

Your ref:
Our Ref: 266603/1/SBUD
Date: 24 October 2017

Direct dial: +44(0)20 7014 2151
Direct fax: +44(0)20 7837 9792
Direct email: s.budhani@bindmans.com
Paralegal: t.middleton@bindmans.com

ELS
Seax House
Victoria Road South
Chelmsford
Essex
CM1 1QH

First by email: legal.officesupport@essex.gov.uk
Copied to: democratic.services@essex.gov.uk

Dear Madam or Sir

Proposed claim for judicial review on behalf of Dave Plummer of 21 Townmead Road, EN9 1RP, in respect of the withdrawal bus services 250 and 251

I. INTRODUCTION

1. We are instructed by the above proposed claimant in respect of the decision of Essex County Council ('the Council') of 14 August 2017 to withdraw bus services 250 and 251 ('the Decision'), effective from 27 August 2017, and the failure to consider and institute alternative services, in breach of the Council's duties under 63 of the Transport Act 1985 to provide appropriate transport to meet the needs of the local area.
2. This letter is written in accordance with the pre-action protocol for judicial review. In the absence of a satisfactory response within the timeframe set out below, our client intends to issue judicial review proceedings by Monday 13 November 2017.

II. DETAILS OF THE MATTER BEING CHALLENGED

3. The following matters are to be challenged:
 - i. The Decision of 14 August 2017 to withdraw services 250 and 251.
 - ii. The failure to consider and institute any alternative service provision.
 - iii. The failure to discharge the section 149 Equality Act 2010 duty.

Bindmans LLP

236 Gray's Inn Road London WC1X 8HB
DX 37904 King's Cross Telephone 020 7833 4433 Fax 020 7837 9792
www.bindmans.com info@bindmans.com

Bindmans LLP is a limited liability partnership registered in England and Wales under number OC335189. Its registered office is as set out above. The term partner means either a member of the LLP or a person with equivalent status and qualification.

SENIOR CONSULTANTS
Selman Ansari
Sir Geoffrey Bindman QC*
Katherine Gieve
Stephen Grosz QC*
Lynn Knowles

PARTNERS
Tamsin Allen
Liz Barratt
Jules Carey
Saimo Chahal QC*
Emilie Cole
Jon Crocker
Kate Goold
Flora Grossman
John Halford
Siobhan Kelly
Shazia Khan
Alla Murphy
Jamie Potter
Shah Qureshi
Martin Rackstraw
Paul Ridge
Michael Schwarz
Farhana Shahzady
Alison Stanley
Katie Wheatley

ASSOCIATES
Salima Budhani
Emma Cohen
Peter Daly
Liz Dronfield
Yagmur EKICI
Ashley-Jayne Fleming
Nicholas Fry
Roberta Haslam
Charlotte HaworthHird
Laura Higgs
Tammy Knox
Jude Lanchin
Kathryn Macken
Najma Rasul
Amy Rowe
Jessica Skinns
Anna Thwaites

SOLICITORS
Karan Ahluwalia
Lana Adamou
Rachel Benett
Jessica Black
Samantha Broadley
Alice Davis
Sarah Dodds
Abigail Evans
Ben Gaston
Rachel Harger
Laura Hobey-Hamsher
Catherine Jackson
Louis MacWilliam
Oliver Oldman
Jamie Phillips
Sharney Randhawa
Caroline Robinson
Rosie Roddy
William Whitaker

CONSULTANTS
Rhona Friedman
Tony Taylor
*Honorary

*Contracted with
the Legal Aid
Agency*

*Specialist
Fraud Panel*


Practice Management Standard
Law Society Accredited

Authorised and
dated by the
:itors
ilation
ority

III. FACTS

The services

4. Bus services 250 and 251 were evening services running to Waltham Cross from Loughton/Debden and Upshire respectively, on Mondays to Saturdays. The 250 comprised 6 journeys on Mondays to Fridays and 8 journeys on Saturdays. The 251 comprised nine journeys on Mondays to Saturdays. These services provided the only evening services between these towns and Waltham Cross, and the only evening service at all to Waltham Abbey.
5. The Council subsidises around 15% of the bus services in its area. The 250 and 251 services were subsidised by the Council.
6. On 4 August 2016 the Council announced a consultation on changes to bus services in Essex. The consultation ran until 28 September 2016. The Cabinet Member for Highways and Transport said:

We provide financial support for a number of routes and it is our responsibility to ensure that these deliver a reliable service as well as value for money.

Taxpayers are currently paying for a number of lesser-used routes that cost ECC more than £5 for each passenger they carry.

This is not sustainable in the long run and that is why we are looking at a whole host of options to support the future of bus services across Essex.

