

By email only

Oxfordshire County Council
County Hall
New Road
Oxford OX1 1ND

Attn: Susannah Wintersgill
Director of Communications, Strategy and Insight

susannah.wintersgill@oxfordshire.gov.uk

Direct Dial: 020 7650 1232

Your Ref:

Our Ref: RGA/MAT/01025853/1

Date: 21 July 2023

LETTER BEFORE CLAIM
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Oxfordshire County Council

Consultation on disposal of council-owned land to Oxford United Football Club

Introduction

1. We act for Friends of Stratfield Brake, a community group whose aim is to protect Stratfield Brake and land to the east of Frieze Way and south of the Kidlington roundabout known as the "Triangle" from inappropriate development.
2. We refer to our clients' letter and email dated 2 and 11 June 2023 respectively and your replies dated 22 June 2023, which was only actually sent to our clients on 11 July 2023, and 17 July 2023. Based on your response to date, our clients believe that the information provided by the county council as part of its consultation on the proposed sale of the Triangle to Oxford United Football Club ("**O UFC**") is insufficient to enable members of the public to give an intelligent consultation response. Our clients therefore propose to file a claim for judicial review unless the county council takes steps to remedy the legal issues identified in this letter.

The decision our client proposes to challenge

3. Our clients propose to challenge the decision by the county council to embark on a consultation in respect of the proposed disposal of the Triangle which does not comply with the legal minimum requirements for a lawful consultation.

This letter

4. This letter is a formal letter before claim, sent in accordance with the Pre-Action Protocol for Judicial Review. It sets out the factual and legal basis (as we presently understand it to be) on which any claim would be pursued. Please be clear in your response in identifying any areas of factual or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.
5. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the court. If we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.

Party details

6. In accordance with the Pre-Action Protocol, we confirm the following details:
 - a. Proposed claimant: Friends of Stratfield Brake
 - b. Proposed defendant: Oxfordshire County Council
 - c. Proposed interested party: OUFC
 - d. Our reference: RGA/MAT/01025853/1
 - e. The matter being challenged: The decision, as described above
 - f. Details of claimant's legal advisers: Leigh Day, Panagram, 27 Goswell Road, London EC1M 7AJ; rgama@leighday.co.uk and makhtar@leighday.co.uk

The Issues

Factual Background

7. OUFC has occupied the Kassam Stadium in south east Oxford since that stadium was built 22 years ago. The freehold of the Kassam site is owned by Firoka (Oxford United Stadium) Limited (“**Firoka**”).
8. Until recently, OUFC occupied the stadium under a 20-year licence agreement with Firoka dated 21 March 2006. The 2006 agreement provided an automatic right of renewal on the same terms in 2026. However, we understand that during the Covid pandemic, the licence was terminated and following that a new licence was entered into allowing the occupation of the stadium until June 2026. According to a statement on OUFC’s website, the new licence does not include provision for automatic renewal. We do not know that to be the case because we have not seen a copy of the new licence.
9. In early 2021 OUFC approached the county council with a proposal to develop a large site known as Stratfield Brake, which included the Triangle. This proposal was not progressed, and subsequently, on 24 January 2023, the county council’s cabinet agreed to enter into negotiations with OUFC for the disposal of only part of the original site: the Triangle.
10. On its website¹, OUFC explains why it considers a new stadium at the Triangle is needed:

“Oxford United’s current home the Kassam stadium, is unsustainable in a number of ways, and remote from public transport. With the current agreement for the Kassam stadium coming to an end in 2026, there is an urgent need to develop a new stadium in order to protect the future existence of one of the oldest football clubs in the UK.

[...]

Several questions have been raised regarding the status of the Kassam Stadium Licence agreement and why Oxford United Football Club could not simply continue to use the Kassam Stadium.

The position is that after 30th June 2026 Oxford United will have no legal right to use or occupy the Kassam Stadium.

