 11 December 2019 14:26
To: Charlotte White
Cc: [REDACTED]
Subject: [REDACTED]
Attachments: [REDACTED]

Importance: High

Dear Charlotte,

We have become aware of the additional survey of Building 7, submitted by the Applicant's team on 25th November 2019 (attached for reference). This represents the submission of substantial information (it amounts to a new 'bat survey'), and on which you should have engaged in further consultations as the presence/absence of protected species represents a material consideration. There is precedent, as you had carried out further consultations following receipt of other substantial reports (the Air Quality Memorandum). It is unclear why you did not re-consult on this information upon receipt and requested a deferral of Committee (which occurred in any event for other reasons, as you know). You will be well aware that failure to consult on key pieces of (new) information will increase the risk of a successful legal challenge against any positive decision on procedural grounds. In this regard, when you do consult on this information, [REDACTED] (both of whom are copied to this email) should be asked for comment to ensure site-specific advice is received from local conservation trusts (as you know, Natural England's advice is generally generic and not site or proposal specific). This would also mean it would be wholly inappropriate to attempt to determine the application at the 8th January Committee meeting without undertaking a new consultation, for the avoidance of doubt, but I also note that the EIA Screening Direction request is still outstanding.

Before you engage in further consultations, I wish to draw to your attention that there are further shortcomings with the report, and therefore it would be inappropriate to rely on this information to satisfactorily confirm that there are no bats roosting in the building and discharge your statutory responsibilities towards protected species. Further information – in the form of bat emergence surveys – remains required and only after these are provided should a consultation be undertaken. Unless of course the Council refuses the application due to a lack of information, which is warranted given how long the Applicant has had to supply emergence survey data.

Our key concerns with the latest report:

- The author of the report was the reviewer of all of the applicant team's ecology reports, including the original November 2018 PEA which indicated that the building had 'low' potential for a bat roost and reiterated in the July 2019 PEA. As the signing authority within the Applicant's team, the person was satisfied that bat emergence surveys would be required for the building based on the evidence provided at the time. It is noted that the original survey of the building also used endoscopes as part of the survey when drawing the conclusion that 'low' roost potential existed. There is nothing to suggest that the other surveyors (including the [REDACTED] surveyor) were any less qualified to draw their conclusions regarding the bat roost potential of the building. As such, it is unclear why the author would deviate from the precautionary approach that was established in the PEA November 2018.
- The report indicates that the building and area are largely devoid of well-connected or extensive seminatural habitats. This is factually incorrect. The site is linked way of the rear gardens of Hartington Road to vegetation along the Queensway, and which leads to more attractive bat foraging vegetation located along the east-west railway route. This is completely ignored by the report, although this is clearly set out in [REDACTED] 14th November note and other evidence presented to you. Indeed, applying the Applicant's comments, it appears that the author of this report would have also drawn the same conclusion as regards the potential of the church graveyard for bat roosts and foraging (i.e. that it too would also not support use by bats because it too would be 'isolated' given the extent of unsupportive development around it). However, the Applicant's team is well aware that foraging occurs at the graveyard (they actively recorded 2x *Common*

[REDACTED]

Pipistrelles bats during their survey). As such, it can be concluded that the 'Context' section of the report is not sufficiently accurate and detailed, and omits relevant facts, to enable you to consider it to be appropriate.

- The presence of suitable habitats surrounding the building and the presence of foraging bats in the area are facts excluded from the Applicant's team arguments put forward in their email dated 17th October 2019, and which are repeated in this report (see attached, which was obtained via FOI although it is clear it should have been published to the application website as critical information). I note that the commentary in the email also fails to recognise that the Principal Ecologist who carried out the May 2019 (i.e. the in-season survey) is not licenced to use endoscopes as part of a roost survey because of licence restrictions, but the person who carried out the October 2018 survey was (and this was approved by the author of this report). The May survey reports, which was omitted from the July 2019 PEA, can be considered to be limited as compared with those undertaken in October 2018. This fact completely undermines the conclusions of that email, as we have previously noted, and the current report.
- The report indicates that the roof void was too narrow to support bats. However, the Applicant's team would be well aware that a lack of space only limits use by certain types of bats. As mentioned above, *Common Pipistrelles* were found in the area and these bats will roost in small crevices and cavities, and will crawl into entrances. Again, it is simply not accurate to draw a blanket conclusion when factual data collected by the Applicant's team clearly indicates the types of bats that are known to use such narrow spaces forage in the area. We come to this again below.
- In the final sentence of the third paragraph of Page 2, it states that the view across the void was limited ("the view that could be achieved"). The limited nature of the view is clearly shown in Photo 2 of the report. The Applicant's team cannot state with certainty that the whole of the void is not suitable as they clearly could not inspect the space in its entirety, noting the type of species that are found within the area. In this regard, I draw reference back to the Bat Conservation Trust's (BCT) guidance, which is clear at Paragraph 5.2.9 that information as presented "*must estimate the likelihood of bats being present at other times of the year. It there is a reasonable likelihood that bat roosts could be present, and particularly if there are areas that are inaccessible for survey, then further surveys may be needed.*" Part of the void has not been surveyed, and the Applicant's team, of which the author was a part, had already stated that bat emergence surveys must be undertaken. They have not surveyed the whole of the relevant space during the optimum period to confirm bats are or could not be present.
- The author indicates that the roof void was dry and cobwebby in places, with no signs of water ingress. The author effectively confirms that the space provides suitable conditions internally for roosting bats, such as *Common Pipistrelles*. The cobwebs are meaningless, as these can be established within hours, and there are many examples where roosting takes place in and around spiderwebs.
- The PPG regarding Protected Species is clear that: "*You only need to ask an application to carry out a survey if it's likely that protected species are: present on or near the proposed site, such as protected bats.*" I refer to the fact that *Common Pipistrelles* are found near to the site. The timing of this detailed inspection (which was limited due to there being inaccessible areas) raises questions regarding whether the information can be relied on. Indeed, the original PEA 2018 included a survey in October 2018, which is much closer to the optimum period than the current report.