The Bus Priority Policy

7. On 29 December 2016 the Council decided to procure 79 local bus network services and 6 School Transport Services according to a set of agreed criteria, including minimum service requirements and a maximum public subsidy of £5 per passenger journey. The upper limit of £5 was set out in the Council's Local Bus Service Priority Policy 2015-2020 (**'the Bus Priority Policy'**).
8. At paragraph 1 of the Bus Priority Policy the Council's "*key outcomes*" were set out along with the "*Transport outcomes*":

The key corporate outcomes are set out below:

They are:

- Children in Essex get the best start in life.
- People in Essex enjoy good health and wellbeing.
- People have aspirations and achieve their ambitions through education, training and lifelong-learning.
- People in Essex live in safe communities and are protected from harm.
- Sustainable economic growth for Essex communities and businesses.
- People in Essex experience a high quality and sustainable environment.
- People in Essex can live independently and exercise control over their lives.

Transport outcomes that directly contribute to these corporate outcomes are set out below:

1. Providing access to schools, colleges, and training, work, health and leisure services.
 2. Providing access to health services, shopping, leisure activities, employment, reducing isolation and increasing independence.
 3. Providing access to learning and training opportunities, supplier workforce training and apprenticeships.
 4. Providing access to care services and providing safe transport for access to health, education, work and leisure services, reducing the number of people killed or seriously injured (KSIs).
 5. Attracting inward investment by offering improved connectivity, access to work and leisure opportunities and reducing congestion.
 6. Reducing congestion, air quality and CO2 emissions.
 7. Enabling access to key services, improving community involvement.
9. The Council's Local Bus Service Assessment and Priority System is described in section 2 of the Bus Priority Policy. The Service Need Assessment System is "*aimed at determining whether there is a need for a service as a result of commercial transport operators' failure to provide one*" and it includes the following stages:
- Assessment Stage 1: Is there market failure?
 - Assessment Stage 2: Does the available transport for the area affected meet the Service Intervention Point (SIP) benchmark?
 - Assessment Stage 3: What is the impact on current transport users?
 - Assessment Stage 4: Does the service offer value for money?
 - Assessment Stage 5: Conclusion
10. Stage 1 provides for the following assessment:

The council will consider the following factors when determining whether a market failure has occurred.

- Are there reasonable alternative services on offer that will already allow residents to make the same Journey?
- Are there broadly comparable journeys or suitable alternative destinations accessible without the need for an intervention by ECC?
- Will any ECC service provision risk undermining the economic viability of a commercial service?

If there are reasonable alternative or broadly comparable services available or of the provision of a contracted service would undermine the economic viability of a commercial bus service then normally assessment will end here and no contracted service will be provided.

If there are none, then the assessment proceeds to **Assessment Stage 2**.

Definitions of what would be considered to be reasonable and broadly comparable in terms of services are set out in **Appendix 1**.

11. Assessment Stage 2 involves consideration of the Council's "*Service Intervention Point*":

This stage considers whether in the absence of the service or services in question, the areas affected still have a level of service at or above that at

which the County Council feels it is necessary to consider whether it is necessary to provide additional transport services.

To this end the County Council has developing a series of tables setting out **Service Intervention Points (SIPs)** that indicate the level of bus service available to residents in an area beneath which it will consider the need to provide additional transport services.

- The levels for urban and key interurban corridors are based on frequency along main transport corridors.
- Those for peri-urban, suburban and rural areas will be based on population, with higher populations assumed to require better access to key services.

The **SIPs** are intended based on the minimum service levels set out the Essex Road Passenger Transport Strategy, adjusted to allow for changes to the commercial network since these were introduced, the need to reflect the Essex Outcomes and issues raised through the consultation and area review process.

The proposed SIP tables are shown in **Appendix 2** below.

If the SIP level of service is met by existing services, then assessment will normally stop here and no contracted service will be provided.

If the SIP level is not met then assessment proceeds to **Stage 3**.

12. Assessment Stage 3 involves consideration of the impact upon current transport users, as follows:

This stage assesses the impact of a loss of service or decision to provide a service on current or potential future bus service users.

This will be considered looking at:

- Are there any people using the service toward whom the County Council has a statutory duty to provide transport?
- Are there key services or destinations that residents will not be able to access if a service is not provided and are there no other destinations at which similar services can be obtained that can still be accessed by public transport?
- Are the residents of the area likely to be particularly reliant on public transport services?

For the purposes of this stage of the assessment:

People toward whom the County has a statutory duty to provide transport will include:

- Students of statutory school age who qualify for free home to school transport under the regulations applying at the time of assessment.
- Any other specific group toward which there is a statutory duty to provide transport at the time of assessment, or for whom the County has an agreed local policy of providing free transport at the time of assessment.

