

**LAND SOUTH OF OIVINGDEAN ROAD, BRIGHTON**

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**ADVICE**

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**Introduction**

1. I have been asked to advise in relation to the merits of the Council's case in relation to the Ovingdean appeal and, specifically, to consider whether each of the reasons for refusal advanced by the Council are defensible. I am also asked to advise on the risks of a costs award being made against the Council.
2. On 8<sup>th</sup> January 2017 I attended a conference together with the professional team appointed for the appeal. This team consists of:
  - i. Eimear Murphy (Murphy Associates) – Heritage, Landscape, Planning Balance
  - ii. David Kavanagh- Spall (Arborweald) – Ecology
  - iii. Graham Parry (Accon) – Air Quality
  - iv. Nick Ireland (GL Hearn) – 5 year Housing Land Supply
3. At the conference I asked that the team *inter alia* to provide their expert opinion on the merits of the reasons for refusal with which they are dealing. They have now done so, and I have taken that information into account when drafting this advice.

**Background**

***The application and reasons for refusal***

4. The application in question is for outline planning permission (with appearance reserved) for the construction of 45 dwellings and associated infrastructure at Land South of Ovingdean Road, Brighton ("the Appeal Site").
5. Officers of the Council recommended that permission be granted for the scheme. However, on 10 May 2017 the Planning Committee resolved to reject that recommendation (by a vote of 7 to 5). Instead an alternative recommendation to refuse

the application on four grounds was passed. These grounds were later crystallised in the decision notice issued on 23 May 2017 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.”*

6. It is notable that: (a) there was no specialist/technical evidence before the Planning Committee to support the contention that the proposed development would have an adverse impact on Air Quality within the AQMA. Indeed, the Environmental Health Officer concluded that, with appropriate mitigation measures, the scheme should be recommended for approval; (b) the Council’s Heritage Officer not only recommended approval but advised in terms that the Appeal Site did not form part of the setting of Ovingdean Conservation Area or Rottingdean Conservation Area.

### ***The earlier application and Appeal***

7. The application for 45 dwellings on the Appeal Site followed an earlier application for 100 dwellings on the same site which was refused by the Council in January 2015. It is important to note the basis on which the Council refused the application. There were three reasons for refusal, which in essence were a follows:
  - i. Insufficient information had been provided to assess the likely impacts of the development with respect to Air Quality within the Rottingdean AQMA.
  - ii. The LPA had not been able to assess the likely impacts with respect to ecology.

- iii. That by virtue of the scale of development and site coverage, there would be harmful impacts on the (a) local landscape character and (b) setting of the National Park.
8. It is important to note the following:
- i. There was no allegation of harm to the setting of the Ovingdean Conservation Area and Rottingdean Conservation Areas. In fact, despite the scheme being significantly larger than the current scheme, no heritage reason for refusal was advanced at all.
  - ii. The reasons for refusal in respect of Air Quality and Ecology were based on insufficient information being provided. In the current decision notice there is a positive averment that the proposal will cause harm.
9. The matter went to appeal in January 2016, with the Inspector issuing his decision on 29 March 2016. The most salient points from his decision letter are as follows:
- i. **Air Quality** – Following the refusal the Appellant submitted a further Air Quality Assessment report, which showed that there would be a negligible impact on Nitrogen Dioxide concentrations within the AQMA arising from the development. This was accepted by the Council who confirmed that they were satisfied that the scheme would not be harmful to local air quality
  - ii. **Ecology** – The Inspector was of the view that the Appellant’s ecological surveys supported the view that the site was of “limited overall ecological value”; that in absence of management there was no evidence that what value it had would persist; and that the proposed mitigation and management programme (to be secured by condition) would mean that the proposal “*would not be harmful to the ecological significance of the site*”.
  - iii. **Impact on Landscape Character** - (i) The site clearly has capacity (in landscape terms) to accommodate significant residential development to the west ; (ii) however the extent of residential development proposed and its spread to the east would “*introduce an unduly urbanised built form to the east at variance with, at the expense of, the more open rural distinctiveness of the site...*”; (iii) having particular regard to the scale of development and extent of site coverage the development would be harmful to the character and appearance of the appeal site and surroundings.

iv. **Traffic** – the Inspector rejected concerns of third parties with regards to the robustness of the modelling and data inputs. Overall he concluded that the traffic impact would not be severe (which is the key test to be applied by the NPPF)

10. Whilst the previous Inspector's decision is not be binding it does constitute an important material consideration which the new Inspector will be required to take into account and will most likely form the starting point for his consideration

