

<b>Subject:</b>	<b>Land South of Ovingdean Road, Brighton : Public Inquiry (Planning Application ref. BH2016/05530)</b>		
<b>Date of Meeting:</b>	<b>7 February 2018</b>		
<b>Report of:</b>	<b>Executive Lead Officer – Strategy Governance &amp; Law</b>		
<b>Contact Officer:</b>	<b>Name:</b>	<b>Hilary Woodward</b>	<b>Tel: 01273 291514</b>
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<b>Ward(s) affected:</b>	<b>Rottingdean Coastal</b>		

**NOT FOR PUBLICATION**

~~Note: The public are likely to be excluded from the meeting during consideration of this report as it contains exempt information as defined in paragraph 5 of Schedule 12A, Part 1, to the Local Government Act 1972 (as amended).~~

**1. PURPOSE OF REPORT AND POLICY CONTEXT**

1.1 The Committee is being asked to agree to withdraw reason for refusal 2. (heritage) and reason for refusal 3. (air quality) in relation to planning application ref. BH2016/05530 – Land South of Ovingdean Road, Brighton, to consider, should those reasons for refusal be withdrawn, whether the planning balance is such that the Council should continue to defend the appeal and to agree that the Council enter into a s106 Planning Obligation should the Inspector be minded allow the appeal.

**2. RECOMMENDATIONS**

That the Committee:

- 2.1 agrees to withdraw reason for refusal 2. (heritage) for the reasons outlined in paragraph 3.9 of this report;
- 2.2 agrees to withdraw reason for refusal 3. (air quality) for the reasons outlined in paragraph 3.10 of this report;
- 2.3 considers the planning balance and whether to continue to defend the appeal should it agree that the heritage and/or the air quality reason for refusal be withdrawn;
- 2.4 agrees that the Council enter into a s106 Planning Obligation to include the heads of terms set out in paragraph 3.15 of this report should the Inspector be minded to allow the appeal

### 3. CONTEXT/ BACKGROUND INFORMATION

- 3.1 On the 10 May 2017 Planning Committee considered a report on planning application reference BH2016/05530: Land South of Ovingdean Road, Brighton. The proposed development was "Outline planning application with appearance reserved for the construction of 45 one, two, three, four and five bedroom dwellings with associated garages, parking, estate roads, footways, pedestrian linkages, public open space, strategic landscaping and part retention/reconfiguration of existing paddocks. New vehicular access from Ovingdean Road and junction improvements". A copy of the report is attached as Appendix 1.
- 3.2 The Officer's recommendation was that the Committee be Minded to Grant planning permission subject to a s106 agreement. However, the Planning Committee resolved to refuse the application for four reasons. The reasons for refusal are as follows:
1. The proposed development would have a harmful impact on the ecology and biodiversity of the site, which would not be sufficiently mitigated by the measures proposed, contrary to paragraph 118 of the National Planning Policy Framework, policy CP10 of the Brighton & Hove City Plan Part One and policy QD18 of the Brighton & Hove Local Plan.
  2. The extent of the proposed development would result in the loss of part of the gap between the villages of Ovingdean and Rottingdean and have an adverse impact on the setting of the Ovingdean Conservation Area and Rottingdean Conservation Area, contrary to policy HE6 of the Brighton & Hove Local Plan.
  3. The increased traffic generated as a result of the proposed development would have an adverse impact on air quality within the Rottingdean Air Quality Management Area, contrary to policy SU9 of the Brighton & Hove Local Plan.
  4. By virtue of the scale of development proposed and the site coverage, the development would be harmful to the character and appearance of the appeal site and its surroundings through over-development and associated loss of local open landscape character, contrary to policy SA4 of the Brighton & Hove City Plan Part One.
- 3.3 The refusal of planning permission has been appealed and the appeal will be dealt with by way of public inquiry. The inquiry will commence on 24 April 2018 and has been set down for four days. Insofar as the officer recommendation was "Minded to Grant" and the relevant consultees supported the application the Council has appointed consultants to give evidence on its behalf and counsel has been instructed to act as advocate.
- 3.4 At the beginning of December, and following a conference with the appellant's counsel, the appellant's agent sent a letter requesting that the ecology and air quality reasons for refusal be withdrawn and seeking clarification that it was the Council's intention to refer to a gap between Ovingdean and Woodingdean in reason for refusal 2., and not Ovingdean and Rottingdean. The response given was that reference to Rottingdean in reason for refusal 2. was correct and that

the request to withdraw the ecology and air quality reasons for refusal would need to be considered by the Planning Committee.