'Key Destinations not able to be accessed' will include:

- Town centres giving access to shopping
- Health centres such as Hospitals or Doctors surgeries

- Secondary Schools, Further or Higher Education centres
- Major Employment centres outside town centres (above 500 persons employed)

Groups for whom there may be a 'particular reliance on public' transport will include (but will not necessarily be limited to):

- Residents of protected or sheltered accommodation or residential care homes, either for older people or people with disabilities.
- Areas that show high level of social deprivation and/or low car ownership

If any of the above applies, then the assessment will proceed to Assessment Stage 4. If not, then assessment will not normally continue and no contracted service will be provided.

13. At assessment stage 4 the Council considers whether the service offers value for money, as follows.

A service will then be assessed to determine whether it offers value for money for the taxpayer. This will be done by considering the nett cost to the taxpayer of carrying each passenger after all income for the service (from on-bus fares, concessionary travel and any season tickets or other pass arrangements) has been taken into account over a given period (usually one year) will be calculated and this will be divided by the number of passenger journeys (individual movements) of all types carried on the service over the same period. This is the Cost Per Passenger Journey (CPPJ)

The County Council has set an upper limit to the cost per passenger journeys beyond which it will not normally continue to provide the service. This upper cost will initially set at **£5.00** but may be reviewed periodically in light of changing circumstances.

14. The final stage involves a decision about whether the service is in principle required based upon the preceding stages and if the answer is yes, the process will proceed onto the priority determination stage. This stage is designed to focus the Council's expenditure on transport services that will most effectively meet residents' needs and that will serve the Council's "*key outcomes*" set out above.
15. Evening services were allocated priority 5 (on a scale from 1 to 7) on the basis of three consultations that were carried out between 2013-14 and 2015-16.
16. The final stage also includes a determination by the cost per passenger journey:

Within each Service category, priority of service provision is determined by the services' Cost Per Passenger Journey (See **Assessment Stage 4**) above. The lower the CPPJ, the higher the priority given to the service.

The CPPJ therefore acts as a value for money check by both giving an absolute cap to the level of expenditure on any service at £5.00 per passenger carried and by determining the priority a service receives within its category).

A list of ECC supported services broken down into Service Category priority and by CPPJ priorities within service categories is produced in **Appendix 4 Service Category Priority List**

17. At the time of writing this letter, Appendix 4 had been withdrawn by the Council although it is not clear when it was withdrawn. An email of today from Richard Gravatt, Passenger Transport Strategy Specialist, said:

Please find attached a copy of the support policy and the first three appendices. Since the policy as put in place, there have been significant changes to the local bus network supported by the Council. In particular there were significant changes in both 2016 and 2017 to service number and structure that makes the original Appendix 4 misleading and it has therefore been withdrawn. Our intention is to update this as soon as possible.

18. There are then sections on “*Allocation of Priorities for Future Services*” and “*Further Changes to Council Funding Priorities*”. The final section, entitled “*Special Circumstances*” provides:

Regardless of the outcome of the above priority system, the Cabinet Member for Transport, Planning and the Environment (or any duly appointed responsible successor cabinet post, or duly delegated officer) will have the authority to determine whether a service should be provided, where in their assessment special or exceptional circumstances warrant such intervention.

The Director’s Report

19. The Director for Commissioning prepared a report (**‘the Director’s Report’**) dated 7 August 2017 which recommended that services 250 and 251, together with services 9 and D6, be withdrawn. It was noted that (paragraph 3.7):

In February 2017 local bus services whose contracts expired in August 2017 were procured through the DPS. The evaluation criteria required bids to meet minimum service requirements and the £5 per passenger journey value criterion set out in the Local Bus Service Priority Policy 2015 to 2020. Despite the procurement allowing for a variety of options to be tendered, including the possibility of integrated service bids, reduced levels of service and where applicable variant timetables to, for 3 services the lowest tender was significantly more expensive than the current price and consequently the cost per passenger journey rose above £5.

20. According to the Director’s Report, the Council decided to carry out a public consultation on the withdrawal of the services 18 May 2017 (paragraph 3.8). It was noted that, based upon data received from the operators suggesting an average 6 (for the 250) and 12 (for the 251) passengers a day, the cost of providing each passenger journey at tender was stated to be £15.07 (for the 250) and £17.61 (for the 251) (paragraph 3.15).

The consultation

21. The consultation ran from 31 May 2017 to 3 July 2017 (although the undated **Consultation Summary** refers to the consultation period being 22 May 2017 to 3 July 2017). The consultation document included the following:

Essex County Council carried out a review of its contracted services and consulted on changes to services 250 and 251 during August and September

2016. This included a reduced level of service to bring the cost below the maximum level the council will support. This is set at £5.00 for each passenger being carried after fares are taken into account. (The policy can be found at: www.essex.gov.uk/busreview).

