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| <u>No:</u> | BH2019/00964 | <u>Ward:</u> | Rottingdean Central |
| <u>Subject</u> | Appealed Planning Application ref. BH2019/00964 – Land at Brighton Marina comprising Outer Harbour, Western Breakwater and adjoining land | | |
| <u>Date of Meeting</u> | 10 February 2021 | | |
| <u>Report of</u> | Liz Hobden, Head of Planning | | |
| <u>Contact Officer:</u> | Carl Griffiths | | |

PURPOSE OF REPORT

The application was submitted to the Council for consideration in April 2019. In the absence of a determination on the application, the applicant exercised their right to appeal against the non-determination under Section 78 of the Town and Country Planning Act 1990 (as amended), in August 2020.

In order for officers to get the necessary authority to defend the pursuant appeal, a report was presented to Planning Committee on 30th September 2020 which recommended that Committee resolve that it would have been minded to refuse the application for the following reasons:

- 1) Phase 2 of the development and the parameters sought under Phase 3 of the development, by virtue of the density, massing, inadequate spacing between buildings, rigid layout and the lack of definition between public and private spaces, would result in a cramped, impermeable, illegible and homogeneous form of development that would represent an unacceptable quality of building design, layout and public realm; and the cumulative views of both phases would not protect or positively enhance the Marina environment, would harm the surrounding townscape, heritage features and the setting of the South Downs National Park, and would thereby be contrary to Policies CP12, CP13, CP14, CP15, DA2, and SA5 of City Plan Part One, Planning Advice Note 04 (Brighton Marina Masterplan), the National Design Guide, and paragraphs 127 and 130 of the National Planning Policy Framework.
- 2) Insufficient information has been submitted to justify why a non-policy compliant level of affordable housing being provided as part of the proposal, contrary to Policy CP20 of City Plan Part One.
- 3) Phase 2 of the development, combined with the parameters sought under Phase 3 of the development, by virtue of the zero provision of private amenity space, the lack of sunlight penetration to the communal amenity spaces and

the inadequate level of children's playspace, would result in unacceptable residential amenity for future occupiers, contrary to Policies CP12, CP13, CP14 and CP16 of City Plan Part One, Planning Advice Note 04, and Saved Policy HO5 of the Brighton & Hove Local Plan.

- 4) The development, by virtue of the inadequate separation distances between Blocks 1 and 2, and Blocks 2 and 3 (Phase 2), would result in an unacceptable level of daylight, sunlight, outlook and privacy to future occupiers, failing to provide an adequate standard of accommodation, contrary to Policies DA2 and CP12 of City Plan Part 1, paragraph 127 of the NPPF, and Saved Policy QD27 of the Brighton & Hove Local Plan.
- 5) The development by virtue of the inadequate levels of cycle parking within Phase 2 and the lack of dedicated accessibility for cyclists across the breakwater would fail to promote safe, sustainable modes of transport, contrary to Policies DA2 and CP9 of City Plan Part 1, Saved Policies TR7 and TR14 of the Brighton & Hove Local Plan, SPD14: Parking Standards, and paragraphs 108 and 110 of the National Planning Policy Framework.

Planning Committee subsequently agreed the officers' recommendation based on the aforementioned putative reasons for refusal.

This report seeks the Committee's agreement that in response to the additional information received since the Planning Committee's decision of the 30 September last reasons 2) and 5) as set out above should not be pursued at the upcoming Planning Inquiry.

1.0 RECOMMENDATION

1.1 That the Committee agrees that the following putative reasons for refusal shall not be pursued by the Council in relation to appealed application ref. BH2019/00964 :

- 2) Insufficient information has been submitted to justify why a non-policy compliant level of affordable housing being provided as part of the proposal, contrary to Policy CP20 of City Plan Part One.
- 5) The development by virtue of the inadequate levels of cycle parking within Phase 2 and the lack of dedicated accessibility for cyclists across the breakwater would fail to promote safe, sustainable modes of transport, contrary to Policies DA2 and CP9 of City Plan Part 1, Saved Policies TR7 and TR14 of the Brighton & Hove Local Plan, SPD14: Parking Standards, and paragraphs 108 and 110 of the National Planning Policy Framework