█ survey on 14th November 2019 was not undertaken at a time when bats would be expected to be seen; we acknowledge this point and to suggest otherwise is wholly misleading by the Applicant's team. It is simply not █ responsibility to conduct a full and appropriate survey the building. That responsibility remains with the Applicant's team. The reality is that the Applicant has failed to follow recognised guidance and have conducted ecology surveys in a very haphazard way, with three revisions of the PEA, one key email and a further bat report having been submitted. You will have seen in my previous emails that demonstrate how far the Applicant's team has deviated from guidance, and many of these deviations remain with the latest report. For example, the Applicant's team will be well aware of the BCT's guidance in Paragraph 5.2.1, which states: "*In many situations it is not possible to inspect all locations where bats may be present and therefore an absence of bat evidence does not equate to evidence of bat absence.*" Their conclusions are clearly contrary to that unambiguous position in the BCT Guidance. To go back to our original position, we are simply requesting that the Council following standard practice regarding the surveys (because you do not have reliable information or ability to check the information that enables you to deviate). More appropriately, you should simply **refuse the application if the Applicant does not want to provide them** based on a lack of information (there are other reasons to refuse the application, as you know).

█

The fact is that the report does not change the risk to the Council that a legal challenge will likely be successful without the provision of emergence surveys data. Our conclusion is further supported by the fact that you have no suitably qualified (independent) wildlife advisor at the Council who can verify the Applicant's information and approach are sufficiently accurate and according to guidance, and you have not consulted on the latest report or the 17th October 2019 email to confirm the accuracy of the approach (which we note above, raises significant concerns). It remains unclear how the Council can be certain that the submitted information will enable you to satisfactorily discharge your duties with respect to the 3 legal tests regarding licensing.

We still object to the scheme on ecology grounds, notwithstanding this report. Our client will ensure that the Council complies with all statutory responsibilities towards protected species before making any determination of the application. Indeed, as you know, there were previous lapses with regards to the removal of the Rossi Ice Factory, so it becomes more imperative that guidance is adhered to with this proposal because bats are present in and around the Seaway site and the building's potential remains classified as 'low'.

I would be grateful if you kindly confirm receipt of this email.

Kind regards,



Sent: 25 November 2019 17:10

To: 'Charlotte White'



Dear Charlotte,

You may be aware that we received a cache of correspondence between SBC and its advising partners and the applicant earlier today following a FOI request. I attach an email from the applicant's team dated 17th October 2019 which provides a response to our email of 10th October in relation to missing bat emergence surveys (see below). It appears that their email may have formed the basis of Paragraph 6.224 of the Committee report, along with the PEAOct19.

The email contains a serious error which leads to the wrong conclusion, and SBC's reliance on it would therefore be incorrect. The email states that no bat activity was recorded during the after dark survey of the buildings to the west and so the value of the block (Building 7) was downgraded from low to negligible. This is an incorrect statement. I refer you to Paragraph 2.16 of the PEA July 2019 version, which states: *"Two foraging common pipistrelle bats were heard by surveyors and record foraging in the church yard and back gardens off Herbert Grove from 21.36 (30 minutes after sunset)."* A similar statement exists at Paragraph 3.24 of the PEAOct19 (extract attached).

As you will know, there are a number of buildings along Herbert Grove that fall within the Site (including the ones that were being surveyed on the night the bats were recorded). It is misleading to categorically state that the Site was devoid of bat activity when actual reporting states otherwise. It undermines the evidence (or lack thereof), on which the Council may have relied to draw its conclusion on this matter. In any event, we note that that the applicant is drawing conclusions about bat activity over the entire the Seaway site, despite only surveying one area of it (the far west).



As for the experience, I note that the October 2018 surveyor held a higher level licence, and their results are confirmed by [REDACTED] ecologist, as you will have seen.

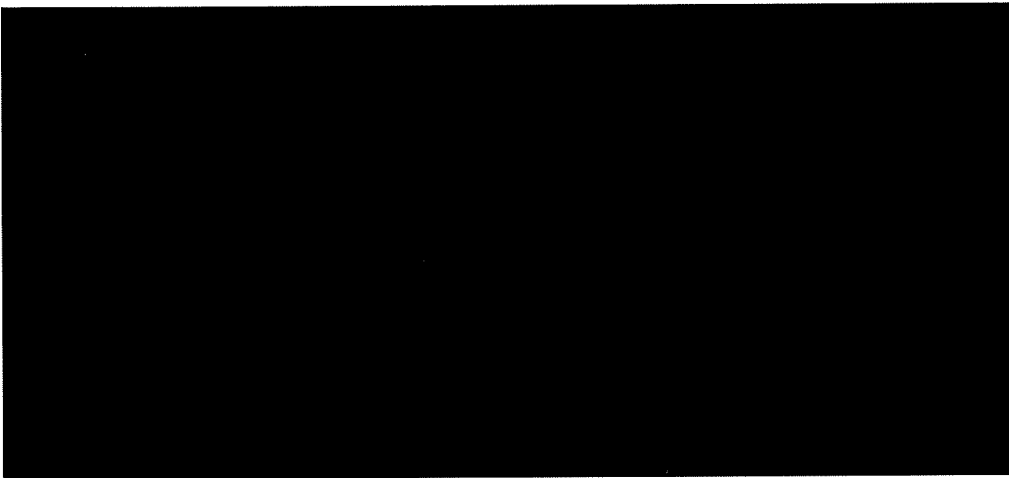
[REDACTED] also raises concerns that SBC did not undertake a preliminary bat roost survey of the former Rossi Ice Cream factory before it was demolished, according to FOI records. However, it is noted that the applicant's team have identified the presence of bats in and around the Seaway car park, so it appears to be an error that the Council did not undertake roost surveys before the Rossi building was demolished. As set out in the BCT Guidance, damage or destruction of a roost is an offence as identified in the Habitats Regulations, and could be committed accidentally. Whilst the Rossi building is now long lost, to avoid future mistakes regarding accidental or otherwise damage to roosts, it is imperative that SBC refuse the current application as there are no bat emergence surveys for Building 7, the building has been classified as 'low' and the justification provided by the applicant to deviate from the guidance is absent or inaccurate.