However, in the subsequent tender, the cost of providing this service rose to the point where the tax payer would be paying more than £5.00, even allowing for the reduced level of service.

Services	Origin	Destination	Days of operation	Annual cost	Annual passenger numbers	Cost per passenger journey
250	Debden	Waltham Cross	Monday to Saturday (evenings)	£24,943.65	1,656	£15.07
251	Upshire	Waltham Cross	Monday to Saturday (evenings)	£67,100.00	3,811	£17.61

Essex County Council is therefore carrying out a public consultation on the future of these evening services. This questionnaire is also designed to identify why passengers use these services and what they would do if these services are withdrawn.

22. The Council received 148 responses regarding the 250 service and 131 for the 251 service. Of those who responded:

- There was a high proportion of daily use: 37 (39%) used the 250 daily and 31 (45%) used the 251 daily;
- The second largest category for frequency of use was weekly: 37 (39%) used the 250 weekly and 23 (33%) used the 251 weekly;
- The reason for use of both services was primarily employment: 55 (34%) used the 250 for employment and 36 (31%) used the 251 for employment, with most (65 or 75%) reporting that they work full or part time;
- Leisure was the second most common reason for use: 46 (28%) for the 250 and 29 (25%) for the 251;
- The respondents were mostly female (58 or 67% versus 26 or 30% men and 3 or 3% who preferred not to say);
- Most respondents were 35-44 (21 or 24%) with the 25-34 year olds (18 or 21%) and 45-54 year olds (17 or 20%) making up the second and third largest categories;
- The majority of respondents preferred not to say whether they had a disability (74 or 85%) but 5 respondents (6%) reported a physical disability and another 5 (6%) reported another long term disability.

23. Amongst the responses were comments referring to:

- Concern as to the accuracy of the passenger figures on which the consultation was based;
- The suggestion that only one of the services be cut (the 251) rather than both;
- Concern as to the ability of people working in London or Loughton to get home at night and that some people would lose their jobs as they could not afford to spend £13-£15 on taxis;
- Waltham Abbey having high deprivation;

- Three people responding referred to their visual impairment/use of guide dogs;
- The suggestion that the Council offer taxis or consider an alternative (e.g. EOS London) or a demand responsive service or a smaller bus/minibus;

24. At the bottom of the Consultation Summary is a table that reads as follows:

Proposed solution	Reasons
If route is to be withdrawn then please state any other public transport available for passenger.	ECC fund the evening journey currently operated by Regal Busways. Arriva Herts and Essex operate journeys up until 19:33 as a commercial service. If all ECC funded journeys are withdrawn alternative transport is available, however, not operating as late as the ECC funded journeys. EOS commercial service 66 last journeys between Waltham Abbey and Waltham Cross at 20:05 and at 18:32 on service 86 and Waltham Cross to Upshire is 20:18 on service 66 and 18:00 on service 86, (the timetable information for commercial services are correct at time of printing).

The Equality Impact Assessment

25. An Equality Impact Assessment (“EIA”) was completed on 21 July 2017. It assumed disproportionate and high impacts on bus users with various protected characteristics based upon an assumption that those groups are disproportionate user of bus services: age, disability, pregnancy and gender; and that people from lower socio-economic backgrounds would be affected. However as the total numbers using the buses was low the overall effect would be relatively low.

26. Section 3.2 of the EIA included:

In general most respondents opposed the service withdrawals on the basis that buses offered key access to work (shift work on the 250/251 in particular), education, health and shopping services and that their loss would fall disproportionately on the groups outlined due to their reliance on public transport. The point was also made that reducing bus services seemed to run against the County Council’s expressed aims as set out in it’s strategic goals.

There was some recognition that the Council could not continue to support very lightly used services regardless of cost, but it was felt that in these cases wherever possible alternate service options should be explored. Some people did suggest that they would be unable to get to work, socialise or attend health appointments or visit relatives if these services were withdrawn or would incur significantly higher costs in doing so.

The County Council considered these responses very carefully and for the 9, 250/251 had already gone as far as it felt able to address them through the tender process. For example, not only were a number of options for different service levels tendered The Council also adopted the approach that it would look to award the option with highest level of service that met the Council’s support criteria, not just the least costly option. In addition innovative approaches such as the use of demand responsive transport, integrating transport services between school and local bus services and shopper buses were also built into the tender.

As noted above where the outcome, of the tender was that no sustainable, compliant bid was received, further work has been undertaken to ascertain whether there was a realistic opportunity to secure a sustainable services by other means and for number of contracts, permission is being asked to pursue this route.

