Planning Application reference BH2023/03236
Unit 2, Home Farm Business Centre, Home Farm Road, Brighton BN1 9HU

ADVICE

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1. I am instructed by Legal Services, Brighton & Hove City Council (the "**Council**") to advise on the relevance of the public sector equality duty to the above planning application (the '**Application**') which is a retrospective application for 'the permanent retention of a previously approved temporary extension' at Unit 2 ('the Site'). I understand that the extension had been granted planning permission on 4 September 2018. The 2018 Permission was subject to conditions including a condition that the approved temporary extension be removed from the Site 'on or before 5 years from the date of the permission'. The Application seeks to make the temporary extension permanent.

2. I am instructed that the Applicant is an international company which specialises in aerospace and technology and it is understood that the Site is used for the manufacture of component parts that form weapons that are exported abroad. There is no suggestion that this activity is currently in breach of any licensing or other regulation.

3. Officers prepared an initial report to Committee which is in the public domain. Since then, officers have given further consideration to the equality impacts of the development and have produced a document entitled "General Equality Impact Assessment Form" which advises further as to a number of matters relating to section 149 of the Equality Act 2010. A number of considerations in that report were not addressed in detail in the original officer report to Committee. Nonetheless, the officer recommendation in an updated report remains that "the retention of the extension on a permanent basis is considered acceptable, and to accord with the development plan and other material considerations". I am asked to advise as to the extent to which public sector equality duty matters are relevant to members' decision whether to grant planning permission.

4. From the evidence and instructions with which I have been provided, I understand that the existing use of the site has resulted in areas neighbouring the Application site becoming sites of protest. There has at one point been a "peace camp" and I understand that there

have been protests and occasional skirmishes outside the factory over the past few years. I understand that these protests might have impacts on highways and policing in addition to the community impacts I address below. I have seen reference to the continued use of the site heightening tensions between communities of one race or religion and another and to risks of exacerbating racially or religiously motivated crimes.

Summary Advice

5. In summary, the Council must have due regard to the equalities impacts of the development. That duty arises pursuant to section 149(1) of the Equality Act 2010 (the Public Sector Equality Duty or "PSED") and section 70(2) of the Town and Country Planning Act 1990, Most relevantly the PSED imposes a duty on the Council to pay due regard to the need to eliminate discrimination, harassment, and victimisation (s.149(1)(a)) and to the fostering of good relations between persons of one race and another, or of one religion and another (s.149(1)(c)). In my opinion, it is open to Council members to conclude, as a matter of their planning judgment, that the granting, and perhaps also the refusing, of this application for planning permission, will have impacts which are relevant to the Public Sector Equality Duty. For example, as a matter of their planning judgment, members may conclude that approving (or refusing) the application is capable of exacerbating tensions within the community in ways that might lead to an increase in discrimination, harassment, victimisation and to the detriment of fostering good relations between people of one race and another, or one religion and another.

6. If the Council takes the view that there are matters of that kind which are material to the planning application, then it is for members to give such weight to those matters as they consider appropriate in the exercise of their planning judgment, subject to basic constraints in public law terms including that they must act rationally and fairly. It is, in principle, open to Council members to take the view that relevant impacts on equality are of such concern that they outweigh other considerations in the planning balance such that planning permission should be refused on grounds of those impacts. There is no reason in law why members should not give decisive weight to equalities considerations, nor any reason why they may not give very low weight to them.

7. Members should be conscious that if they refuse planning permission they would be departing from the recommendation of officers who, expressing their professional judgment in the officer report, have recommended that the application should be granted planning permission. I note that that recommendation was made prior to the more detailed consideration of equalities impacts which has now been undertaken. I note that the officer report has been updated inter alia to take account of equalities issues, but despite acknowledging that the weight given to such matters is for members, the recommendation remains to grant planning permission. If members do depart from the officer recommendation, they should carefully consider, and in my view (though there is no statutory obligation to do so) should seek to articulate brief reasons for departing from the officer decision so as to assist officers in drafting any formal reason for refusal. Members should be conscious that any decision to refuse planning permission might be appealed to the Secretary of State. An appeal might be decided at an inquiry given the controversy and scale of objection. At inquiry a planning inspector would form his or her own independent judgment on the planning balance. The Council would need to defend its decision, and in circumstances where members had departed from the recommendation of officers, it would be appropriate for members themselves to give evidence and to explain at an inquiry the judgment they had reached and the evidential basis of the concerns which had informed that judgment. If the Inspector considered that the decision to refuse planning permission that was not properly supported by evidence or had not been reasonably open to the Council, he might award costs against the Council.