In addition to the guidance that I have referred to below, Clause 7.3 of the BS42020:2013 indicates that Preliminary ecological appraisal reports are inadequate to inform the planning process unless no further surveys or mitigation area required, to add to your arsenal that any decision to refuse the application on lack of survey information will be upheld by an Inspector.

I look forward to confirmation that you have now withdrawn Paragraph 6.224 and put forward a recommendation for refusal.

Please confirm receipt of this email.

Kind regards,



Dear Charlotte,

I write to regarding the ecology matter (further to my email below and our representations of 7th November 2019). First, I do not apologise for the length of the email. I want to be clear to you: this email will be forwarded to [REDACTED]

[REDACTED] All parties can see the evidence, and draw their own conclusion regarding what SBC should be doing on 27th November 2019 when DCC considers the application. Indeed, I have done this because we want transparency in decision making: the reasons to refuse permission are fully justified and any other decision does not enable the Council to discharge its statutory responsibilities as set out in the Government's PPG and BCT Guidance. The details in this email are also designed to dispel at the outset any myths that might be perpetuated by the applicant's lobby team after my email is circulated. I have sent the email as a blind copy to external parties so their data can be protected if the email is published.

You have clearly set out in Development Control Committee's (DCC) Committee Report Paragraph 6.224 that clarification was obtained from the applicant regarding the ecologist surveys, and which you appear to accept at [REDACTED]

face value. Unfortunately, this appears to be a fatal mistake on the Council's part as the evidence supplied by the Applicant in October 2019 is contrary to guidance and remains unjustified. To the point, the Council should not have relied on the applicant's evidence before it drew the conclusion that Building 7 is of negligible bat roost potential. This is because the downgrade is not justified (indeed, there is no evidence submitted by the applicant which would warrant the change), and in fact the applicant's conclusions are incorrect given the building's features etc, as I'll set out below. Ultimately, the implications are that as no bat emergence surveys are forthcoming before the DCC meeting this Wednesday, so you must therefore change your recommendation to one of **refusal on a lack of information on the impact of the development on protected species (there are other issues which warrant refusal, but that is not relevant to this email but could form further justified reasons)**. I provide all the evidence of the reason for this below, so you (and DCC) will be fully confident that such a refusal will be upheld by an Inspector with any Planning Appeal.

There is no doubt that DCC must refuse the application on the lack of bat emergence surveys alone. For example, the Government's Protected Species Checklist (as attached) is clear that without the emergence surveys, the decision falls under Category F: *"Inadequate survey. Request this is done properly as in question 3 or refuse application."* It is supported by the Government's Planning Practice Guidance (PPG), which states: *"You can refuse planning permission, or ask for a survey to be redone..."* (PPG Chapter: *'Protected Species: How to Review Planning Applications – As a Planning Authority use Natural England's standing advice to review planning applications that might affect protected species'*). It goes on to state: *"Use Natural England's guidance (known as 'standing advice') to help you decide whether to reject or approve an application if a protected species could be affected. You need to take standing advice into account when making your planning decision."* Under the checklist for 'Making a Decision' within the same PPG section, it is clear that the proposal fails all criteria (no additional surveys carried out, no confidence a licence can be granted, no mitigation or compensation plans put forward, etc). You can be wholly confident that the scheme's refusal is justified by the PPG and other guidance, and will be upheld by a Planning Inspector at Appeal (who will take their responsibilities towards protected species very seriously given EU and UK law on the matter). Indeed, without changing the current recommendation, the report could be conceived as being misleading noting the evidence that we have already submitted, and additional information that we submit to you with this email. So the conclusion that can be drawn is that DCC would be falsely informed when making their decision if our information below is not supplied to them. There could be substantial negative consequences arising.

We can draw this conclusion because [REDACTED] own ecologist, who holds Natural England Levels 3 and 4 bat licences, has conducted an independent survey of the building (see attached report). You will see that that the report clearly concludes that the building should be subject to further emergence surveys because it remains classified as a building which hosts 'low' potential for a bat roost (and the evidence to support that conclusion is supplied). You will see by their report that they state on Page 3: ***"There was potential for bats to roost within the roof void and/or behind the wooden fascia of Building 7, and the building was considered to have low roost potential. Demolition of this buildings is planned as part of the proposed development and therefore further surveys on this building are required in advance of planning."***

Furthermore, there are other reasons as to why you should withdraw Paragraph 6.224 of your report and alter your recommendation to one of **refusal**, which can be summarised as follows:

- The PEA November 2018 incorporated survey results from a high bat licenced ecologist. It clearly drew the conclusion that the building's bat roost potential was 'low' and further emergence surveys would be required before any planning permission could be granted.
- The PEA October 2019 includes references to a May 2019 building survey, but which contains no documentary evidence that justifies that a downgraded potential exists, in direct conflict with Bat Conservation Trust (BCT) guidance (details below).
- Building 7's features that the applicant's team identified that exist and warrant further investigation have not changed.
- The absence of external evidence is not sufficient justification to warrant the downgrading of the potential, according to the BCT guidance.
- No internal survey of the building has been recorded. As the building has been abandoned, there can be no certainty that bats are not roosting within the building.
- Sufficient connectivity exists between the building and wider foraging routes for common bat species, noting the presence of vegetation in the rear gardens of Hartington Road that links the northern and southern parts of the site and wider foraging areas.