27. Section 6 of the EIA included:

Section 6: Action plan to address and monitor adverse impacts		
What are the potential adverse impacts?	What are the mitigating actions?	Date they will be achieved.
Where bus services are withdrawn there may potentially be localised or very specific adverse impact, resulting in residents being unable to access key services such as employment, education, leisure, shopping or health facilities.	<ul style="list-style-type: none"> • Every effort has been made to maintain a level of service and a number of options were tendered in order to explore all possible avenues to ensure that residents who are currently able to access the bus network continue to be able to do so. • Where no conventional bus service can be provided, ECC funds community transport schemes in each Essex district, that provide transport to residents in their area who cannot access conventional public transport by reason of age disability, or geographical location • ECC will continue to work with local authorities and operators over particular issues arising. 	The effort to find a sustainable option has already been carried out. Community Transport Schemes are currently operational in all Braintree and Maldon and will be informed of changes in their area. Work with local councils and transport representatives on potential options are ongoing and will continue after 27th August 2017 the introduction date of the changes.

28. Therefore, it appears that any consideration of alternative options took place at the stage of the tender only.

The Options

29. The Director's Report recognised there are no alternative bus services available so users would have to rely on taxis or alternative private transport arrangements. However, in light of the low recorded passenger numbers, it was considered that the overall impact on passengers would be limited (paragraph 3.17).

30. The following options were put forward (section 4 of the Director's Report):

Option 1 - Continue to provide all services under contract to the council (Not Recommended)

Benefits:

- Local communities served by the four bus routes would retain their bus service, maintaining links to key services at the times and locations they serve.

Issues:

- Decision not aligned with Local Bus Service Priority Policy 2015 to 2020, which sets a maximum level of support for contracted services at £5.00 per passenger journey. All of the services identified exceed this figure.
- Risk that a decision to retain services above the £5 threshold could have wider implications for other local bus services in the future.
- The local bus budget is fully committed and additional funds would have to be found elsewhere - in practice this may mean withdrawing other services.

Option 2 - Continue to provide some services under contract to the council for those communities most affected by the change (Not Recommended)**Benefits:**

- Some communities would retain their bus service, ensuring links are maintained to key services at the times and locations they serve.

Issues:

- Decision not aligned with Local Bus Service Priority Policy 2015 to 2020, which sets a maximum level of support for contracted services at £5.00 per passenger journey. All of the services identified exceed this figure.
- Would be difficult to justify why one bus service should be retained over another, as all services are above the Council's £5 per passenger journey threshold. This could potentially result in challenge and reputational damage to the authority.
- Risk that a decision to retain services above the £5 threshold could have wider implications for other local bus services in the future.
- The local bus budget is fully committed

Option 3 - Withdraw financial support for services: 9, 250, 251 and D6 with effect from 27 August 2017 (Preferred option)**Benefits:**

- Decision in line with the County Council's well established Local Bus Service Priority Policy 2015 to 2020, which sets a maximum level of support for contracted services at £5.00 per passenger journey. All the services identified exceed this figure.
- There would be a financial saving to ECC by not providing the services.
- The number of local residents affected by the change is minimal based on passenger usage figures.

Issues:

- Adverse impact on local communities, with residents losing connections to key services on the days and times affected as set out above. Reduced services for residents potentially resulting in loss of access to health, employment, education and leisure facilities.
- Negative media and reputational damage to the organisation.

31. It was noted that the savings from removing the services would be (paragraph 5.1.2 of the Director's Report):

- 250: £14,551 for 2017/18 (£24,944 annualised)

- 251: £39,142 for 2017/18 (£67,100 annualised)

The Decision

32. According to the final page of the Director's Report the recommendation was approved by Councillor Ray Gooding (Cabinet Member for Education) on 14 August 2017. The decision took effect on 27 August 2017 which was the end date of the existing contracts.

Interim partial replacement

33. Since the withdrawal of the services, the operator of route 66 (EOS), which serves Waltham Abbey and Waltham Cross during the day, has agreed to temporarily provide a slightly extended service (for three months from 1 September 2017). However, it finishes at around 9 pm whereas the 250 and 251 ran until around 11.30 pm. It is not clear how this arrangement came about. The manager of EOS commented as follows to Epping Forest Transport Action Group ("EFTAG"):

Because we are set up as a day time operation with little to no staff late at night I do not feel comfortable operating buses up to almost midnight.

However, given that Essex County Council has withdrawn the equivalent evening service to our day time operation, I feel that we have a duty of care to provide an extra later service for our valued customers to be able to travel home.

As a commercial business it is a great shame that we are having to risk investing the profit from our daytime service to support these withdrawn evening services, which may in turn increase our fares and make bus travel less appealing, especially in an age when we are trying to reduce our carbon footprint.