Detailed Advice

8. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Section 70(2) of the Town and Country Planning Act 1990 requires that the Council, in dealing with an application for planning permission, to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.

9. Section 149 of the Equality Act 2010 provides:

> **149 Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need 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 persons who do not share it

Officer Advice

10. Members have the benefit of a Committee Report prepared by planning officers and a "General Equality Impact Assessment Form" dated 30 April 2024 which has been prepared by five officers including those responsible for equality and diversity and for planning.

11. The Committee Report to which I have been referred is thorough and careful and sets out a wide range of matters considered to be material to the planning application. Council members should have regard to each of them. The original Officer Report summarised the application as follows:

> 4.1. Planning permission is sought to retain an extension to the industrial buildings that was granted a temporary, five year permission in 2018.
> 4.2. The extension is located to the rear of the site in the north-western corner and forms a subservient addition to the main building. It is set back some 21m from its front façade, and measures 15m x 15m with a pitched roof to 7.6m in height and eaves to 5.2m in height. It has a large roller shutter door in the frontage measuring 4.5m in height and 4m in width.
> 4.3. The main building is some 10.4m in height, with eaves sloping down to 7.6m adjacent to the extension the subject of this application.
> 4.4. For the avoidance of doubt this application seeks approval for operational (built) development. No change of use is sought.

12. Paragraph 11.2 of the original Officer Report advised that there is no indication that those with any protected characteristic would be disadvantaged by this development, including through increased discrimination and harassment. However, having subsequently reconsidered the matter in combination with equality and diversity officers, the "General

Equality Impact Assessment Form" reflects more detailed consideration of the impacts of the development pursuant to section 149 of the Equality Act 2010 and concludes that there are potential impacts from the development relevant to PSED.

13. The General Equality Impact Assessment Form is not a statutory form, but has been designed by the Council as a means of ensuring that the equalities implications under the public sector equality duty are thoroughly addressed. It asks a long list of questions addressing each of the protected characteristics under the Equality Act 2010. The form explains:

> "Consultation and publicity has been undertaken in accordance with the requirements of the Town and Country Planning (Development Management Procedure) (England) Order 2015 resulting in responses from 600 individuals along with national and local politicians and three non-statutory consultees."

14. At 6.3 the form asks "Does your analysis indicate a disproportionate impact relating to ethnicity?

> Experience of community tensions around the current operation of the premises (recent protest camp) and the consultation responses to the retention of the extension indicate that the decision on this application could have a disproportionately negative impact on minority ethnic groups in the city, principally Jewish, Israeli, Palestinian, Muslim and Arabic speakers.
>
> … Figures relating specifically to anti-Semitic and anti-Islamic hate crimes are not separated out but there is anecdotal evidence that Brighton & Hove has experienced a rise in antisemitic and anti-Islamic hate incidents, as well as demonstrations calling for a ceasefire in Gaza/Israel hostilities. Representatives of local Muslim and Jewish communities have reported to elected members of the council that their respective communities feel increasingly unsafe, isolated, and fearful

15. A further question asked is

> "Does your analysis indicate a disproportionate impact relating to Religion, Belief, Spirituality, Faith, or Atheism?" The answer given is "yes" and the same considerations as above are detailed.

16. At 6.11 the form asks "Does your analysis indicate a disproportionate impact relating to Expatriates, Migrants, Asylum seekers, Refugees, those New to the UK, and UK visa or assigned legal status? (Especially considering for age, ethnicity, language, and various intersections)" and again the answer is "Yes".

17. At 6.18 a question is asked about cumulative impacts and the answer given is that

> "While the nature of products manufactured on the site is not within the control of the planning process, the decision on the application could have a disproportionately negative impact on minoritised ethnic and religious groups in the city, principally Israeli, Palestinian, Jewish, Muslim, and Arabic speakers."

18. The form then sets out some crime statistics and then states:

> "The City has a strong Stop the War campaign and has seen significant protest against the L3 Harris facility for a number of years, particularly since information was put online alleging that parts manufactured in Brighton had been used in bombs against Palestinians.
>
> Action against the site has increased since the application was submitted, particularly as the submission coincided with the conflict in Gaza. There have since been regular protests across the city in support of both Palestine and Israel.
>
> The decision on the planning application could also have implications for those employed at the site if it is refused and the operator decides to move the business elsewhere, noting that the ward has 9.22% people of working age being involuntarily out of work (compared with 9.39% for Brighton and Hove)."