- 3.5 The reason why the appellant has requested the withdrawal of the ecology and air quality reasons for refusal is that it considers: “Both of these matters represent technical/scientific matters that are subject to objective assessment by expert witnesses. We consider these matters are demonstrably unreasonable and should form agreed matters between the parties”.
- 3.6 A conference with the Council’s barrister, attended by the Council’s consultant witnesses and relevant officers, was held at the beginning of January 2018. The reasons for refusal were discussed and counsel asked the witnesses to revert to him with their professional views, in detail, as to whether their particular reason for refusal was defensible.
- 3.7 The witnesses responses, and counsel’s advice having considered those responses, is set out in the following paragraphs.
- 3.8 Ecology: The Council’s witness considers that “on balance” the reason for refusal is defensible. However, counsel notes that the appeal site has no formal ecological designation, nor would there be any impact on a protected species: therefore, even should the Inspector agree with the Council’s witness and conclude that there would be harm in ecological terms “it is possible – if not likely – that he would conclude the benefits of the scheme outweigh these harms”. Counsel also advises that as the Council has not objected to the principle of housing on the site there is some merit in the point that will be made by the appellant that even on the Council’s own case some level of ecological harm would be acceptable. Counsel concludes: “Overall, whilst I cannot advise that this reason for refusal is strong, taking into account the expert advice, it does appear to be defensible”.
- 3.9 Heritage: The Council’s witness for this reason is a heritage expert. Her advice, as regards impact on the conservation areas, is “It is my opinion that whilst setting is an important consideration, in this case the appeal site does not fall within the setting of either Conservation Area. As it does not fall within their respective settings, the site does not contribute to the significance of those Conservation Areas. Based on my experience ... the second prong of Reason for Refusal No.2 could not be defended with any success.” Counsel’s advice on this part of the reason for refusal is that it is “entirely indefensible” and “My firm view is that the Council should withdraw the allegation that the appeal proposal would have an adverse impact on the setting of the Conservation Areas.”

Counsel then went on to consider whether the remaining part of reason for refusal 2. (the impact of the appeal scheme on the gap between Ovingdean and Rottingdean) could remain. His advice was that it could not. It is not a free-standing reason for refusal but is tied into the allegation of harm to the conservation areas; there is no policy protection for protection of the gap between the two settlements; the issue was not raised before the previous Inspector.

Counsel concludes that reason for refusal 2. should be withdrawn in its entirety.

3.10 Air Quality: The Council's witness has reviewed the information in relation to the potential impacts of the scheme on the Rottingdean Air Quality Management Area, undertaking his own modelling of the likely impacts of the development as well as taking into account the latest DEFRA emission factors. The witness's conclusions can be summarised as:

i. The overall trend shows significant improvement in measured NO<sub>2</sub> values in the AQMA;

ii. In 2015/6 the NO<sub>2</sub> values were all below the "limit value" set out in the relevant EU Directive. For 2017 at one receptor there was an exceedance of the limit value, although the data for the year is not completed;

iii. the modelling shows that by 2019 the NO<sub>2</sub> values will all be below the "limit value". This is consistent with the modelling results provided by the appellant's air quality consultant; and

iv. the witness concluded that "there is no discernible difference between the modelled NO<sub>2</sub> pollutant concentrations [for the AQMA] without the development in place [or] with the development in place and fully occupied"

Counsel's advice is that this reason for refusal is "entirely indefensible" and that his "firm view is that the Council should withdraw reason for refusal 3."