Tailored Solutions

34. The Council's bus and passenger strategy ("*Getting around in Essex*") includes the following strategic action point:

Proposal 6: Tailored Solutions

2.08 We want to see what services we can provide to people who live where a traditional bus service (a single large vehicle on a set timetabled route) is prohibitively expensive and inflexible. This tends to be in rural areas where the population is more dispersed. We propose to:

- Work with local communities, operators and taxi firms to identify where tailored local schemes can be more cost effective.
- Identify where we can replicate our successful demand responsive services.

IV. OUR CLIENT

35. Our client is the organiser of EFTAG. As a resident of Waltham Abbey, he is directly affected by the withdrawal of these services. He used the services around twice per week, in order to attend social engagements, community meetings and events, and on some occasions for employment

as a music tutor. The withdrawal of the services means he is unable to attend these meetings and events, and is also unable to attend District Council meetings, which restricts his ability to make representations to the council on the issues that EFTAG is concerned about.

36. A survey has been conducted by EFTAG regarding ticketing practices on the 250 and 251 services. The results of the survey suggest that a high number of people were not given tickets (see attached excel spreadsheet). This may have led to an under-reporting of passenger numbers. We are instructed that it was very common that tickets were not given to passengers even if money was accepted.

V. RELEVANT LEGAL FRAMEWORK

Duty to secure appropriate public transport to meet an area's needs

37. Section 63(1)(a) of the Transport Act 1985 provides that:

(1) In each non-metropolitan county of England and Wales it shall be the duty of the county council-

- a) To secure the provision of such public passenger transport services as the council consider it appropriate to secure to meet any public transport requirements within the county which would not in their view be met apart from any action taken by them for that purpose.

38. Non-metropolitan county councils have a power to secure the public transport services by entering into an agreement providing for service subsidies (s.63(5)). This power can only be exercised where the service would not be provided, or would not be provided to a particular standard without such a subsidy (s.63(5)(a)).

39. In exercising these functions councils must have regard to "*the transport needs of members of the public who are elderly or disabled*".

40. The section 63 duty has been held by the court to be a duty to (i) identify public transport requirements which would not otherwise be met, and (ii) once identified, secure what is appropriate (*R v Hertfordshire County Council ex parte Three Rivers District Council (1992) 90 LGR 526*).

41. In addition, each local transport authority is under a duty to develop policies for the promotion and encouragement of safe integrated efficient and economic transport to, from and within their areas, namely a Local Transport Plan (LTP), under the Transport Act 2000. They are under a duty to carry out their functions so as to implement the policies of their LTP (s.108(1)(b)). Alterations to the LTP must be consulted on with operators, passengers and other members of the public (s.109).

Public Sector Equality Duty

42. Section 149(1) of the Equality Act 2010 imposes a duty on all public authorities in the performance of all their functions to pay 'due regard' to three statutory equality needs to:

- a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - c) Foster good relations between persons who share a relevant protected characteristic and those who do not share it.
43. Section 149(7) provides that the seven relevant protected characteristics are: age, disability, gender reassignment; pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
44. The courts have endorsed the so called 'Brown principles' *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506; *R (Domb) v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941; *R (Kaur) v London Borough of Ealing* [2008] EWHC 2062 in challenges concerning the PSEDs, which can be summarised as follows:
- i. Decision makers must be made aware of their duty to have due regard to the identified goal; an incomplete or erroneous appreciation of the duty will mean that due regard has not been given to them;
 - ii. The due regard duty must be fulfilled at a formative stage, i.e. before and at the time that a particular policy that might affect protected groups is being considered;
 - iii. The duty must be exercised in substance, with rigour and with an open mind;
 - iv. It is a non-delegable duty;
 - v. It is a continuing duty;
 - vi. It is good practice to keep an adequate record showing that the equality duty has been considered. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty.

VI. ANALYSIS / PROPOSED GROUNDS OF CHALLENGE

45. As is recognised by the Council, the passengers using the 250 and 251 - evening services primarily used by people coming home from work - have no other alternative options available to them. It follows that the Council is subject to an exacting duty to consider options and alternatives in compliance with its statutory duties.

Decision based on incorrect passenger numbers

46. As noted above, the passenger numbers upon which the Decision was based are in doubt; there are strong indications that the figures were significantly underestimated/underreported and, consequently, that the cost per passenger journey was artificially high for both services. Had

the figures been properly calculated they may have been closer to or even beneath the £5 limit.