***Principle of Development on the Site/BHCC's Plan-making for the site***

11. It is an important consideration that BHCC do not advance any 'in principle' objection to housing development on the site. Nor could the Council rationally do so (at least without a material change in circumstances) because it is clear from the following that the Council is expecting – indeed it could be argued is *relying* upon – the Appeal Site providing housing:

- i. **Urban Fringe Assessment** (Jan 2014)- which concluded that the Appeal Site (or rather a slightly larger area) is "*considered suitable for low density residential development in the norther western part of the site*" and recommended that the Appeal Site could accommodate approx.. 45 dwellings.<sup>1</sup>
- ii. **2016 SHLAA** - The 2016 SHLAA identifies the site as being "deliverable" – that is contributing 45 units towards the 5 year supply. Importantly that meant that the Council expected the site to deliver this number of units by 2021. I am told that the updated 2017 SHLAA (which will be published in the next few weeks) will identify the site as being "developable" – that is contributing 45 units towards the projected supply, but in years 6-10 (ie by 2027).

12. Given the above at the Inquiry, the Appellant will (rightly) say that the principle of developing the housing on the Appeal Site is not objected to by the Council, and the only issue in dispute is the actual form of development proposed by this scheme.

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<sup>1</sup> The report did recognise that, in terms of ecological effects, the impacts assessed were uncertain "as the potential for effects will depend on the exact nature and design of the new development, as well as the exact details of the ecological value of the site, including presence / absence of protected / notable species."

## Merits of the Reasons for Refusal

### *RfR 1 – Ecology*

13. The findings of the previous Inspector in respect of what was a larger scheme, and the fact that the County ecologist supported the scheme, undoubtedly make this a difficult reason to defend.
14. However, Mr Kavanagh-Spall, the ecology expert appointed by the Council, considers that *“on balance”* the reason for refusal is defensible. In particular he explains that *“having visited the site with my botanist, we have assessed the site as being plant species rich, invertebrate species rich, important to numerous fauna including bats and reptiles,...important as a wider mosaic habitat...and important as a ‘stepping stone’ to surrounding important habitats”*. This is consistent with his advice at conference to the effect that the previous Inspector was wrong to conclude the site was of *“limited overall ecological value”*;
15. I also note in this regard that Mr Kavanagh-Spall’s assessment is broadly supported by the report submitted by arbeco on behalf of the Deans Preservation Group.
16. On this basis, and subject to Mr Kavanagh-Spall’s evidence coming up to proof at the Inquiry (I have no reason to think he will not do so), I consider to be defensible.
17. However I should add two words of warning:
  - i. Mr Kavanagh-Spall was very clear in conference that there were no *“show stoppers”* (it is not a site which has any formal ecological designation for instance, nor, as I understand it, would there be any impact on a protected species). Therefore even if the Inspector agrees with Mr Kavanagh-Spall and concludes 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
  - ii. As noted above, the Council does not object to the principle of development on the site. It will be said that this means that, even on its own case, some level of ecological harm would be acceptable. There is some merit in this point.
18. **Overall, whilst I cannot advise that this reason for refusal is strong, taking into account the expert advice, it does appear to be defensible.**

## **RfR 2 - Heritage**

### **(1) Impact on the Conservation Areas**

19. Without wishing to stray into hyperbole, the Council's allegation that the proposal would cause harm to the significance of either the Ovingdean or Rottingdean Conservation Areas is **entirely indefensible**.

20. To put the alleged harm in context: (i) the Appeal site is over 300m away from the Ovingdean CA and over 1km away from the Rottingdean CA; (ii) the Appeal Scheme has no inter-visibility with either of the CA, a matter demonstrated by the Appellant's ZTV and confirmed by Ms Murphy on her detailed site visit; and (iii) this reason was not advanced at all by the Council (or anyone else) in respect of the previous, significantly larger scheme.

21. Having undertaken a site visit Ms Murphy, who is a heritage specialist, concluded (as part of a detailed note) as follows:

*"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 and by using this well-tested and accepted stepped approach, the second prong of Reason for Refusal No.2 could not be defended with any success.*

*In respect of this site, in dismissing the previous appeal on a greater area of the site, the Inspector did not raise a heritage objection. The Council's own Conservation Officer did not object on heritage grounds and did not consider that site affect either Conservation Area. I therefore consider that this prong of Reason for Refusal 2 is very weak and could not be defended. To attempt to do so would render the Council liable to an Award of Costs."*

22. Therefore, if called to give evidence – which she will be in any event in respect of Landscape and Planning matters – Ms Murphy will be obliged to give her professional opinion on this matter. That is she will be professionally obliged to explain that in her expert view the appeal site does not fall within the setting of either of the conservation areas. This is a view shared by the Council's Conservation Area and the Appellant's heritage expert.