- It is not possible to conclude that there is no bat activity on another part of the site from the data collected during the May 2019 surveys, as the ecologists were located in immediate proximity to Buildings 1 and 3, and at some distance from Building 7. Bats will be using the extremities of the site due to the unattractive surface level car park in the middle, as acknowledged by the Applicant's team, and no evidence is supplied that would demonstrate the ecologists were surveying the eastern side of the site at the relevant times. In any event, the May 2019 survey results demonstrates that **bats are present** in the vicinity (I come to this again below with a PPG reference on how to deal with this).
- So, to draw that conclusion that bats are not active on the whole of the site, formal bat activity surveys of the entire site would be required and forms the outcomes of multiple surveys between April/May and September/October. No evidence of such surveys has been presented, and we suspect that these have not been carried out.
- In any event, you already have the evidence that two ecologists (from the same firm) who have formed differing opinions regarding the potential surveys that should be prepared, with the more qualified person stating that the building hosts 'low' potential and further surveys are required. You therefore must err on the side of caution and require such surveys before any application is determined, according to the PPG.
- In fact, with [REDACTED] report, you now have confirmation the two more qualified ecologists who have visited the building have confirmed in their view the building's potential is 'low' and which bat emergence surveys are required before the Council can conclude that there is no likelihood of impact on protected species by the proposed development, in accordance with the NPPG and Circular 05/2006. This cannot be ignored or brushed aside.

Without such bat emergence surveys, the only conclusion you can draw is that the application should be **REFUSED** according to relevant guidance, which the applicant's team appears to be asking you to deviate from without providing any good reason to do so.

I set this out in more detail, for your benefit. Following our objections in October 2019, the Council had received a revised PEA from the applicant's team, and published this on the application website on 23rd October 2019. It is referred to as the PEAOct19. This contains a number of changes, primarily focused around 'Building 7', a former toilet block building located in the south-eastern corner of the site, and to which our comments below primarily related. These can be summarised as follows:

- Added reference to a new surveyor [REDACTED] (a Natural England Level 1 bat worker) in Para 2.6, who has supposed carried out a further survey of the toilet block on 29th May (no evidence or details of the survey are supplied within the report).
- A new paragraph was inserted for the description for Building 7 and its potential on Page 11, which indicates that upon the further May visit, the toilet block is no longer considered to host 'low' potential for a bat roost. Hence no surveys were required in May.

[REDACTED] holds strong reservations as to why this information was not provided at the outset with the July revision of the PEA following the May 2019 surveys carried out by the applicant's team (referred to as PEAJul19), on which our objections below have been submitted. The evidence would have clearly been available in July when the applicant prepared an update to the PEA, and indeed, the Figure was altered at that time, but without any accompanying text within the report to explain why it had changed. It appears to be a substantial omission. More to the point, [REDACTED] also notes that there is no evidence (e.g. survey notes or photographs) attached to the PEAOct19 that complements the primary changes to it. We come to this again below, but it does raise questions on why the Case Officer can be confident that what is reported is accurate and justified.

Before discussing the reasons that justify our position, I take the opportunity to set out the relevant guidance, as you may not be familiar with it. The Bat Conservation Trust's 'Bat Surveys for Professional Ecologists Good Practice Guidelines (3rd Edition)' (referred to as the 'BCT Guidance') is most pertinent (I note that the applicant's team has sponsored the document, so you would expect them to adhere to it). The key paragraph is Paragraph 5.2.9, which states:

"Where the possibility that bats are present cannot be eliminated or evidence of bats is found during a preliminary roost assessment, then further surveys (such as winter hibernation (Section 5.3), presence/absence (Section 7.1) and/or roost characterisation (Section 7.2) surveys) are likely to be necessary of the impacts on the roosting habitat (or the bats using it) are predicted. The ecologist should consider the



further surveys needed (if any), their logistics (resources, emergence survey locations, timings), and any potential health and safety hazards reported.

"If the structure has been classified as having low suitability for bats (see Table 4.1), and ecologist should make a professional judgement on how to proceed based on all of the evidence available.

*"If sufficient areas (including voids cracks and crevices) of a structure have been inspected and no evidence found (and is unlikely to have been removed by weather or cleaning or be hidden) then further surveys may not be appropriate. **Information (photographs and detailed descriptions) should be presented in the survey report to justify this conclusion and the likelihood of bats being present at other times of the year estimated.** If there is a reasonable likelihood that bat roosts could be present, and **particularly if there are areas that are inaccessible for survey, then further surveys may be needed and these should be proportionate to the circumstances (see Section 2.2.5).***

*"If not suitable habitat for bats is found, then further surveys are not necessary. In this scenario, it is **necessary to document how this decision has been reached; photographs and details descriptions should be made available as evidence of a robust survey and assessment.**"*

Our main concern is that the PEAOct19 alterations that indicate that Building 7 has 'negligible' potential for a roost is **NOT** supported by any documentary evidence within the report and which would normally be required with such a conclusion. The approach that has been adopted by the applicant's team is without doubt contrary to the BCT Guidance regarding such a situation, as referred to above. This is especially pertinent when the original surveying ecologist is a Natural England Level 2 licenced bat worker (i.e. has more experience) and is licenced to use endoscopes as part of the preliminary roost survey, whilst the May 2019 survey was carried out by members who does not hold such advanced licences. It is also pertinent that the building's relevant features have not been changed in any of the three versions of the PEA that would suggest a downgrade to the potential is warranted, and there is no evidence that the building was internally inspected to confirm the absence of bats, noting the building is abandoned so without regular disturbance, it could become an attractive place for bats to roost. Indeed, as you'll see from our report, there are certainly reasons as to why the building was initially identified as hosting 'low' potential for a bat roost.

