

PLANNING COMMITTEE

2.00 PM, 7 February 2018

COUNCIL CHAMBER, HOVE TOWN HALL

MINUTES

REDACTED VERSION AS AGREED FOR RELEASE BY PLANNING COMMITTEE, 7 MARCH 2018

Present: Councillors Cattell (Chair), C Theobald (Opposition Spokesperson), Mac Cafferty (Group Spokesperson), Bennett, Daniel, Hyde, Inkpin-Leissner, Littman, Miller, Moonan and Morris

Officers in attendance: Abraham Ghebre-Ghiorghis, Executive Lead for Strategy and Governance; Liz Hobden, Head of Planning Policy and Major Projects; Paul Vidler, Planning Manager, Major Applications, Wayne Nee, Planning Officer, Jonathan Puplett; Principal Planning Officer; Andrew Renaut, Head of Transport Policy and Strategy; Hilary Woodward, Senior Lawyer and Penny Jennings, Democratic Services Officer

103A Rationale for Consideration of the Report under Exempt Category 5

Before proceeding to consideration of the report the Head of Planning, Policy and Major Projects, Liz Hobden, explained that Counsel's advised course of action formed the recommendations in the confidential report. The report needed to be confidential as it contained legal and other (i.e. specialist witness') advice which would have jeopardised the Council's case at the appeal had the report been made public and the Committee voted to continue to defend the appeal. It was therefore very unfortunate that the report or its contents had been leaked to the "Evening Argus" as some of that detail had now appeared in the public domain as that would damage the Council's position going forward as it could make it apparent to the applicant's that the reasons for refusal were considered to be unsustainable in some instances and at best weak in others.

The Executive Lead for Strategy and Governance, Abraham Ghebre-Ghiorghis, explained further that whilst it was very unfortunate that information intended to be confidential had gone into the public domain it was important that the Committee did not let that influence its decision making. Also, that any information/decision arrived at during the course of that afternoon's decision making was not disclosed outside the meeting at the present time. The Committee might decide to disclose that information either in its entirety or in part in future but any information disclosed or discussions which took place must be treated as being in the strictest confidence until/unless it was decided otherwise.

As circulation of the report before the Committee had been strictly controlled an investigation would take place and would be referred to the Audit and Standards Committee depending on evidence found and whether that course of action was considered appropriate.

In answer to questions by Councillors Miller and Morris, the Executive Lead for Strategy and Governance responded that such instances were rare and that in view of the detailed information Members needed to acquaint themselves with it had been considered appropriate to circulate the report to members in advance of the meeting to allow sufficient time for them to read it and to formulate any questions they might have, rather than releasing it immediately before-hand . Councillor Littman concurred stating that it was important for members to have the opportunity to study complex/detailed paperwork well in advance of a meeting at which a decision needed to be taken.

Following further discussion Members agreed that following the meeting all confidential papers appertaining to their discussions would be collected together for safe disposal by the Democratic Services Officer. As a general point Members requested that the Post Room ensure that sufficient quantities of “confidential waste” sacks were available for individual members on request

Officer Introduction and Presentation

- 103.1. The Committee considered a report of the Executive Lead Officer, Strategy, Governance and Law relating to Land South of Ovingdean Road, Brighton, Public Inquiry (Planning Application ref: BH2016/05530) (circulated to Members only) – Exempt Category 5. The report relating to the planning application originally considered by the Committee at its meeting on 10 May 2017 had been considered in the public domain and as such was not restricted and formed a background document to the report relating to the exempt matter. As such it had been circulated and had also been placed on the Council website as an addendum.
- 103.2 The Committee resolved that the public be excluded from the meeting during consideration of this report as it contained exempt information as defined in paragraph 5 of Schedule 12A, Part 1 of the Local Government Act 1972 as amended.
- 103.3 The Planning Manager, Major Projects, Paul Vidler gave a presentation by reference to location plans, photographs, elevational drawings and aerial photographs detailing the scheme as originally presented to the Committee at its meeting held on 10 May 2017. Outline permission had been sought for the construction of 45 dwellings with associated garages. Parking, estate roads, footways, pedestrian linkages, public open space, strategic landscaping and part reconfiguration of the existing paddocks. The application had included a new vehicular access from Ovingdean Road and junction improvements to Falmer Road. Matters for assessment of the application had included layout, access, landscaping and scale, whilst its