2.0 BACKGROUND

- 2.1 A detailed description of the proposed development, its location, the background to the application and representations received can be found in the officer report accessed via the following link:
<https://present.brighton-hove.gov.uk/mgChooseDocPack.aspx?ID=10239>.
- 2.2 Following the committee resolution on 30th September, the appellant intimated that further information would be submitted to address and overcome the two putative reasons for refusal to which this report relates.
- 2.3 On 8th December 2020, the appellant submitted 'Brighton Marina Outer Harbour Development - Cycle Parking and Access' note (ref: 262282-71) which sought to overcome the reason for refusal relating to the cycle parking and access.
- 2.4 On 1st February, the appellant submitted detailed viability correspondence and supporting documentation which sought to overcome the reason for refusal relating to affordable housing.
- 2.5 No further public consultation was undertaken, however additional input was sought from the Council's appointed viability consultants, the District Valuer Service (DVS), and the Council's Transport team. These responses are set out below.

District Valuer Service (DVS)

- 2.6 "I write further to your recent request to summarise the development viability position in relation to the planning applicants recently agreeing to incorporate the S106 surplus of £6,552,236 into the Phase 3 assessment to provide additional affordable housing / Social Rent tenure units over and above the 15% provision already agreed with the planning applicant.
- 2.7 The planning applicant has agreed that 10% affordable housing / Shared Ownership units will be provided in Phase 2.
- 1) The S106 surplus of £6,552,236 is to be index linked
 - 2) The £6,552,236 relating to the S106 surplus can either be apportioned on a unit basis - $\text{£6,552,236} / 1,000 \times \text{units}$ equates to approximately £6,552.23 per unit Phase 2 = £3,145,073.40, and Phase 3 = £3,407,162.60.
Total = £6,552,236.
 - 3) Alternatively as Phase 2 comprises of 480 units (48%) and Phase 3 = 520 units (52%), you can calculate the apportionment on a percentage basis as follows 48% of £6,552,236 = £3,145,073.28, and 52% of £6,552,236 = £3,407,162.72.
Total £6,552,236.
- 2.8 Whilst the bases of apportionment are very similar the calculation will need to be agreed between the parties.

- 2.9 To protect the Local Authority's' position if the Stage 3 scheme is not going to be built out, the S106 agreement will need to incorporate a provision for this which can state an agreed time period that the payment of the Phase 2 surplus sum of approximately £3,145,073.40 (to be index linked) should be paid by.
- 2.10 Obviously if the Phase 3 scheme is not built out then the apportioned S106 surplus sums/affordable housing for the Phase 3 scheme will not be provided.
- 2.11 There also needs to be a trigger relating to the Phase 2 - 10% affordable housing provision and when that is to be provided.
- 2.12 Having regard to my comments above and as stated in my earlier emails today there are a number of matters for you to agree with the planning applicant/agents and incorporate into the S106 agreement which can be summarised as follows;
- a) Apportionment of the S106 surplus of £6,552,236 (index linked) between Phases 2 and 3
 - b) Time period that the Phase 2 surplus monies are to be paid. i.e. If Phase 3 construction has not commenced within say 12 to 18 months of the Phase 2 scheme commencing then the payment of the Phase 2 apportioned surplus has to be paid. The Council may also wish to incorporate a provision that if the monies are not paid then the Phase 2 scheme is put on hold until payment is made.
 - c) Trigger for the Phase 2 surplus to be paid. i.e. commencement of Phase 3 construction within 12 to 18 months of the Phase 2 scheme, or other such time period agreed with the planning applicant
 - d) The trigger for the viability assessment / review of the Phase 3 scheme will also need to be agreed.
- 2.13 As previously stated you are strongly advised to discuss the above with the Local Authorities Legal Department and take legal advice prior to this matter being agreed and incorporated into a S106 agreement.”

Transport and Highways

- 2.14 “The Council's Transport team were consulted on the revised proposals and their response was as follows:

Further consideration of these matters has taken place, following submissions by and discussions with the applicant, and they have made the following revisions by taking into account relevant guidance and advice which includes LTN1/20, London Cycle Design Standards and manufacturers' specifications. These are incorporated in a comprehensive technical note.