Some other points of relevance:

- There is a claim that the building is isolated with hardstanding located between it and any suitable bat foraging habitat. This clearly ignores the presence of suitable trees and other vegetation located at the rear of the properties that face onto Hartington Road, and which provides a reasonable link to wider foraging routes including northward along Queensway to the railway line, or along the Seaway Car Park trees to the church yard, where bats were recorded as foraging during the May 2019 site visit. The bats could have easily travelled along the rear of the gardens of Hartington Road and along the line of trees that fact the Queensway and Chancellors Road to get to the church yard, and would explain why they were recorded to have arrived at the church yard sometime after sunset (as we set out in our objection below).
- A lack of bat activity has been cited. It is unclear how the ecologists could have concluded this, as during the May visit, they were located adjacent to Buildings 1 and 3, so at some distance from Building 7, and with their devices facing the two buildings that they were surveying. It is likely that with vehicle movements and other noises may have intervened, and so there can be no conclusive evidence that bats are not active in the vicinity of Building 7 during the May 2019. Indeed, the evidence of the ecologists clearly demonstrates bats were active in the vicinity, so the opposite is true from the evidence provided to you by the applicant. Furthermore, no bat activity surveys of the whole of the site have been carried out.
- Also cited is the fact that no external evidence was found on the building. We are surprised that they are relying on this position because the BCT Guidance is clear on this point in Paragraph 5.2.4.1 (External Surveys), where it emphasises the point that: **"Sometimes bats leave no visible sign of their presence on the outside of a building (and even when they do, wet weather can wash evidence away)."** Indeed, the same guidance is repeated with the equally high emphasis in Paragraph 5.2.4.2 (Internal Surveys). No justification has been provided that would enable the ecologist to rely on this against BCT Guidance.
- [REDACTED] notes there is no evidence that the applicant's team has undertaken an internal survey of the building. BCT Guidance in Paragraph 5.2.1 states: **"A Preliminary Roost Assessment is a detailed inspection of the exterior and interior of a structure to look for features that bats could use for entry/exit and roosting and to**



search for signs of bats. The aim of this survey is to determine the actual or potential presence of bats and the need for further survey and/or mitigation. In many situations it is not possible to inspect all locations where bats may be present and therefore an absence of bat evidence does not equate to evidence of bat absence." It is clear from the BCT Guidance that if no internal inspections have been carried out, a precautionary approach is necessary and emergence surveys must be carried out. As noted above, bats are present in the area. It would be incorrect to conclude there are no bats at the building simply because no external evidence was found.

The Council is effectively being asked to deviate from standard guidance regarding bat emergence surveys by the Applicant's team without the latter supplying the Council with any evidence to do so. We are completely unclear why you would take their information as face value given the substantial omissions, unless you are looking at the commercial realities of a lease arrangement which falls outside of planning matters. The PPG section on Protected Species states: *"Use Natural England's guidance (known as 'standing advice') to help you decide whether to reject or approve an application if a protected species could be affected. You need to take standing advice into account when making your planning decision.*

Use an expert, such as your local authority ecologist, to help you apply the standing advice to planning decisions if you're not a wildlife specialist." Unless you are a qualified expert, the PPG is clear that you will need to rely on one to determine whether the PEA submitted by the Applicant is valid and justified. I am not aware that SBC has obtained evidence from an independent qualified ecologist to verify the applicant's PEA, even though [REDACTED] has raised substantial concerns regarding the evidence presented through the application process (perhaps you could have asked Essex County Council's team, who are copied into this email, or Natural England for more advice). This puts DCC's decision at risk if it is anything but **REFUSAL**.

Regardless, the BCT Guidance is equally clear on this point at Paragraph 4.3.8, which states: *"Where further surveys and mitigation are required, the preliminary ecological appraisal report in isolation will not be adequate for submission to the LPA in support of a planning application. The report will only be adequate for this purpose if there is need for further surveys and mitigation."* It is clear that a further Phase 2 bat survey report is necessary before the Council can consider sufficient evidence has been supplied to enable the Council to deviate from BCT Guidance. This is repeated in the PPG, which states: *"You only need to ask an applicant to carry out a survey if it's likely that protected species are:*

- *present on or near the proposed site, such as protected bats at a proposed barn conversion*
- *affected by the development, such as the effect of a wind turbine proposal on protected birds"*

We already know that bats were found in the churchyard within the vicinity of the site, as I mentioned above. They are near to the site, and therefore the Council's position to not request additional surveys would be clearly against such guidance and which justification must then be supplied. Without such evidence, the Council must follow the PPG and BCT Guidance as otherwise it could render any decision invalid because DCC would not have considered all material considerations appropriately. This is particularly true when the Council employs no ecologists inhouse to carry out an independent verification of the evidence, and which the reliability of the applicant's evidence has been heavily questioned by others.

The Council cannot impose a Condition to require the provision of Surveys after permission is granted.

You may be tempted to suggest to DCC that a condition could address the matters. I want to make it clear that this would be against guidance. I also want to ensure the applicant's lobby team does not mis-represent the correct approach.