appearance had been a reserved matter, it had been stated within the application that the proposed dwellings would be two storeys in height and that the ridgelines of the properties would reflect the East to West gradient of the site. It had been explained to the Committee that 40% of the proposed units, 18 units would be affordable housing, including one, two and three bed units with an offered tenure mix of 55% social, affordable rent, 10 units and 45% intermediate, 8 units. The positive contributions provided by the scheme set against any potential harm had been considered by the Committee and on a recorded vote the application had been refused on four grounds. The applicants had subsequently appealed that decision which as it stood would be subject to a full Public Inquiry, scheduled to last for 4 days from 24 April 2018. As a result of a case conference held following a conference with the appellant's counsel and further advice received from counsel acting for the council the Committee were now being requested to consider withdrawal of two of its original reasons for refusal.

- 103.4 The Legal Adviser to the Committee, Hilary Woodward, explained that the Committee was 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, Brighton, to consider, should those reasons for refusal be withdrawn, whether the planning balance was 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 to allow the appeal.
- 103.5 It was noted that the Officer recommendation when the application had been considered at the meeting of the Planning Committee held on 10 May 2017, had been that the Committee be Minded to Grant planning permission subject to a s106 agreement. However, the Committee had resolved to refuse the application for the four reasons set out in paragraph 3.2 of the report.
- 103.6 That refusal had subsequently been appealed by the applicants and this would be dealt with by way of a Public Inquiry set to commence on 24 April 2018 and to be held over four days and counsel had been appointed to act on the Council's behalf. At the beginning of December a conference had taken place with the appellant's counsel and subsequently a letter had been sent on their behalf by their agent requesting withdrawal of the ecology and air quality reasons for refusal. A conference had been held with Council's barrister, consultant witnesses and relevant officers in January 2018 at which the reasons for refusal had been discussed. Following that meeting witnesses had been asked to provide their professional view as to whether their particular reason for refusal was defensible and their respective views were set out in the circulated report. Having considered the information provided Counsel had concluded that reason for refusal 1 (Ecology) appeared to be defensible.
- 103.7 Reason for refusal 2 (Heritage). In the witness's professional view, the site did not fall within the setting of either the Ovingdean or Rottingdean Conservation Areas and so could not contribute to the significance of those

conservation areas, Counsel's advice therefore had been that that part of the reason for refusal was "entirely indefensible". Counsel had then gone 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.

- 103.8 His advice had been that it could not, as the remaining part of the reason for refusal was not a free-standing reason for refusal but was tied into that of harm to the conservation areas; there was no policy protection in place to protect the gap between the two settlements; this issue had also not been raised before the previous Inspector. On that basis, the advice of Counsel had been that reason for refusal 2 should be withdrawn in its entirety.
- 103.9 In respect of reason for refusal 3 (air quality), the council's witness had reviewed the information provided in relation to the potential impacts of the scheme on the Rottingdean Air Quality Management Area, (AQMA) undertaking their own modelling of the likely impacts of the development as well as taking into account the latest DEFRA emission factors. The witness had concluded that there was no discernable difference between the modelled NO₂ pollutant concentrations for AQMA without the development in place or with the development in place and fully occupied. In consequence, Counsel had advised that reason for refusal 3 was "entirely indefensible" and that it was his firm view that this should also be withdrawn.
- 103.10 In respect of reason for refusal 4 (landscape), Counsel had advised that reason for refusal appeared to be defensible.
- 103.11 Counsel's overall view was that the merits of the Council's case were weak and that in his view the likelihood of successfully defending the decision to refuse was low and that should the Committee agree to withdraw the heritage and/or air quality reasons for refusal members would also need to reassess and consider where the planning balance lay and whether the benefits of the scheme outweighed ecological interests of the site as well as landscape and visual harm. Members needed to consider whether those benefits justified granting permission.