The Kassam Stadium is owned and operated privately by a stadium company “Firoka (Oxford United Stadium) Limited”. The stadium company is separate from the football club and owned by Firoz Kassam. Oxford United hold a license to use the stadium which ends on the 30th June 2026.

¹ <https://oufcstadium.co.uk/background/>

Oxford United are restricted under the terms of the current licence agreement to use the Kassam Stadium for first team home league and cup matches, some friendly games and specified testimonial games. Oxford United have use of some office space and the ticket office at the stadium and are not permitted to use the rest of the stadium outside of those allowed match days.

Oxford United have held three licences since the Stadium was constructed. These are:

An Original licence dated 21st March 2006 that was originally due to expire in 2026 but was terminated by Firoka (Oxford United Stadium) Limited on 9th May 2021;

A short licence that permitted use until June 2021 to allow a play-off match to be played in May 2021; and

The current licence which started on 1st July 2021 and expires on 30th June 2026.

Under the terms of the original licence and as a result of Covid 19, Firoka (Oxford United Stadium) Limited terminated the original licence which it was legally entitled to do. The current licence terms were subsequently agreed to allow continued use until 30 June 2026.

The current licence does not include any renewal rights or renewal requirements within it. In certain circumstances the Landlord and Tenant Act 1954 provides security of tenure and a statutory right to a renewal of a lease where premises have been occupied for business purposes. These rights do not apply under the terms of the current licence and the correct statutory procedure to exclude them was followed.

There is a restrictive covenant that was put in place by Oxford City Council when the land was first released under the terms of a Development Agreement with Firoka (Oxford United Stadium) Limited to construct the Kassam Stadium. This requires the site to be used primarily for football until 14th October 2026. This does not provide any right for Oxford United to use the Stadium, only that football is required to be a primary use at the site until 14th October 2026.

The reality is therefore after 30th June 2026 Oxford United will have no legal right to use or occupy the Kassam Stadium, there is no right of renewal in the licence, there is no statutory security of tenure (these have been excluded following the correct statutory procedures) and therefore the club is looking for a new home ground."

11. No information has been provided by OUFC or anyone else as to whether the club has sought to negotiate a new long-term licence with Firoka for the continued occupation of the Kassam Stadium beyond June 2026.
12. On 9 June 2023 the county council launched a "public engagement on whether OUFC's scheme meets the council's strategic priorities"². The webpage for the "public engagement" explained:

² <https://www.oxfordshire.gov.uk/council/about-your-council/oxford-united-stadium>

“To receive agreement from the council, the club’s proposal must bring benefit to communities in Oxfordshire and specifically address the following seven key strategic priorities set out by the council for the use of the land:

- 1. maintaining a green barrier between Oxford and Kidlington and protecting and enhancing the surrounding environment including biodiversity, connecting habitats, and supporting nature recovery*
- 2. improving public access to high-quality nature and green spaces*
- 3. enhancing inclusive facilities for local sports groups and ongoing financial support*
- 4. significantly improving the infrastructure connectivity in this location, improving public transport to reduce the need for car travel in so far as possible, and to improve sustainable transport through increased walking, cycling and rail use*
- 5. developing local employment opportunities in Oxfordshire*
- 6. increasing education and innovation through the provision of an accessible sports centre of excellence and facilities linked to elite sport, community sport, health and wellbeing*
- 7. supporting the council’s net zero carbon emissions pledge through highly sustainable development.*

It must also meet objectives around managing financial risk and obtaining the best value for the taxpayer from any transaction.”

13. It also states: *“Before filling in the survey, we strongly recommend that you read the overview and summary document provided by OUFC.”*

14. The overview and summary document referred to explains the rationale for relocating from the Kassam Stadium to the Triangle:

“We cannot play at the Kassam Stadium following the conclusion of the 2025/26 season, due to the expiry of a lease agreement with the current stadium owners. Further information is available on the Oxford United Football Club Stadium Development website here: <https://www.oxfordshire.gov.uk/council/about-your-council/oxford-united-stadium>

We want to construct a new stadium in time for the 2026/27 season commencement and have appointed a professional project team of design and management consultants to develop the proposals to date.”