Our ecologist's letter is clear that it states that further surveys would be required as they would inform mitigation measures necessary. The Council cannot impose a condition to any permission that requires the submission of the surveys and the eventual submission of mitigation (which could require planning permission to implement), because 'exceptional circumstances' according to Circular 05/2006 Paragraph 99 do not exist (the applicant's team has not presented any evidence of such circumstances, and missing a survey season is not an 'exceptional circumstance'). Any condition imposed would fail the tests of the NPPF, as it would not be 'precise'. The Council also has a requirement that they be fully confident that Natural England would issue a licence in the future of a bat roost is found, noting any licence must comply with the 3 legal tests set out in the PPG. You have made no assessment of



the 3 legal tests in your report, so DCC would be blindly making the decision without reference to the correct approach. In fact, the PPG clearly states: "You'll need to agree any mitigation or compensatory measures as part of the proposal. To make sure that mitigation measures are effective when granting planning permission you may have to consider" imposing a planning condition or planning obligation. However, you cannot ensure any mitigation could be effective if you are not able to ascertain whether bats are in fact on site or not, hence it would be inappropriate to secure such surveys by way of condition.

It states under 'Making a Decision' that you can grant planning permission if:

- an appropriate survey was carried out by a qualified ecologist at the time of year specified in the standing advice – **Further survey not completed.**
- a wildlife licence is likely to be granted by Natural England – **unknown, as an assessment against the 3 legal tests cannot be carried out without further surveys.**
- Mitigation plans are acceptable – **none submitted as species surveys not carried out across whole of site.**
- Compensation plans are acceptable when mitigation isn't possible – **same, no mitigation plans presented because species surveys were not carried out.**
- review and monitoring plans are in place, where appropriate – **no plans to review.**
- all wider planning considerations are met – **approach completely contrary to PPG and BCT Guidance and the recommendations that further survey of the building is necessary according to the applicant's original submission and [redacted] recent report.**

We look forward to receiving confirmation that you have submitted a change to the recommendation in the report and you now recommend that the application is **REFUSED**.

I would be grateful if you would kindly confirm receipt of this email, noting the 'missing emails' point. Of course, I would be happy to discuss with you the evidence presented in the above email on in the attached as required.

Kind regards,

[redacted]

From [redacted]
Sent: 10 October 2019 00:33
To: Charlotte White [redacted]

[redacted]

[redacted]

Dear Charlotte,

Straight to the point, it is come to light that the Applicant has failed to complete all relevant bat emergence surveys, and therefore the application cannot be determined before this information is submitted. The information can only be collected between May and August, and therefore it can only be provided next summer. Any decision before this is provided is likely to result in a successful legal challenge because the Council cannot be certain to have discharged its statutory duties. I set out the reasons for this below.

As set out in the email below, you may recall that we objected to the Applicant's proposals on the basis that there was a lack of ecology information (bat emergence surveys), and which are required in order for the Council to

[redacted]

discharge its responsibilities regarding protected species (I come to this again below). We were clear that the Council should have invalidated the application due to a lack of ecology information, given it would take many months before the information could be provided. We were disappointed that you did not do this, even though it was clearly contrary to your own Local Validation List. That said, we are where we are now, which brings me to the current point.

The original Preliminary Ecological Appraisal (PEA) Report (November 2019) indicated that they surveyed the site on 19 October 2018 by [REDACTED]. At Paragraphs 3.22 and Paragraph 4.10, it was identified that Buildings 1 (29 Herbert Grove), 3 (1&3 Herbert Grove), and 7 (public toilet block) had LOW value for roosting bats, and thus should be surveyed (see attached extracts). We indicated in our objection letter (see Page 8 of our Cover Letter dated 7th February 2019) that further bat emergence surveys will be required. Figure 3.1 indicates the Building 7 was of 'low' potential, along with Buildings 1 and 3 and therefore a survey should be carried out within the recognised period of 'May-August' according to the relevant guidance.

The Applicant has now submitted a revised PEA, dated 26th July 2019. A number of key points:

- Paragraph 2.12 confirms that a bat roost emergence survey was carried out on the evening of 29th May 2019 on Buildings 1 and 3 (1-3 and 29 Herbert Grove). No record was noted of any survey or examination of Building 7.
- Paragraph 3.22 confirms that the same Buildings 1, 3 and 7 are still assigned LOW value to roosting bats.
- Paragraph 5.8 indicates that *"The site was of limited overall value to protected species, with interest relating predominantly to the potential value of Buildings 1 and 3 (see Figure 3.3) to building – roosting bats, all of which were assessed as being of Low potentially according to current best practice guidelines for assessing building for their bat roost potential. Follow-up bat activity survey has been completed that confirms bat roost absence from both buildings."*

Again, there is no mention of a survey for Building No 7, the toilet block. The absence of emergence survey information is a substantial omission and which means the Council cannot be confident of discharging its responsibilities related to protected species until this survey is completed. I come to this again below.

- Indeed, the update PEA's Figure 3.3 sets out which building locations have value to roosting bats, and which require further surveys. The record on this drawing has been changed to refer to 'negligible' although the description in revised PEA Paragraph 3.22 remains the same as it was recorded in the original PEA (see attached extracts). It is wholly misleading change therefore, and its LOW value requires the requisite emergence surveys.
- We note that [REDACTED] was the same ecologist who undertook both the 19th October 2018 survey and the 29th May 2019 surveys, and is a Natural England Level 2 licenced bat worker, so capable of identifying relevant roosts.
- Importantly, the PEA was substantially updated in July 2019 without any change to Building 7's description and features, so this would strongly indicate that the potential for bat roosts remains.
- A survey of the building is therefore required to be conducted between May and August (optimal) or April/September (sub-optimal) 2020 before the Council can determine the application.
- [REDACTED] notes that in Paragraph 2.16 that the surveys recorded 2 bats foraging in the church yard and back gardens of Herbert Grove, and 30 minutes after sunset (which suggests they may have come from elsewhere). Indeed, as these did not emerge from Buildings 1 & 3 which were being surveyed at the time, their roosts are likely elsewhere. Noting the identified potential of Building 7, it is not unreasonable to conclude that these bats possibly came from the toilet block (which if the ecologist had surveyed it, they would have known for certain, but in the absence, it cannot be excluded given it has features that would support bat roosts). Approving its demolition of these buildings as part of this application without relevant emergence surveys would be an unreasonable risk to take.