3.11 Landscape: The council's witness has advised that the allegation that the proposal would cause some landscape and visual harm is defensible. So far as this reason for refusal is concerned counsel has advised that although the reason for refusal is not strong, taking into account the witness's expert advice "it does appear to be defensible". Counsel does, however, consider that the reason "will not be easy to defend" in light of a) the Council's acknowledged need to build on urban fringe sites in order to meet its housing requirements; b) the principle of development coming forward on the site has been accepted; c) the Council has previously identified that a slightly larger area than the appeal site is likely to be able to accommodate up to 45 units and d) the previous Inspector's view that the west of the site clearly has capacity in landscape terms to accommodate significant residential development.

3.12 Counsel's overall advice on the merits of the Council's case is that it is weak and that in his view the likelihood of successfully defending the decision to refuse is low. He further advises that should the Committee agree that the heritage and/or the air quality reasons for refusal be withdrawn that Members will need to reassess where the planning balance lies. Essentially this means whether the benefits of the scheme, including the provision of market and affordable housing, outweigh the harm to the ecological interests of the site, as well as the landscape and visual harm.

3.13 Members will need to consider whether those benefits justify granting permission for development which, on the Council's case, is in breach of the development plan policy cited in the reasons for refusal. Counsel advises that "when assessing the balance, it is relevant to have regard to the fact that the Council envisages (indeed to some extent relies upon) some form of housing coming forward on this site and therefore, presumably, accepts some level of landscape and visual

harm, and harm to ecological interests, is acceptable in order to meet the Council's housing needs". Should Members come to the view that the planning balance weighs in favour of the appeal scheme the Council should "give serious consideration as to whether it wishes to continue to defend the appeal".

- 3.14 Counsel has further advised on the costs' risk associated with the appeal. The appellant submitted an application for a full award of costs with the appeal and as the inquiry is listed for four days, the appellant has instructed leading counsel and is likely, on the current reasons for refusal, to have to call five witnesses, the costs involved are likely to be substantial. Counsel considers that it is extremely likely that the Inspector will make a costs award in respect of the heritage and air quality reasons for refusal



- 3.15 Should the Inspector be minded to allow the appeal the Council's case is that any approval should be subject to a s106 Planning Obligation to mitigate the impacts of the scheme. The heads of terms of the proposed Planning Obligation were included in the officer's recommendation in the 10 May 2017 Committee report and were:

- 40% affordable housing (55% affordable rent (10 units) and 45% shared ownership (8 units));
- A total contribution of £251,353 towards the cost of providing primary (£105,097) and secondary educational (£146,256);
- A contribution of £20,500 towards the Council's Local Employment Scheme;
- A contribution of £45,000 towards an Artistic Component / public realm;
- Construction Training and Employment Strategy including a commitment to using 20% local employment during the demolition and construction phases of the development;
- A Residential Travel Plan, to include a Residential Travel Pack, to be provided for all first occupiers of the development;
- Walkways Agreement, to agree a means of access and management of the pedestrian and cycle routes within the site which do not form part of the principle estate roads;
- A long-term management and maintenance plan for the proposed horse paddocks and public open space areas; and
- A contribution of £ 191,432 towards open space and indoor sport.

#### **4. ANALYSIS & CONSIDERATION OF ANY ALTERNATIVE OPTIONS**

- 4.1 An alternative option would be for the Council to proceed with its defence of the appeal for the reasons set out in the decision notice. This would be contrary to counsel's advice and with the risk of a substantial costs award being made against it.

#### **5. COMMUNITY ENGAGEMENT & CONSULTATION**

- 5.1 None has been undertaken in view of the nature of the report.

## **6. CONCLUSION**

- 6.1 In view of the representations received by the Council's witnesses on the defensibility of the heritage and air quality reasons for refusal, and counsel's advice on the same, it is considered expedient to recommend to the Committee that those reasons for refusal be withdrawn. The withdrawal of reasons for refusal requires a reassessment of the planning balance and the Committee is asked to consider whether the balance now weighs in favour of the appeal scheme and, if so, whether the Council wishes to continue to defend the appeal. Finally, whether or not the Council defends the appeal, it is recommended that the Council requires a s106 Planning Obligation to secure those matters referred to in paragraph 3.15., should the Inspector be minded to allow the appeal.

### **SUPPORTING DOCUMENTATION**

#### **Appendices:**

1. 10 May 2017 Planning Committee Report on application BH2016/05530;