- 1) In order to meet the minimum provision of 510 long-stay cycle parking spaces for Phase 2, as set out in Supplementary Planning Document 14

(SPD14), the applicant has reviewed the previous provision of 300 cycle parking spaces. They have now increased provision and proposed a revised number (512 spaces) comprised of a combination of Josta tiered stands and Sheffield stands on the ground floor of Block 1. They have also illustrated the access routes within the Marina to and from the cycle parking and the access routes within the buildings where the spaces are located.

- 2) The issue of access and safety along the Marina breakwater to and from the site, especially applied to a short section where it narrows adjacent to the proposed development. The applicant has considered and provided indications of how this route area could be designed in order to comply with the principles set out in LTN1/20 and the wider design of the public realm within the site, using certain materials and signing. It is therefore considered appropriate that the detail required could be secured via a planning condition, should the appeal be allowed.

- 2.15 In conclusion, in overall terms, the revised proposals put forward by the applicant are therefore considered reasonable and adequate enough to address the reason for refusal based on cycle parking and access routes agreed by Planning Committee in September 2020.”

3.0 ASSESSMENT

Affordable Housing

- 3.1 The second putative reason for refusal agreed at the 30 September Committee states the following:
 - 2) *Insufficient information has been submitted to justify why a non-policy compliant level of affordable housing being provided as part of the proposal, contrary to Policy CP20 of City Plan Part One.*
- 3.2 City Plan Part 1 Policy CP20 requires housing development of over 15 units to provide 40% affordable housing. The 40% target may be applied more flexibly where the council considers this to be justified, as set out in the policy. Such considerations include the financial viability of developing the site (as demonstrated through the use of an approved viability model), which is of particular relevance here.
- 3.3 Planning Advice Note 04: Brighton Marina Masterplan notes that varied tenures will be encouraged in accordance with the results of the Housing Needs Survey, as well as a greater proportion of social rented to shared ownership in the affordable housing element.
- 3.4 In the original submission, the applicant proposed 72 affordable units (15% of the total number of units) within Phase Two comprising all Shared Ownership (S/O) units along with a *minimum* of 15% (by unit) within Phase 3, also all comprising S/O units.
- 3.5 Given that the affordable housing provision proposed fell below the CP20 target of 40%, a Financial Viability Assessment (FVA) was submitted as part of the

application. The FVA summarised that the maximum amount of affordable housing that the scheme could provide was 6% (all shared ownership).

- 3.6 The Council engaged the District Valuer Service (DVS) to undertake a formal review of the FVA. Following the initial review and discussions with the LPA, revisions were made to the affordable housing offer in order to ensure that they better reflected the Council's housing needs.
- 3.7 As a result, the applicant made a revised affordable housing proposal comprising 10% Shared Ownership units in Phase 2 along with 15% Social Rented units in Phase 3 – i.e. a 12.5% affordable housing provision across the site. As part of this proposal, a review mechanism would be triggered prior to the implementation of Phase 3 with any additional affordable housing being provided as additional Social Rented housing over and above the 15% baseline provision in Phase 3.
- 3.8 As noted in the September committee report, the applicant's Financial Viability Assessment was reviewed by the DVS who disagreed with numerous assumptions and concluded that the proposed affordable housing scenario would have generated a surplus of approximately £3m. However, it was also highlighted that this surplus was mainly generated from ground rents which have since been discounted from viability practices. Nevertheless, as part of the adopted CIL regime, the application site is identified as being nil-rated for CIL meaning that no CIL payment would be required for the development as proposed. With the adoption of CIL, the LPA would thus be unable to secure the s106 tariff based and infrastructure contributions which had been modelled as part of the affordable housing scenario, and the appellant would not be required to pay them.
- 3.9 The total sum apportioned to S106 contributions within the FVA, and not able to be secured under the CIL regime is £6,552,236. Given that the appellant would no longer be required to pay these monies through the s106, and they had not been modelled into the viability assessment, officers had to conclude that the affordable housing proposed did not represent the maximum reasonable level in accordance with Policy CP20. Officers' recommendation to refuse the application on this basis was subsequently endorsed on this point and the committee resolved it would have refused the application partly on this basis.
- 3.10 Since the date of the committee resolution, officers and the appellant have re-engaged with a view to addressing the outstanding surplus and ensuring that it is used to provide additional affordable housing. Further viability work was undertaken by the applicant and reviewed by DVS with a view to agreeing what level of additional affordable housing could be provided from the £6.5m surplus.
- 3.11 As set out in paragraph 3.7, the affordable housing proposal comprised 10% Shared Ownership in Phase 2 and a minimum of 15% Social Rented units in Phase 3.
- 3.12 It is important to note that Phase 2 would comprise most of the high cost enabling works, including works to the existing cofferdam which must be apportioned to Phase 2. Mainly due to these high construction costs the viability circumstances