23. The Council would therefore be unable to advance any evidence to support its case on this element of reason for refusal 2.

24. Even if, in the very unlikely event that the Inspector disagreed with the unanimous view of the heritage experts and concluded that the appeal site was in the setting of the conservation areas, this of itself would not warrant the reason for refusal. It would be necessary to show (i) that the setting appeal site contributed to the significance of the conservation area – of which there is absolutely no evidence and (ii) that any harm was not outweighed by the public benefits of the scheme, including providing housing (applying para 134 test in NPPF). I see no rational basis on which the Inspector could come to this conclusion

**25. 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**

***(2) Impact on Gap between Ovingdean and Rottingdean***

26. This is not a free-standing reason for refusal, no doubt because there is no policy protection for the 'gap' between these two settlements. I assume this is why the concern was tied into the allegation of harm to the conservation areas.

27. Nor was it an issue raised before the previous Inspector (whilst an issue was raised about the loss of gap between Ovingdean and Woodingdean, I believe by local residents, this was rejected by the Inspector).

28. I have given thought as to whether this element of the reason for refusal could be incorporated with reason for refusal 4 (ie the Landscape reason for refusal). I would advise against such a course of action for the following reason: (a) there is no gap policy; (b) the concern raised was plainly in relation to heritage impacts, not landscape impacts thus it would appear opportunistic to now argue impact on gap was part of the Council's landscape case; (c) the physical gap (unprotected in policy terms) between Ovingdean and Rottingdean is sizeable and the development would plainly have very limited impact on the extent of the gap, thus it adds very little, if anything, to the landscape case; and (d) if any part of RfR2 is retained the Appellant would be entitled to contend that the reason for refusal has not been withdrawn and to call heritage evidence. This would have cost implications (see below).

**29. It follows that I strongly recommend that reason for refusal 2 is withdrawn in its entirety.**

***RfR 3 – Air Quality***

30. The Air Quality reason for refusal, like heritage, is in my view **entirely indefensible**.

31. The decision by the committee was undertaken without any expert evidence to support their position. It was contrary to the opinion of the Environmental Health consultant. It is also, on its face, inconsistent with the position taken by the Council at the previous Inquiry (in relation to a larger scheme).

32. Following the decision the Council appointed Graham Parry, an experience air quality consultant, to review the information in relation to the potential impacts of the scheme on the Rottingdean Air Quality Management Area. In doing so, he has undertaken his own modelling of the likely impacts of the development, as well as taking into account the latest DEFRA emission factors.

33. In short, his conclusions can be summarised as follows:

- 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. Mr Parry’s 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 Appellants air quality consultant.
- iv. Crucially Mr Parry concluded “*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*”

34. In light of the above Mr Parry has confirmed that reason for refusal 3, and the allegation that the proposed development would have an adverse impact on air quality within the Rottingdean Air Quality Management Area, is not defensible. If called to give evidence he would be professionally obliged to accept as much.

**35. My firm view is that the Council show withdraw reason for refusal 3.**

36. On a related note, I am aware that the predicted traffic flows from the development have been queried by a member of the public, and a concern raised that they have under-assessed the likely traffic flows through the AQMA. There is no specialist evidence to support this assertion. Nor did the Council refuse the application on the basis of traffic related impacts.



37. However, the concerns raised have been considered by the a Highway expert at the Council, who have found no issue with the assessment undertaken. In particular, they conclude that the proposal will generate a relatively low number of trips and includes appropriate mitigation measures

#### **RfR 4 - Landscape**

38. Ms Murphy has advised that the allegation that the proposal would cause some landscape and visual harm is defensible.

39. However, in light of: (a) the Council's acknowledged need to build on urban fringe sites in order to meet its housing requirements; (b) the fact the Council accept the principle of residential development coming forward on the site; (c) the Council has previously identified that the Appeal Site (or, rather 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, the contention that the scheme should be refused on grounds of its adverse landscape and visual impacts will not be easy to defend.

**40. Therefore, whilst I cannot advise that this reason for refusal is strong, taking into account the expert advice it does appear to be defensible.**

41. However, I am concerned that the reason for refusal, as drafted, may restrict what Ms Murphy can say. In particular the harm is said to arise from "*the scale of development proposed and the site coverage*". Given that only appearance is reserved, it is likely to be argued by the Appellant that because no reference has been made to layout or landscaping causing harm, that these elements of the scheme are not harmful.