Indeed, on the above basis, a precautionary approach regarding the presence of a bat roost in the toilet block is required. Indeed, this is set out clearly in 'Circular 06/05: BIODIVERSITY AND GEOLOGICAL CONSERVATION – STATUTORY OBLIGATIONS AND THEIR IMPACT WITHIN THE PLANNING SYSTEM'. It states at Paragraph 99:

"It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted. However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development. Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, before the permission is granted. In appropriate circumstances the permission may also impose a condition preventing the development from proceeding without the prior acquisition of a licence under the procedure set out in section C below."

There are no exceptional circumstances in this scenario. There was clear evidence that a survey was required for Building 7, as identified in the original PEA (Paragraph 4.10). The building's description was not changed between the original PEA and revised PEA, despite there being numerous other changes between the two reports. The same ecologist, who is bat licenced, identified the potential. The omission of the survey by the Applicant's team is not an exceptional circumstance. The Council must therefore conclude that there remains a need for this survey, and the change to Figure 3.3 in the revised PEA must be treated as a substantial error. On the above basis, the Council cannot categorically state that they would be able to discharge its statutory obligations with respect to protected species and enable them to grant planning permission for the development **until they have evidence of the bat emergence survey for Building 7. The survey cannot be undertaken until next May at the earliest.**

The error arising from Figure 3.3 raises substantial questions regarding the PEA's accuracy and evidence as the change is not substantiated by the written evidence (so the reason for the change is unclear).

In this circumstance, the Council has no professional ecologists that can verify either PEA's data and has not sought consultation from Essex County Council's ecologists. It would be wholly prudent and appropriate of the Council to independently engage a certified ecologist to verify the whole of the evidence within the PEA given this substantial oversight between the two versions of the PEA (in the same way as the Council has now engaged a landscape architect following RPS's concerns). Any other action (i.e. granting of planning permission without the additional survey) would likely result in a legal challenge given the Council would have failed to comply with Circular 06/05, and which the Council would not be able to professionally defend.

Indeed, I have copied in both [REDACTED] ecologists, who I am sure would agree with [REDACTED] that there is a precautionary need to delay any decision until the Applicant has completed the relevant emergence in the correct period and verified its PEA data on the whole. Since Southend has no in-house ecologists, Essex County Council is the closest relevant statutory consultee.

Returning to my point that the application has insufficient information to determine it on ecology grounds, the Council must either refuse the application **now** due to a lack of information on ecology, or deem that the application is invalid and take action to force the application's withdrawal. It would be wholly unreasonable to hold an application in abeyance (although we'd argue there are many other reasons to refuse permission until this survey can be completed) given the blight that will occur to residents and land owners of the surrounding properties whilst the application remains on hold for what is another 7-8 months until the next survey season.

There are also question marks regarding ecology matters in EIA terms noting the outstanding risk to habitats.

I formally request that you provide me with a response as to what action the Council will take with regards to this substantial error, prior to making any decision on the application.

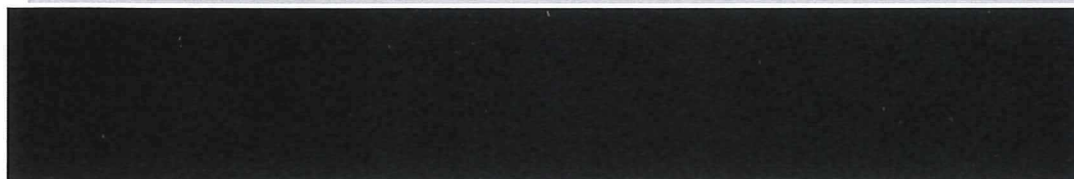
I will write you again shortly with our other objections to the EIA Screening Opinion Request and planning applications. However, as you'll see from those errors, and others we have already identified, it is becoming

[REDACTED]

increasingly clear that the Council may want to fully re-think its relationship with Turnstone Southend Ltd at the earliest opportunity, since such basic errors are being committed.

I would be willing to discuss this further as required.

Kind regards,



Importance: High

Dear Ms White,

Simply following up on the email below and our ecology objections to the above. According to the application website, the above application is still under consideration. I am very surprise by that this noting the lack of ecology information makes it invalid.

As we wrote in our ecology objection, the application should be withdrawn, as it fails to provide necessary ecology information (bat emergence surveys, as acknowledged in the submitted Preliminary Ecological Appraisal's Paragraph 4.10) in accordance with Item L10 of your adopted Local Validation List. The applicant is unable to provide this information before the statutory determination date, which is 16th April 2019, but emergence surveys can only be taken in May 2019 (and since two surveys are required, and must be taken at least two weeks apart, the information will not be ready until late May at the earliest). This is confirmed in the Planning Practice Guidance Page: <https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications>, under the Table: 'When to carry out a survey' and look for 'Bats (Summer Roosts): May to mid-September.