15. On 2 June 2023, the claimants wrote to the county council explaining that the information provided as part of the consultation was insufficient for the public to understand why the proposal had come about and why it was necessary to dispose of a green belt site for development, given that OUFC currently have an existing stadium which appears to be fit for purpose and is only around 20 years old.

16. A substantive response from the county council was received on 11 July 2023. The response merely repeats that OUFC’s existing licence agreement expires in June 2026 with no right of renewal. It suggests that the county council has been provided with

“detailed information” about the existing licence agreement and other related documents, which have been disclosed on a confidential and commercially sensitive basis. Again, what is unclear is whether OUFC have sought to negotiate a new licence agreement with Firoka for the continued occupation of the Kassam Stadium.

17. Our clients have obtained through freedom of information requests the enclosed email dated 20 January 2023 from the owner of Firoka, Firoz Kassam, indicating that the portrayal of Firoka as being unwilling to negotiate a solution which would allow OUFC to stay at the Kassam Stadium may be incorrect. We do not know what press release Mr Kassam is referring to or the full context of his email, but it at least suggests that there may be a possibility for OUFC to negotiate a licence renewal at the Kassam Stadium.

Legal background

18. The principles governing public consultation are well-established.
19. There is no general public law duty to consult, but a duty can arise in four main circumstances: where there is a statutory duty to consult, where there has been a promise to consult, where there has been an established practice of consultation and where, in exceptional circumstances, failure to consult would lead to conspicuous unfairness (*R (HPSPC Limited, National Education Union v Secretary of State for Education* [2022] EWHC 3159 (Admin) at [92]).
20. Whether or not there is a duty to consult in any particular case, it is well established a matter of general law that, if a consultation is initiated, the decision-maker is required to consult in a fair and lawful manner (see *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, Lord Woolf MR at [108]).
21. The key principles governing a lawful consultation were set out in *ex parte Gunning* (1985) 84 LGR 168 QBD at 189 and are that consultation must:
 - a. be undertaken at a time when the relevant proposal is still at a formative stage;
 - b. give sufficient reasons for particular proposals to permit intelligent consideration and an intelligent response;
 - c. give consultees adequate time for consideration and response; and
 - d. be the product of consultation must be conscientiously taken into account when finalising any proposals.
22. In *Coughlan* the Court of Appeal also explained that [112]:

“[the] obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.”
23. Those principles were endorsed in *Moseley v London Borough of Haringey* [2014] UKSC 116.

Proposed ground of challenge

24. Please note that the claimants reserve the right to amend the grounds, or to add or remove grounds of challenge, based on the defendant's response and any further matters which come to light, and may do so without further recourse to the defendant.
25. The claimants allege a single ground of challenge: that the county council has failed to provide sufficient reasons for the proposed disposal of the Triangle site to allow consultees to provide an intelligent response to the consultation. Critically, the consultation ducks or omits a key issue, namely why OUFC cannot remain at the existing Kassam Stadium and why the need has arisen for a replacement stadium for OUFC. Given that the city council's planning policy is to retain, or if it cannot be retained, replace, the Kassam Stadium site (see Oxford Local Plan 2036 Policy SP14), a consultation about whether the Triangle is suitable for the development of a new football stadium can only sensibly be conducted together with providing the public with essential information about why OUFC cannot remain at the existing Kassam Stadium, which was only built 20 years ago. Unless the stadium proposal for the Triangle site is being proposed as a replacement stadium, the whole premise of the consultation is in direct conflict with current planning policy for Oxford.
26. Integral to the question the public is being asked is the question of why the existing stadium cannot be used and, if it is no longer going to be used for football, its intended future use. Inviting the public to consider the suitability of the Triangle in isolation is unreasonable and in direct conflict with the Oxford Local Plan. It fails the legal requirements of a lawful consultation. The county council must provide information (if it has it) as to why the Kassam Stadium cannot be used for football, and what its intended use is. The merits of the Triangle for the replacement of the stadium can only rationally be considered in that context.
27. The "public engagement" exercise which runs until 23 July 2023 is undoubtedly a consultation. We assume that characterisation is not in dispute. The county council is seeking the views of members of the public on a specific proposal with a prescribed set of questions. It is not surprising that it is a consultation given that the county council's consultation and engagement strategy 2022-2025³ commits the council to carrying out a consultation in circumstances such as these. The strategy says that the county council will carry out a range of consultation and engagement processes depending on the circumstances, but that consultation, rather than engagement, will be appropriate where "there is a decision to be made"⁴. In this case, the current consultation is the last time that the public are being asked their views on the proposed decision of the county council to dispose of the Triangle, given that the decision to enter into a sale or lease agreement is