There is then a summary box in which the following is written:

> "The determination of this application is considered to potentially result in negative impacts on minoritised ethnic and religious groups in the city, principally Israeli, Palestinian, Jewish, Muslim, and Arabic speakers.
>
> Section 149(1) of the Equality Act 2010 provides:
>
> 1)A public authority must, in the exercise of its functions, have due regard to the need 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 persons who do not share it.
>
> Section 149(1)(a) and (c) of the Equality Act 2010 are considered to merit particular consideration in determining the planning application… in view of the potential impacts as set out above.

In (*R (Hough) v SSHD* [2022] EWHC 1635 Lieven J considered the grant of a planning permission which extended the period of use of an asylum accommodation centre from one year to five years. The judge held that in granting planning permission there had been inadequate assessment of the public sector equality duty ("PSED") as part of the decision to grant planning permission . The judge held at paragraphs 106-7:

"In my view there has been a failure to have proper regard to the PSED. The caselaw establishes that whether the s.149 duty has been complied with involves a highly fact sensitive inquiry, both into the nature of the decision and the form of the consideration of equality issues. The nature of the development here is one that raises very obvious issues under s.149, in particular relating to potential victimisation and harassment under s.149(1)(a), and the **fostering of good relations under s.149(c).** The provision of a large amount of segregated accommodation for male asylum seekers on the edge of the town has **the obvious potential to create tensions within the local community.** This risk was set out in the EqIA and I accept that the Minister must therefore have been aware of the general issue.

However, there is a very significant difference between a development which is proposed to continue for two months and one for five years. This must especially be the case where the issue is developing community relations, as opposed to some physical impact which will vary little over time. Pressure on community services, for example on the local GP and community health services and possibly on the police, will be very much greater over a prolonged period than only two months. **The potential for impact on community relations are wholly different over the much longer period.** In the documentation before the Minister, there is no consideration of those longer-term impacts on the community relations. There is no consideration of the ability of local health services to manage this population over the much longer period, and how that situation might impact on issues relevant to s.149."

In the case of this application, there is a proposal to make permanent what was originally a temporary permission, and so bears some similarity to the *Hough* case in that respect, albeit different in that the wider use of the site would remain lawful if permission for the operational development of the extension was refused. Also, as in Hough, there have already been community tensions arising from the existing use as summarised above and it is considered there is potential for those to continue and potentially to worsen. That is a factor relevant to section 149(1)(c) of the Equality Act 2010 (fostering good relations between different groups). There is also considered to be the potential for victimisation and harassment to be exacerbated by a grant of planning permission (section 149(1)(a). It is also to be noted, however, that a refusal of planning permission may also have consequences of that nature.

It is for the planning committee to consider the weight it gives to these factors in the overall planning balance.

19. In my view the General Equality Impact Assessment Form is thorough and properly addresses the relevant considerations under the Equality Act 2010. It is not of itself dispositive of the section 149(1) duty, it is part of that process. It will still be for members when considering the planning application to take account of the PSED. However it provides a sound basis upon which Council members may exercise their planning judgment and with confidence discharge their duties under section 149(1) of the Equality Act 2010.

The Decision for the Council

20. I have set out above the duty of the Council to determine the application in accordance with the development plan unless material considerations indicate it should be decided otherwise. Members are also obliged to have regard to the development plan and other material considerations when dealing with the planning application.

21. As to the development plan, I have not been asked to consider any specific provisions, but from a brief review of the City Plan Part 1, I note that Strategic Objective 20 provides:

> SO20 Contribute towards reducing inequalities experienced by different groups within the city and recognise the special needs of younger people, older people, disabled people, lesbian, gay, bisexual and trans people and black and minority ethnic people, gypsies and travellers, refugees and asylum seekers and people of different religions and belief in the provision and improvement of accessible and appropriate community facilities, healthcare, education, housing, safety and employment.

22. Whether or not a particular consideration is material is a matter for the court: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 per Lord Keith at p.764. Subject to *Wednesbury* unreasonableness, however, it is a matter for the decision maker to decide what weight should be accorded to a material consideration: *Bolton v Secretary of State for the Environment* [1991] J.P.L. 241; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; *R. (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] 2 W.L.R. 1173. It is well established that the PSED is a material consideration in the determination of a planning application.

23. The principles governing the application of the PSED are set out in *R (Bridges) v Chief Constable of South Wales* [2020] 1 WLR 5037 §§174-181. The courts have repeatedly held

that the PSED is a not a box-ticking exercise; what matters is that the duty is satisfied in substance (*Bridges* §175(2)). The PSED involves a duty of inquiry (*Bracking* § 26(8)(ii); *R (Edward Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058 at §§ 179-181) which requires the decision-maker to be properly informed before taking a decision and to acquire relevant information if it is not already available. There is a duty to have regard to the *need* to take steps to gather relevant information in order that it can properly take into account matters relevant to the point of discrimination in issue (per *R (Brown) v SSWP* [2008] EWHC 2062 at §85). The judgment of the Divisional Court in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] H.R.L.R. 13 and the Court of Appeal in *Bracking* refer to *SSES v Tameside MBC* [1977] 1 A.C. 1014 as the key statement of the nature of the duty of inquiry, namely that the decision maker *'must not only ask himself the right question but ''take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly*"' (at page 1065B). Further, as explained in *Hurley* at §78:

> '…the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.'