It is such a fundamental error in the application, so if you have not yet made this request to invalidate the application, please would you kindly explain why you have not done so. Indeed, there is even a statutory process that enables you to take such action. It is set out in the Town and Country Planning (Development Management Procedure) Order 2015 (DMPO, as amended) Section 11(5), which states: "*Where, after sending an acknowledgement as required by paragraph (2), the local planning authority consider that the application is invalid, they must as soon as reasonably practicable notify the applicant that the application is invalid.*"

We strongly believe that any action other than a request to have the application withdrawn as invalid (e.g. allowing the applicant to extend the period to determination) renders any decision likely to be legally challengeable. This is for two reasons:

- Your local validation list is clear that such surveys are required before an application can be considered valid. It is obvious from the above dates that the applicant has no way of providing this information within the statutory determination date. The Planning Practice Guidance is clear on this:

"The local list is prepared by the local planning authority to clarify what information is usually required for applications of a particular type, scale or location. In addition to being specified on an up-to-date local list published on the local planning authority's website, information requested with a particular planning application must be:

- *reasonable having regard, in particular, to the nature and scale of the proposed development; and*



- *about a matter which it is reasonable to think will be a material consideration in the determination of the application.*

These statutory tests are set out in section 62 (4A) of the Town and Country Planning Act 1990 (inserted by the Growth and Infrastructure Act) and article 11(3)(c) of the Town and Country Planning (Development Management Procedure) (England) (Order) 2015.

Paragraph: 040 Reference ID: 14-040-20140306”

Impact on protected species is always a material consideration (there is a legal requirement of the authority in this regard). Indeed, if you follow the Government’s Protected Species Checklist for planning applications (see attached), you’ll see that you have to answer ‘No’ to Question 3. Your options are to ask for the surveys, which would take you beyond the determination time period (which you can’t do, obviously), or refuse the application. I take this opportunity to remind you that the damage or destruction of breeding or resting places for bats is a criminal offence that is subject to either a prison sentence or unlimited fine (<https://www.gov.uk/guidance/bats-protection-surveys-and-licences>), hence we are seeking formal evidence that there are no bats within the buildings to be demolished before the application has been determined.

The application as it stands cannot be seen to fall within the spirit of the Town and Country Planning Act 1990 Section 62 or the DMPO. To continue to process the application without such evidence before you seems to disregard the purpose of adopting validation lists, unless you can kindly explain why an exception should be granted in this case to simply allow an extension. It would also make a complete mockery of the consultation period that has just recently closed as the Council willingly engages in this knowing there is key information missing. Otherwise the actions of the Council are highly questionable and possibly subject to a legal challenge.

- The Council is the landowner, has strong financial interest in the outcome of the application, and thus has a strong responsibility to ensure that there is no actual or perceived favouritism with regards to the processing of the planning application. From my our experience, it is extremely rare for Councils to continue processing such applications without requisite ecology information, particularly that which cannot be provided within the statutory determination period for the application, and this follows legal authorities on the matter. As such, if you do not take action, I think that it is extremely imperative that you explain in writing why this application warrants special treatment not in accordance with standard practices and your own validation list. We note that Council’s own failings with regards to biodiversity surveys for the same site (see below).

There are already question marks regarding validation. Here, I draw your attention to the fact that the application was submitted on 7th December 2018 and only validated on 15th January 2019. It is usual that an application has been held for validation for such a long period of time, noting that there are still obvious mistakes with validation. Can you explain the delay?

As a separate, but not completely unrelated issue, the submitted Preliminary Ecological Appraisal with the Seaway Car Park application indicates that there is a potential for bats at 29 Herbert Grove. We are quite concerned that the Council has failed in its own duties to ensure that there was no harm caused to protected species with the removal of the immediate adjacent former Rossi Ice Cream Factory, which used to site within the application site and was removed to facilitate the development subject to the above application (the link between the demolition and this application has been confirmed by the Council in writing). We have reviewed the information with the application Ref: 17/00902/DEM, and following a Freedom of Information Request, we understand that no ecology information has been prepared prior to the demolition taking place. Indeed, the officer’s report for that application makes no reference to Biodiversity. As removal took place between August and November 2018, and the PEA for the Seaway Car Park development was undertaken around the same time and clear notes that there is potential for bats on the adjacent site, we are unclear how the Council could be 100% certain that they have complied with the Wildlife and Countryside Act 1981 as well as The Conservation of Habitats and Species Regs 2012 without evidence of a protected species survey taken place during the correct time. As such, we urgently request that you investigate the omission of biodiversity information with the demolition of the former Rossi Ice Cream factory, and halt any processing of the Seaway Car Park planning application (notwithstanding our point that it is invalid) until the Council



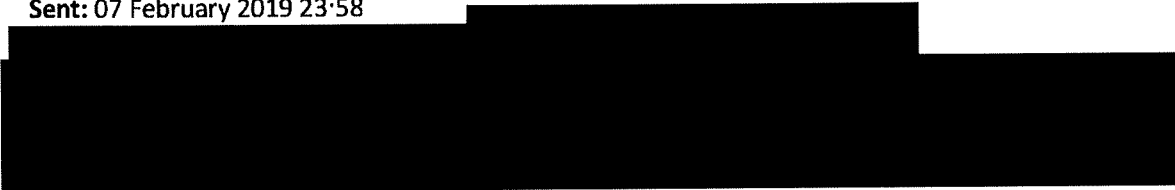
can confirm it has not taken actions to facilitate that development without due care to protected species. We will be contacting the relevant authorities to alert them to the potential offence under the Countryside and Wildlife Act and Habitats Regulations.

I look forward to receiving notification that the Seaway Car Park application has been made invalid. In the meantime, I would be more than happy to discuss anything set out in the above, or our objection letters, including at a meeting.

Kind regards,



Sent: 07 February 2019 23:58



Dear Ms White,

Please find attached our objection regarding ecology in relation to the above application.

I would be grateful if you would kindly confirm receipt

Regards,