are challenging in Phase 2 and 10% provision (Shared Ownership) is considered to be reasonable, in line with DVS advice.

- 3.13 Given the challenging viability circumstances in Phase 2, DVS have advised the Council that the surplus would be most efficiently realised as one sum. The Council would thus get best value by providing additional affordable housing in Phase 3, essentially because by the time the viability review takes place more Phase 2/3 development scheme information will be available to undertake the apportionment of the index linked £6.5m surplus. Accordingly, officers consider that the principle of all of the surplus being allocated to Phase 3 is acceptable.
- 3.14 Having established the principle of the surplus being apportioned to Phase 3, the key issue is then what level of additional affordable housing could be provided by the £6.5m surplus. Based on the affordable housing scheme proposed within the September report, the affordable housing element of Phase 3 would comprise a minimum of 15% Social Rented properties only. In consultation with the Council's Housing team, some target rent levels were established and agreed with the appellant for the Social Rented units which would represent a weekly rent of £90 for 1 beds and £125 for 2 beds (plus £10 towards service charges).
- 3.15 Having agreed these target rents, the viability was reappraised for the entirety of Phase 3 (including the 15% baseline provision) and the output demonstrated that a maximum of 16% Social Rented units could be provided, or an increase of 1% (5 units) over and above the baseline provision. This viability reappraisal was reviewed by DVS and found to be reasonable and robust. The underlying reasons for the £6.5m only generating an additional 1% of affordable housing provision was the low target Social Rents which were only crystallised and modelled subsequent to the September resolution. The low target rents associated with Social Rent units significantly reduce the value of the units and the corresponding value in the viability calculations which equates to the reduced level of additional affordable housing that is generated.
- 3.16 Officers are of the view that securing and fixing an additional affordable housing level of only 1% at this stage of the development process would not be in the Council's interest. DVS have given clear and unambiguous advice to the Council to this effect.
- 3.17 The target rent levels that were modelled into the viability reappraisal are significantly below the LHA rent caps and as such there is substantial head room for these rents to be increased closer to the LHA caps of £184 (1 bed) and £230 (2 bed) as Affordable Rent units. Increased rents would allow for increased numbers of affordable rented properties to be provided in Phase 3 whilst also ensuring that the units remain affordable and accessible to those in housing need.
- 3.18 On this basis, DVS has given clear advice to the Council that the £6.5m surplus should be index linked and then ringfenced to be added to the viability reappraisal which would be triggered prior to the implementation of Phase 3. It is also recommended, in order to allow flexibility and realise the best value for the Council, that the tenure of affordable rented accommodation be amended to allow for the delivery of Social Rent *or* Affordable Rent units. The Council's minimum

baseline position would be protected through a minimum baseline position of 15% of Social Rented units (as appraised through the most recent viability appraisal). Affordable Rents should allow for substantial uplift over and above the 15% baseline, especially taking into account the likely improved market conditions at the time Phase 3 is implemented.