47. We note that the numbers of respondents to the consultation stating that they were daily users of the services greatly exceeds the numbers provided by the operator and used to reach the Decision (e.g. in respect of the 250: 6 passengers per day per paragraph 6 of the Director's Report as opposed to 37 respondents to the consultation who stated that they used the service daily).
48. Further, aside from the discrepancy in the figures, one respondent to the consultation explicitly raised the issue of the 250 being very busy and passengers on the 250 not being given tickets:

...there are many people lots others who use this bus it's packed at night. Also if they haven't been in contact with you I speak on behalf of other users. The tall American guys and his girlfriend. The tall broad businessman. The lady's / boys / teens that all work late at the Tesco stores on route. The boys finishing at Renalds. Many African ladies who visit/work at Care homes across Waltham abbey, usually about 5/6 every night. And lots more users, these are just faves that I see every night... Its impossible not to see revenue from this, if not I would look abit deeper. It would only take you one bus ride to go out of your way on the 250 to see what's going on and that there are lots of people using this bus it's just the fact!!!

49. We have also noted a discrepancy in figures between the Report of 7 August 2017 (6 and 12 respectively on the 250 and 251) and the date provided in email correspondence to Counsellor Finch on 10 May 2017 (6 and 7 respectively).
50. In the ticketing survey conducted by EFTAG 33 respondents stated that they were not given a ticket at least once per week. This implies that at least 66 journeys per week were not recorded and, therefore, would not have been included in the averages from which the cost per passenger journey was derived. In addition, we note that some users will have season passes or return tickets purchased in the morning. It is not clear whether or in what way such passengers were accounted for in the cost per passenger journey calculations.
51. Despite the fact that the consultation results themselves were indicative of an error of some sort having infected the calculations there is no evidence whatsoever of the Council having investigated further. There were a number of avenues open to investigate, and the fact that EFTAG quickly were able to produce a questionnaire is illustrative of the Council's failure. Other options would have been to review CCTV footage or to conduct an audit of journeys.
52. However, we have not seen any reference to further investigation being conducted to establish the accuracy of these numbers. Indeed, the evidence strongly indicates that the Council has failed to comply with its *Tameside* duty to acquaint itself with the relevant facts to enable a decision based upon accurate figures. Further, as the cost per passenger journey was derived from the number of passenger journeys actually taken, and there is significant evidence suggest that those figures were

inaccurate it follows that the Decision was based upon material error of fact, thereby rendering the Decision unlawful.

Failure to properly consider alternatives to service withdrawal

53. In order to establish what provision is appropriate under s.63, the Council needs to consider a range of options. The Council states at various points that alternatives to service withdrawal have been considered and found to be unviable. However, no evidence has been published regarding the viability of these alternatives, such as a *de minimis* contract, community transport options, or a demand responsive service. Further, the Council's documents suggest that alternative options were considered at the stage of tendering only and that the Council closed its mind to consideration alternative options following the consultation (it is suggested in the EIA that consideration of the options is ongoing but there is no evidence of such consideration being ongoing as at today).

54. Indeed, the Director's Report refers to three options only:

- i. Keep both services;
- ii. Keep one service; or
- iii. Terminate both services.

55. We have several observations to make on this. First, we note that there was no consultation on option (ii) (keep one service). The Director's Report assumes that:

Would be difficult to justify why one bus service should be retained over another, as all services are above the Council's £5 per passenger journey threshold. This could potentially result in challenge and reputational damage to the authority.

56. However, had the Council applied its mind to option (ii) it may have found (for example) that a sufficient number of passengers on one of the two services could transfer to use the remaining service, which would have had a knock on effect on passenger numbers, therefore, the cost per passenger journey.

57. Secondly, in view of the fact that the 250 service is cheaper than the 251, by some margin, there is an obvious justification to considering them separately, contrary to the stated position of the Council.

58. Thirdly, absent evidence that the Council considered alternative solutions, such as retaining one service with an amended route or timetable the Council could not properly suggest that it has considered tailored solutions in keeping with its bus and passenger strategy.

Failure to conduct a lawful Equality Impact Assessment

59. Whilst the consultation paper does contain equality monitoring questions, it does not appear that this information was analysed to determine the actual the impact of losing these specific services would be (as opposed to notional impacts based on the typical populations of bus users). The

EIA appears to be generic and is not based on information specific to the services in question, such as the fact that the services in question are evening services. For example it is apparent from the consultation responses cited that the majority of passengers are using the buses to travel to or from work, which is not reflected in the EIA.

60. This failure has, in turn undermined the assumptions upon which the Decision was based. For example, whilst full time and part time workers between the ages of 25-54 years old form the largest groups of service users for both services, this is not recognised in the EIA. Consequently, for example, there has been no consideration given to the Council's Transport Outcome number 1 ("*access to ... work ...*") or other policies that are specifically relevant to workers.
61. Furthermore, while the EIA makes reference to mitigation and the exploration of alternatives, again there is no evidence that these have been fully explored.