42. Moreover, scale is defined within the within The Town and Country Planning (Development Management Procedure) (England) Order 2015 as "the height, width and length of each building proposed within the development in relation to its surroundings" . It therefore may be said that this is the only concern raised by the Council.

43. I would ask that Ms Murphy reflect on this and consider whether the wording of the reason for refusal should be amended, particularly to include a reference to layout (and perhaps to amount of development).

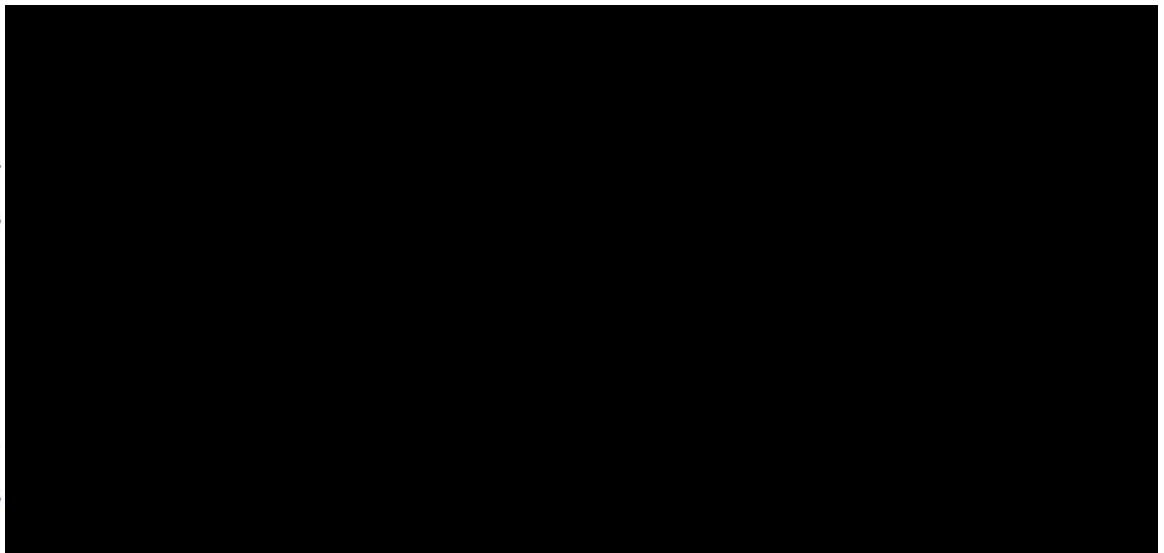
**Overall advice on Merits and reassessing the planning balance**

44. The Council's case is undoubtedly weak. In my view, the likelihood of successfully defending the decision to refuse is low.

45. Reasons for refusal 2 and 3 are indefensible and should be withdrawn. Indeed, in light of the opinion of the relevant experts on heritage and air quality, the Council would not be able to advance any evidence to support these reasons for refusal.

46. If this advice is accepted, members will need to reassess where the planning balance lies. In particular they will need to consider whether the benefits of the scheme (including, but not limited its provision of market and affordable housing) outweigh the harm to the ecological interests of the site, as well as the landscape and visual harm? And do those benefits justify granting permission for development which (on the Council's case) is in breach of development plan policy? When assessing this 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 that some level of landscape and visual harm, and harm to ecological interests, is acceptable in order to meet the Council's housing needs.

**Strategic considerations –** 



[REDACTED]

**Costs Risk**

49. The Appellant has already submitted an application with the appeal for an award of full costs. Given that the appeal is listed for a 4 day Inquiry, the Appellant is likely to be represented by leading counsel, and (at the moment) they are likely to have to call a5 witnesses, the costs involved are likely to be substantial.

50. In my view, it is extremely likely that an Inspector would make a costs award in respect of reason for refusal 2 and 3. [REDACTED]

[REDACTED]

[REDACTED]

**Conclusion**

53. In conclusion my advice is that the Council should:

- i. Withdraw reasons for refusal 2 and 3 at the earliest opportunity;
- ii. If so advised by Ms Murphy, give consideration as to whether the reason for refusal 4 needs to be redrafted;
- iii. If it does withdraw reason for 2 and 3 consider where the planning balance lies in light of that change in circumstances and, ultimately, give serious consideration as to whether it wishes to continue to defend the appeal.

**ROBERT WILLIAMS**

**Cornerstone Barristers**

**24 January 2018**