Questions for Officers

- 103.12 In answer to questions of Councillor Miller relating to potential awarding of costs, the Legal Adviser to the Committee, Hilary Woodward, explained that the advice received from counsel had indicated that should the council decide to proceed with its defence of the appeal for the reasons set out in the decision notice there was a risk of a substantial costs award being made against it.
- 103.13 Councillor Miller also enquired as to whether the minutes of that days' meeting and the decision taken could be released into the public domain. It was confirmed that whilst the Committee could agree to do so subsequently the information on which Members needed to base their decision that afternoon should be treated as highly confidential at present as further

disclosure of that information, details of any decision taken and the rationale for it could compromise the council's position in respect of the Public Inquiry and could also impact on that being put forward by other objectors. Councillor Miller also asked for clarity as to how the Open Space and indoor sports provision, as well as that some of the transport provision would be spent on a crossing at Longhill School across the Falmer Road. The Head of Planning Policy and Major Projects, Liz Hobden, explained that there would be a long term management and maintenance plan for the proposed horse paddocks and public open space area and a contribution of £191,432 would be provided towards open space and indoor sport. The following information had been included in the Additional/Late Representations List" as follows:

S106 Heads of Terms:

21. No development above ground floor slab level of any part of the development hereby permitted shall take place until a scheme setting out highway works to implement the following together with a Stage 2 Safety Audit has been submitted to and approved in writing by the Local Planning Authority. The works shall include:
- a) The proposed main site access from Ovingdean Road which includes a side road entry treatment;
 - b) The provision of a vehicle crossover to serve Plot 1;
 - c) The reinstatement of the redundant vehicle crossover on Ovingdean Road back to footway;
 - d) A right turn lane with a pedestrian refuge at the junction of Falmer Road/Ovingdean Road;
 - e) The provision of parking restrictions and/or measures to prevent parking on Falmer Road and adjacent verge in order to maintain visibility of and from the proposed crossing; and
 - f) The implementation of bus shelters, Real Time Passenger Information signs and Kassel Kerbs at the two bus stops on Ovingdean Road directly opposite the site and the two bus stops closest to the site on Falmer Road.

No part of the development hereby approved shall be occupied until the approved highway works have been carried out in accordance with the approved scheme.

Reason: To ensure that suitable vehicle and pedestrian access provision is provided to and from the development and to comply with policy CP9 of the City Plan Part One and policy TR7 of the Brighton & Hove Local Plan.

S106 Head of Terms - Open Space/Indoor Sport Contribution:

A contribution of £191, 432 towards open space and indoor sport to be spent at:

Parks/Gardens - Kipling Gardens and/or Rottingdean Recreation Ground;

Children's Play- Rottingdean Recreation Ground and/or Happy Valley;

Amenity/Natural Semi Natural - Kipling Gardens and or/Beacon Hill Nature Reserve;

Indoor/Outdoor sports facilities - Rottingdean Recreation Ground and/or Withdean Leisure Centre, Stanley Deason Leisure Centre, Saltdean Lido, Deans Leisure Centre;

Allotments - Ovingdean and/or Hoggs Platt, Hildesland, Windmill Hill.

103.13.1 In answer to further questions it was explained that in this case no s106 transport contribution had been sought - instead a condition would be attached requiring details to be submitted regarding the S278 works which would be undertaken by the developer in lieu of a contribution.

103.14 The Head of Planning, Policy and Major Projects, Liz Hobden, explained that the Committee was not being asked to reverse its decision but to consider the information provided by counsel. It was important to ensure that any information provided to residents and others was provided in consistent manner. Once the Committee had made a decision careful thought would need to be given to what and how relevant information was disseminated reiterating this it was important for all information to be treated as strictly confidential until/unless it was decided otherwise.

103.15 Councillor Littman sought clarification regarding the level of s106 contributions required and a break-down of its constituent elements, also how/whether they would impacted by any changes to the reasons for refusal.

Debate and Decision Making Process

103.16 Councillor Miller referred to the information which was summarised in the report detailing counsel's opinion. He sought clarification regarding the expertise and qualifications of the council's specialist witnesses, also regarding the information summarised by counsel. He considered that it was important for Members to have sight of the advice received from counsel in totality. Other Members echoed that view. Councillor Littman considered that it was important to see the basis on which the assessments had been made as did Councillor Mac Cafferty who considered that it was important to see how the ecological factors had been analysed for example, particularly as those grounds were considered to be defensible and the full rationale for removal of two the reasons for refusal. Full copies of the advice received from Counsel were circulated to Members and a period allowed for them read and consider that information which was collected when the meeting ended in order to ensure its safe disposal.

103.17 Councillor Miller stated he considered that in his view the "original" reasons for refusal had validity and he was particularly concerned that if two of the reasons for refusal were removed that reference to the need to retain a strategic gap would be lost. He recalled that members had placed emphasis on this when the Committee had made its decision in May 2017. In his view that remained highly relevant and that should still be reflected in any reasons

for refusal put forward. Councillor Hyde concurred in that view. Councillor Miller further enquired whether it would be possible to amend the wording of the reasons for refusal to reflect members concerns in this respect. Also, that expert's information provided at the Committee meeting did not appear to have been included in the assessment made by counsel and some of the advice given appeared to be contradictory.