Failure to follow appropriate policies and procedures

62. The Council's Bus Priority Policy sets out a series of stages (the Service Need Assessment System) to consider whether there is a need for a service, which we presume was designed with s.63 in mind. However, there are no publicly available materials which indicate that proper consideration was given to the Bus Priority Policy.
63. Further, we note that the 250 and 251 Services are not listed within Appendix 2 which is designed to assess the Service Intervention Point, and we understand that Appendix 4 has been withdrawn.
64. As to the final section of the Bus Priority Policy ("*Special Circumstances*") we note that there is no evidence that consideration was given to the exercise of discretion to fund the services/one of the services/an amended service/an alternative service notwithstanding the cost per passenger journey being above £5, in view of the absence altogether of an alternative service for the residents of Waltham Abbey and Waltham Cross. Indeed, we note frequent reference to the £5 limit being just that: a limit above which funding is unavailable, and therefore, a fetter on the Council's discretion.

VII. DETAILS OF THE CLAIMANTS' LEGAL ADVISERS

65. Salima Budhani, solicitor, and Theodora Middleton, paralegal, in Bindmans' Public Law and Human rights team act for the proposed claimant. Please send all email correspondence to both Ms Budhani and Ms Middleton, using the contact details set out above and marked with reference 266603/1/SBUD. Court papers should be served in hard copy also.
66. Should you wish to contact us by telephone, please call 020 7833 4433 and ask to speak to Ms Budhani or Ms Middleton.

VIII. INTERESTED PARTIES

67. All of the former service users of the 250 and 251 services are interested parties. In the event that it becomes necessary to issue judicial review proceedings we shall make a proposal as to whether and how they should be notified and served with a copy of the claim.
68. In the meantime, EFTAG intends to publish this letter on its website.

IX. DETAILS OF ANY INFORMATION OR DOCUMENTS THAT ARE CONSIDERED RELEVANT AND NECESSARY

69. In accordance with your duty of candour please provide the following information and documents:
 - i. Please explain precisely how the estimated passenger numbers were calculated including in what format the figures were received from the operators and how those figures were derived, how they were broken down and averaged.
 - ii. Please explain how paper return tickets/season tickets/bus passes were accounted for in the calculation of passenger numbers.
 - iii. Please confirm whether any investigation was conducted to establish the accuracy of these figures, before and after the consultation.
 - iv. Please provide details of how the cost per passenger journey was calculated for each service.
 - v. Please provide all documents relating to the tendering process in particular, the Invitation to Tender.
 - vi. Please explain what alternative options and tailored solutions have been considered, when and by whom. Please provide evidence regarding your consideration of alternatives including the retention of the 250 or 251 alone, and the provision of a service through the Community Transport Scheme.
 - vii. Please provide further details of the analysis conducted for the purpose of the Equality Impact Assessment. Provide details of the demographic information collected through the consultation and the statistical analysis conducted to determine which groups would be affected by the cuts.
 - viii. Please explain whether the Council was involved in arranging the temporary extended 66 service.
 - ix. Please provide copies of documents evidencing consideration of the necessary stages in the Bus Priority Policy, including the final stage (“Special Circumstances”).
 - x. Please indicate whether the Council presently funds any services by reference to the final stage of the Bus Priority Policy (“Special

Circumstances”) (i.e. services costing over £5 per passenger journey).

- xi. Please provide the documents “Getting Around in Essex: procurement of New Local Bus Network (part 2) Cabinet Member Action. Forward Plan reference FP/573/08/16” and “Getting Around in Essex: Award of New Local Bus Network (part 2) including Maldon services Cabinet Member Action 18 May 2017”
- xii. Please provide all documents relating to the previous consultation conducted in 2016 including the consultation paper, the review of responses, any reports to the Cabinet and any decisions made by the Cabinet.

X. ACTION REQUIRED OF ESSEX COUNTY COUNCIL

70. The Council is asked to:

- i. Agree to reinstate one, other or both of the two routes for the reasons outlined above;
- ii. Failing that, to agree to reconsider its decision to terminate the two routes on a lawful basis including in particular:
 - a. a review of, and proper consultation (in conjunction with local stakeholders) on, any appropriate alternatives to termination of the service;
 - b. a full review the figures upon which the cost per passenger journey was based.

71. If the Council is not willing to agree to the following, we are instructed to proceed with our application for judicial review.

XI. ALTERNATIVE DISPUTE RESOLUTION

72. Our client is willing to engage in alternative dispute resolution with the Council. This could be done in conjunction with the Council reconsidering the matter as requested in paragraph 70 above. In view of the impending limitation period, it may be necessary to issue proceedings protectively and then stay the proceedings to undertake any such discussions. We look forward to your client’s proposals in this regard.

XII. CONCLUSION

73. Kindly acknowledge receipt of this letter by return.

74. We look forward to receiving your response within 14 days.

Yours faithfully

Bindmans LLP

Bindmans LLP

Encs.