³ <https://www.oxfordshire.gov.uk/sites/default/files/file/adult-social-and-health-care/Consultationandengagementstrategy2022-25.pdf>

⁴ Page 3.

proposed to take place at the 19 September 2023 cabinet meeting. These are circumstances where a consultation has been promised by the county council's consultation and engagement strategy.

28. None of the consultation materials, the additional material on OUFC's website or the information provided to our clients in your letters dated 11 and 17 July 2023 provides the information needed in order to establish whether the proposed disposal is *necessary* in order to achieve what is the fundamental justification for the disposal: the construction of a new stadium for OUFC. Moreover, none of the information tells the reader why the existing stadium needs to be replaced or what it is to be replaced with.
29. If this is information which the county council holds it needs to be shared. If the county council does not hold this information then it needs to gather it before initiating public consultations on the potential land transfer for a new stadium in Green Belt.
30. A member of the public reading the consultation materials is told only that the purpose of the disposal is to allow OUFC to construct a new stadium by the 2026/7 season. This is the sole justification provided in the overview and summary document which consultees are "strongly" recommended to read by the county council. OUFC wish to build a new stadium when it has an existing recently built stadium in Oxford. No explanation is provided as to why it is not possible to negotiate a new licence for the Kassam Stadium given that Firoka does not obviously have another potential tenant who could occupy a 12,500 seat stadium and would therefore be under some commercial pressure to negotiate reasonable terms with the only football club in the Oxford area large enough to occupy the Kassam Stadium, which was after all built specifically for OUFC.
31. Why can OUFC not remain at the current stadium? Does the county council anticipate that following the sale Oxford would end up with two stadia? If not, then what is envisaged? Please respond to this letter with appropriate explanation.
32. Consultees must be able to understand that overall context in order to be able respond intelligibly to the consultation. Policy SP14 provides in relation to the Kassam Stadium that "*[t]he football stadium should remain (unless it has been replaced elsewhere in Oxford or in proximity to Oxford) although there may be opportunity to develop new residential development within the corners of the stadium*". The assumption underlying that policy is that the Kassam Stadium will be retained unless a replacement is planned. Since what is being proposed on the Triangle is a new stadium, that presupposes that the Kassam Stadium will be replaced but the public has not been told by what.
33. The public is left in the dark and has not been provided with the full picture of what is intended for the Triangle and Kassam Stadium sites. In particular, the public has not been told why OUFC is abandoning the Kassam Stadium, whether the existing 20 year old stadium will be retained or whether it is to be replaced. That matters for a number of reasons including:

- a. The fact that consent was originally provided for the Kassam Stadium on the condition that it would be used for football and other team sports, something which no longer appears to be the case. The public must be told whether and why the Kassam Stadium is being replaced.
 - b. Because the proposed development is, by definition, inappropriate development in the Green Belt and needs to be justified by “very special circumstances”. In this case, where Oxford has a fit for purpose, centrally located 20 year old stadium and where a new stadium would result in significant climate impacts though embodied carbon, it is not at all clear that a new stadium development is justified.
34. Members of the public are being asked whether they agree to the disposal of public land to OUFC, for best value, in order to realise a private benefit to the club. In those circumstances and given the city council’s adopted planning policy, consultees need to be told what is proposed for the Triangle site *and* the Kassam site. Without understanding whether and why OUFC needs to relocate and what the intended use is of the Kassam site members of the public cannot sensibly come to a judgement as to whether it is worthwhile disposing of the Triangle site.
35. If it is actually the case that for commercial reasons OUFC would *prefer* to relocate and that a deal with Firoka is possible but simply commercially unattractive, consultees must also be told that.
36. It may be the case that the county council does not have this information either. Your letter dated 11 July 2023 suggests you have at least seen the existing new licence between Firoka and OUFC. While that may reveal what the existing legal arrangement is, it would not provide any information as to what if any negotiations have taken place between Firoka and OUFC for a renewal of the licence. If the county council does not know this information, then please indicate so in your response to this letter. However, we would be surprised if in September officers were to recommend to cabinet members that they approve the disposal of the Triangle without providing members with this key information as well as information about the intended use of the Kassam site. For the same reason as that information is essential for consultees to be able to respond intelligibly to the consultation, it will also be essential for members to have that information in order to determine whether to sell the site.

Action the defendant is expected to take

37. In order to remedy the identified legal error, we request that the county council pauses the current consultation and then updates the consultation materials to include the additional information referred to in this letter and explains to the public (a) why OUFC cannot remain at the existing stadium and (b) what the Kassam Stadium is intended to be replaced with.

38. If the county council does not have that information then it should obtain it from Firoka. Once the additional information has been provided, the consultation should be rerun, with appropriate notice provided to members of the public.
39. You say in your 11 July 2023 letter that what information the county council does have is confidential and commercially sensitive. Whether or not that is the case, that fact would not remove the legal duty to carry out a lawful consultation. OUFC's view that information is confidential and commercially sensitive does not override the county council's duty to consult lawfully. If the information is confidential then it is for OUFC to decide whether to waive confidentiality in order to allow the consultation to proceed lawfully.
40. If you refuse to take the above steps, or we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.

ADR proposals

41. We would welcome any proposals to engage on the substantive issues raised in the letter, so as to resolve or narrow the dispute.

Aarhus Costs

42. The proposed claim is an environmental claim that falls within the scope of Article 9(3) of the Aarhus Convention. The case law is clear that "environment" should be given as broad a definition as possible. Please confirm in response that you do not contest the application of the Aarhus Convention and that any claim will benefit from the costs capping in CPR r. 45.43.

Information or documents sought

43. In accordance with the defendant's duty of candour and in accordance with the Environmental Information Regulations 2004, please provide for the period from when OUFC first approached the county council regarding the potential disposal of the Stratfield Brake site to the present any correspondence (including emails) or notes or minutes of meetings between any of the county council, OUFC, Cherwell District Council, Oxford City Council or Firoka regarding the disposal of Stratfield Brake or the Triangle, or regarding negotiations between OUFC and Firoka to remain at the Kassam Stadium.
44. If you fail to disclose a document now, which you later rely on in defence of this claim, then we reserve the right to bring this to the court's attention when it comes to the matter of costs. Moreover, as a matter of law, a claimant in a claim for judicial review cannot be prejudiced at the permission stage due to an absence of documents, and the existence of such further material, which may be critical to the arguability of the claim, is capable of being a good reason in and of itself to grant permission (see *R (Blue Sky Sports & Leisure Ltd v Coventry City Council* [2013] EWHC 3366 (Admin), at §25).

Address and proposed date for reply

45. You are requested to respond by email to ensure we have your response in a timely manner. Please send your response to Ricardo Gama (rgama@leighday.co.uk) and Madeeha Akhtar (makhtar@leighday.co.uk). Please respond within 14 days of the date of this letter, i.e. **by no later than 4 August 2023**.



CC: Oxford United Football Club, newstadium@oufc.co.uk
Councillor Calum Miller, calum.miller@oxfordshire.gov.uk
Councillor Liz Leffman, liz.leffman@oxfordshire.gov.uk

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