- 103.18 The Legal Adviser to the Committee, Hilary Woodward, stated that the council was likely to be exposed to risk of greater costs if it appeared that additional or amended information was provided, this would undoubtedly be challenged by the applicants. The Head of Planning, Policy and Major Projects, Liz Hobden, stated that although reference had been made to the "strategic gap", it was not considered that this represented a sufficiently powerful ground to warrant refusal on a stand-alone basis based on the advice provided and it would be a risky strategy to do so.
- 103.19 Councillor Miller stated that he remained of the view that concerns in respect of the harmful appearance of the development remained unresolved as did measures to ensure the rare red-star thistle was properly mapped and protected.
- 103.20 Councillor Mac Cafferty enquired whether it would be possible to make the conditions relating to the ecology of the site more robust, if it was accepted that two of the reasons for refusal should be removed.
- 103.21 Councillor Moonan whilst recognising the need for housing was also of the view that it was important to ensure that sufficient environmental protection was in place should the appeal be successful.
- 103.22 Councillor Hyde stated that she remained of the view that all of the reasons for refusal originally put forward should remain in place. Local objectors had provided detailed specialist evidence of their own at considerable cost which indicated that the proposed scheme would be detrimental and she was in agreement.
- 103.23 There was a lengthy debate regarding air quality, namely that the expert had said there had been a substantial reduction in levels of NoX. Having looked at the table included within the report Councillor Miller queried this, in his view the information presented suggested that this was steady and did not constitute a substantial reduction, Councillors Littman and Mac Cafferty concurred in that view. Councillor Mac Cafferty asked questions at length regarding the issues that had been taken into account and assessments made in relation to air quality. Councillor Littman who also had specialist knowledge of this area looked at the information provided in respect of this matter and confirmed that the calculations had been based on the latest Defra guidance. Following their subsequent discussions the committee agreed to remove that reason for refusal.
- 103.24 Councillor C Theobald stated that she remained of the view that the development would be too large would represent over development and she

considered it was important that the overwhelming views of local residents should be respected.

- 103.25 Councillor Morris considered that the case put forward for removal of reasons for refusal 2 and 3 was compelling and that to do otherwise would expose the council to greater financial risk. Councillors Moonan and Inkpin-Leissner were in agreement.
- 103.26 Councillor Cattell, the Chair, stated that she was also in agreement that it would be appropriate for reasons for refusal 2 and 3 to be removed in accordance with the advice given by counsel. At that point no further matters of debate were raised and Members voted as to whether or not reasons for refusal 2 and 3 be removed and the outcome of that vote are set out below. Having determined that matter, the Committee then went on to consider the planning balance and whether to continue to defend the appeal having agreed that the heritage and air quality reasons for refusal be withdrawn.
- 103.27 Councillor Moonan stated that as reasons for refusal 2 and 3 had been withdrawn and the remaining reasons for refusal were weak, she considered that if the council continued to defend the appeal it would simply expose it to on-going financial risk and on that basis she was firmly of the view that it should not do so. Councillors Inkpin-Leissner and Councillor Cattell, the Chair, agreed.
- 103.28 Councillors Miller, Hyde and C Theobald expressed grave concern regarding the position that would arise for the objectors should the council decide not continue to defend the appeal. They considered that having originally voted that the application be refused that position should be maintained and the very real concerns of residents supported. If such a decision was to be taken and the minutes remained exempt that could place residents at a disadvantage. On that basis Councillor Miller considered that the minutes or an extract from of them should be placed in the public domain.
- 103.29 The Legal Adviser to the Committee, Hilary Woodward, advised that whilst Members could decide to make the minutes public at a later stage she would advise against that at the present in advance of the Inquiry/Hearing as release of such information could include information which could disadvantage the council. The Head of Planning, Policy and Major Projects, Liz Hobden, stated that careful thought would be given to how information was provided both to the applicant and to residents, particularly in advance of the hearing, and Members would be provided with a briefing note for their use.
- 103.30 Councillor Inkpin-Leissner observed that it would be appropriate to treat the information provided as confidential at present and for Members to take a definitive decision regarding publication of the minutes at a later stage.