24. Where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high: *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin) at §62.

25. In my view, the Council has now, through the preparation of the General Equality Impact Assessment Form complied with the "duty of inquiry". It is evident that subsequent to the preparation of the original Committee Report, careful consideration has gone into the preparation of that form with the input of several officers. The form is not necessarily the end of the process: members may still have regard to objections and other materials which are before them, but the form provides a helpful and sound basis on which to determine the equalities impacts of the development.

PSED and Planning Applications

26. In order to explain the advice above that it is legally open to members to give decisive weight in the planning balance to equality considerations, it may be helpful to members to

consider some of the decisions of the High Court concerning land use and equalities impacts.

27. The General Impact Assessment Form refers to one judgment of the High Court in particular which is the case of *R (Hough) v SSHD* [2022] EWHC 1635 (Admin) which concerned a challenge by judicial review to the grant of planning permission (by special development order) of planning permission for an asylum accommodation centre at Napier Barracks near Folkestone. Planning permission was originally deemed to be granted for one year, but the Home Office wanted to seek a further five-year permission towards the end of the initial one-year period. It was held that in granting a five year permission, the Secretary of State had unlawfully failed to have regard to how the longer duration of use could exacerbate issues relating to tensions with the local community, pressure on local service, risks related to harassment and victimisation. The General Equality Impact Assessment Report provides helpful advice as to considerations that may be drawn from that decision.

28. In *R. (on the application of Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin)*:* planning permission was sought for the partial demolition and rebuild of an estate. No regard was had to the impact on elderly residents of losing their homes and whether the impact was greater than those who did not share that protected characteristic. The outline planning permission quashed. At paragraph 47 of his judgment Lewis J considered an argument in defence of the planning permission that the same outcome was "highly likely". He held:

> In the present case, I cannot say that it is highly likely that the outcome for the claimant would not have been substantially different if the public sector equality duty had been complied with, that is, if the matters concerning the impact of loss of existing homes on the elderly and the disabled in particular had been drawn to the decision-making committee's attention. It is certainly possible that the committee might still have concluded that the benefits of the proposed development overall outweighed any potential disadvantages. That would have been a matter for the committee to assess. However, this was a proposal which was controversial. The ultimate vote was five in favour of the grant of outline planning permission and four against. There would be other options open for addressing the problems of the estate including re-furbishment rather than demolition. In all the circumstance, it cannot be said that it is highly likely that the outline planning permission would have been granted in this particular case if the breach of section 149 of the 2010 Act had not occurred. In those circumstances, and given the absence of any other justifiable reason for refusing

> a remedy, the appropriate course of action is to quash the outline planning permission granted on 30 November 2017 for the redevelopment of the application site."

29. Lewis J's decision illustrates the principle that the weight to be given to various factors within the planning balance was exclusively for the planning committee. The judge was prepared to accept that if proper regard had been had to equalities impacts, then the decision could have been different: that is to say that planning permission might have been refused rather than granted on the basis of the weight given to equalities considerations when properly weighed in the balance. The case is thus an illustration of the principle that matters of weight are for the Council and that equalities impacts can be decisive in that balance. Provided that they have regard to all material considerations, the weight that they give to each one, is a matter for them.

30. In *R. (on the application of Danning) v Sedgemoor DC* [2021] EWHC 1649 (Admin): Steyn J held that there had been an error of law in the failure to fulfil the section 149 duty on the basis of "a complete absence of evidence" in respect to Council's consideration of the impact of proposed changed of use from a pub to residential dwelling on persons with protected characteristics (at [56]). The judge held that if that had been the only error, then on the facts of that case she would not have quashed the decision, because in circumstances where nobody have objected to planning permission on the basis of an equality impact issue, there was no indication that the matter would have changed the mind of the Council.