Officer Summing up and Vote

- 103.31 In summing up the Legal Adviser to the Committee, Hilary Woodward, stated that Officers were recommending for the reasons set out in the report and during the course of debate that the Committee agree to withdraw reasons for refusal 2 and 3. They were being asked if that if they agreed to do so and either or both of those reasons for refusal were withdrawn, to consider the planning balance and whether they wished to continue to defend the appeal. The Committee were also being asked, in order to protect the Council's position to agree s106 Heads of Terms (as set out in the original report to Committee on 10 May 2017) and reproduced at paragraph 3.15 of the circulated exempt report should the Inspector be minded to allow the appeal.
- 103.32 At that point no further matters of debate were raised and Members voted as to whether or not reasons for refusal 2 and 3 be removed and the outcome of that vote are set out below
- 103.33 In response to queries raised relating to the position should the Committee vote to remove reasons 2 and 3 for refusal and then on considering the planning balance that they would not continue to defend the appeal that it was possible that the Planning Inspectorate could decide to downgrade the appeal from a Public Inquiry to a Hearing. The Council's remaining reasons for refusal would still stand. Whilst it would be a decision for the Inspector it was likely in view of the number of objections received from local residents and interest groups including Rottingdean Parish Council that these parties would be permitted to put their case to the Inspector including submissions from their own expert witnesses.
- 103.34 A vote was taken and the Committee agreed the recommendations as set out below. Having agreed that they wished a recorded vote to be taken in respect of the constituent recommendations set out in paragraphs 2.1-2.3 the outcome of those votes are also set out below. In respect of the recommendation set out in paragraph 2.4 the 10 Members who were present when the vote was taken voted unanimously that the council enter into a s106 Planning Obligation to include the Heads of Terms set out in paragraph 3.15 of the report circulated to members should the Inspector be minded to allow the appeal.
- 103.35 **RESOLVED** – (1) That the Committee agrees to withdraw reason for refusal 2. (heritage) for the reasons outlined in paragraph 3.9 of the report;
- (2) Agrees to withdraw reason for refusal 3 (air quality) for the reasons outlined in paragraph 3.10 of the report;
- (3) Having Considered the planning balance and whether to continue to defend the appeal having agreed that the heritage and air quality reasons for refusal be withdrawn has decided that the resulting planning balance is not sufficient to continue to defend the appeal; and
- (4) Agrees that the Council enter into a s106 Planning Obligation to include the Heads of Terms set out in paragraph 3.25 of the report should the Inspector be minded to allow the appeal.

Note 1: Recorded Votes were taken as follows:

Withdrawal of Reason for Refusal 2: Councillors Cattell (Chair), Daniel, Mac Cafferty, Inkpin-Leissner, Littman, Moonan and Morris voted that reason for refusal 2 be withdrawn. (Paragraph 2.1 of the report) Councillors Bennett, Hyde, Miller and C Theobald voted that reasons 2 should remain in place. Therefore reason 2 was withdrawn on a vote of 7 to 4.

Withdrawal of Reason for Refusal 3: Councillors Cattell (Chair), Daniel, Mac Cafferty, Inkpin-Leissner, Littman, Moonan and Morris voted that reason for refusal 3 be withdrawn. (Paragraph 2.2 of the report) Councillors Bennett, Hyde, Miller and C Theobald voted that reasons 3 should remain in place. Therefore reason 3 was withdrawn on a vote of 7 to 4.

Planning Balance and Recommendation 4

The Committee then took a vote having considered the planning balance and whether to continue to defend the appeal having agreed to withdraw reasons for refusal 2 and 3. Councillor Cattell (Chair), Daniel, Inkpin-Leissner, Moonan and Morris voted that the council should no longer defend the appeal. Councillors Bennett, Hyde, Littman, Miller and C Theobald voted that the Council should continue to defend the appeal. Councillor Mac Cafferty abstained. Therefore on the Chair's casting vote it was agreed that the council would not continue to defend the appeal. The 10 Members present when the vote was taken voted unanimously to enter into a s106 Planning Obligation to include the Heads of Terms set out in paragraph 3.15 of the report should the Inspector be minded to allow the appeal.

Note 2: Councillor C Theobald was not present at the meeting when the vote took place relating to s106 contributions.

Note 3: Councillor Gilbey had given her apologies for the meeting due to sickness and therefore was not present during consideration or voting in respect of the above application.