31. In *R. (on the application of Williams) v Caerphilly CBC* [2019] EWHC 1618 (Admin): Claimant successfully challenged decision to close a leisure centre. The Court held that the Council failed to have regard to impact of closure of the leisure centre on elderly and disabled persons. In that case the Council submitted that the decision should not be quashed because taking account of the PSED would make no difference to the outcome. Swift J rejected that submission at [37] holding:

> "Nor do I accept the Council's no difference submission. The present case is not one where that no difference submission is supported by an after the event assessment: compare *R(Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] 1 WLR 3791 per Sir Colin Rimer at paragraphs 87 – 108, in particular at paragraphs 92 and 107 – 108. I do not consider there is any secure basis on which I could reach a no

> difference conclusion. The public sector equality duty is directed to the decision-making process. The premise of the duty is that process is important because it is capable of affecting substantive outcomes. In the present case there is nothing that gives me sufficient confidence that compliance with the public sector equality duty would be without purpose.

The judge's reasoning here is an illustration of the principle that the weight to be given to that factor is a matter for the decision-maker and that equalities considerations are "capable of affecting substantive outcomes".

32. *LDRA Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 950 (Admin) concerned the decision of a planning Inspector on appeal to grant planning permission for an on-shore office and warehouse building at the car park to serve as a facility for an offshore windfarm. There were a range of issues at inquiry including nature conservation, heritage impacts, flood risk etc which all fed into the overall planning balance. Lang J was not satisfied that Inspector had any regard to the impact on disabled people of loss of car park used to access the River Mersey. Planning permission was quashed. Lang J held:

> "In this case I am unable to accept Mr Whale's submission that I should not quash the decision because this was only a sub-issue, not a main issue in the appeal, and if the Inspector had performed his statutory duty, the decision would have been the same in any event. In my view, the evidence of disadvantage to disabled persons was significant, and the Inspector failed to recognise its importance. I cannot say with confidence that the Inspector's conclusion as to the weight to be accorded to the factor of coastal access would have been the same if the Inspector had properly applied his mind to the considerations set out in section 149. Moreover, the section 149 duty is concerned with the manner in which decisions are made, not merely outcomes"

The Court was accordingly of the view that proper consideration of the public sector equality issues could have resulted in a different outcome: it could have been the difference between granting and refusing planning permission. That seems to me to be a further illustration of the principle that matters of weight are for the decision-maker and that equalities considerations could be decisive.

Irrelevant Matters

33. Council members must not have regard to irrelevant matters and must act fairly in determining the planning application (as in the exercise of any of the Council's functions: *Wheeler v. Leicester CC* [1985] 3 WLR 335). It is important given some the nature of some of the objections that the Council takes care not to have regard to matters which are not relevant to the determination of the planning application. The Committee Report and the General Equality Impact Assessment Form provide a useful steer as to the relevant considerations. By way of further example, the identity of the applicant should be treated as irrelevant applying the principles in *R (Wright) v. Resilient Energy* [2019] 1 WLR 6562 that an issue will only be material to a planning decision if it (1) fairly and reasonably relates to the development to be permitted; and (2) is for a planning purpose.

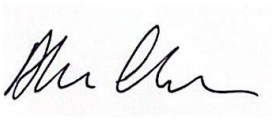
34. Another line of case law establishes that where matters are separately protected by other legislation (particularly private rights) they are usually to be treated as irrelevant: see *R. v Solihull BC Ex p. Berkswell Parish Council* (1999) 77 P. & C.R. 312; *British Railways Board v Secretary of State for the Environment* [1993] 3 P.L.R. 125 and *Vasiliou v Secretary of State for Transport* [1991] 2 All E.R. 77. In this case it seems to me that the question whether or not weapons that may be manufactured at the Application site are or should be granted a license for export is not a matter that is material to the planning application. Those are matters regulated by a separate code.

35. The question of whether "downstream" or indirect impacts may be considered in relation to a planning application is in a state of uncertainty pending the decision of the Supreme Court in *R (Finch) v Surrey Council* [2022] P.T.S.R. 958. As it stands, the judgment of Lindblom SPT in the Court of Appeal at [40] is that indirect effects of a development (in that case the greenhouse gas emissions that might eventuate from hydrocarbon extraction) can be evaluated by a decision-maker to be material to a decision to grant planning permission (at least where the Environmental Impact Assessment Regulations are engaged). However, I consider that is likely to be disrupted by the decision of the Supreme Court. Further, it is strictly a judgment concerned with the indirect effects of EIA development rather than with whether remote impacts downstream are material considerations in an ordinary planning application. I consider it would be legally risky for

the Council to base its decision on giving weight to indirect impacts of the manufacture of weapons at the site and recommend that while as a matter of law there is an argument that such impacts may be relevant, they are in this case remote and should be treated as having no weight in the Council's decision.

Conclusion

36. I have set out a summary at the outset. I am happy to advise further as required.



Alex Goodman KC
Landmark Chambers
16 May 2024
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