- 3.19 Notwithstanding paragraph 3.13, the £6.5m surplus relates to specifically ringfenced monies from the original FVA that were to be utilised to pay S106 contributions. Officers consider it necessary to protect the Council's position and to ensure that the Phase 2 portion of the £6.5m allocated to S106 contributions within the FVA is not lost if Phase 3 does not come forward. Officers would therefore seek a S106 clause that would require a commuted sum commensurate to the quantum of development in Phase 2 to be paid to the Council if Phase 3 is not implemented within an agreed timeframe. At the time of writing this report, such a mechanism has not been agreed by the appellant; however it is important to note that the final terms of the s106 are part of the decision on the appealed application to be made by the Secretary of State.
- 3.20 Officers are therefore clear that the revised affordable housing proposal has fully addressed the reason for refusal as presented to committee in September 2020. The sole reason for officers concluding that the scheme was contrary to Policy CP20 was the surplus of £6.5m not being secured or incorporated into the viability modelling. This surplus has now been secured for the Council in a manner which would result in the most amount of additional affordable housing, fully in line with professional advice from the DVS. The Council's position is also protected in respect of the relative level of S106 surplus associated with Phase 2. The revised proposals are therefore in accordance with Policy CP20 and officers recommend that this putative reason for refusal is not pursued at the appeal.

Sustainable Transport

- 3.21 The fifth reason for refusal as resolved by members on 30th September 2020 relates to cycle parking and access and states the following:
- 5) The development by virtue of the inadequate levels of cycle parking within Phase 2 and the lack of dedicated accessibility for cyclists across the breakwater would fail to promote safe, sustainable modes of transport, contrary to Policies DA2 and CP9 of City Plan Part 1, Saved Policies TR7 and TR14 of the Brighton & Hove Local Plan, SPD14: Parking Standards, and paragraphs 108 and 110 of the National Planning Policy Framework.
- 3.22 At the time of submission, the proposals for Phase 2 incorporated 317 long-stay cycle parking spaces in the undercroft of the development. This was subsequently revised to 300 spaces to allow for greater compartmentalisation of parking, and a wider mix of cycle parking types. The council's Parking Standards require a minimum provision of 510 cycle stands and as such this represented a shortfall of 210 spaces when assessed against Policy TR14 and SPD14 minimum quantity standards.

- 3.23 The appellant has undertaken a design review of Phase 2 and has revised plans to include 212 additional cycle spaces which would exceed the policy minimum. The additional spaces would be provided through two means which are addressed below.
- 3.24 Firstly, two of the flexible units located within the ground floor of Block 1 which were previously identified as providing ancillary residential (C3) floorspace would be amended to provide cycle stores. Revised plans have also illustrated access routes within the Marina to and from the proposed new cycle parking and the access routes within the buildings where the spaces are located.
- 3.25 Secondly, the type of cycle storage in the undercroft areas would be changed with 486 spaces (95%) provided as Josta two-tier racks, and 26 spaces (5%) provided as Sheffield stands. In all, these changes would allow for the minimum policy requirement of 510 spaces to be exceeded.
- 3.26 Officers consider that the proposed changes would sufficiently address the cycle parking element of the reason for refusal without otherwise affecting the acceptability of the development. The loss of the ancillary residential floorspace would not harm the function, vitality or vibrancy of the development as may be the case if commercial space were lost. The use of two tiered Josta racks is considered to be acceptable in order to make the most efficient use of the cycle storage areas and to ensure a policy compliant number of spaces can be provided.
- 3.27 The second part of the reason for refusal relates to access to the development across the breakwater, and in particular a short section where it narrows adjacent to the proposed development. This narrow section would have to accommodate both cyclists and pedestrians and in making the previous recommendation, officers were concerned about conflicts between these user groups the resultant impact on safety.
- 3.28 Since the original recommendation was made, Government Guidance Document LTN1/20 (Cycle Infrastructure Design) has been published and sets out industry wide standards and guidance for cycling infrastructure.
- 3.29 The appellant has identified how access across the breakwater could be designed in order to comply with the principles set out in LTN1/20 and the wider design of the public realm within the site, using certain materials and signing. Officers consider that the details submitted by the appellant demonstrate that the design and control measures would mitigate any potential conflicts between pedestrians and cycles to an acceptable extent.
- 3.30 Taking both of these matters into account, officers are fully satisfied that the matters comprised within the reason for refusal have been fully addressed. Conditions requiring revised proposals showing a minimum of 512 cycle spaces along with an access control and design strategy for the breakwater would be added to the list of suggested conditions should the appeal be allowed. The Council's Transport team were consulted on the revised proposals and fully support officers' recommendation on this matter. Accordingly, it is recommended

that the committee resolve to remove this putative reason for refusal from the Council's case at the appeal..

4.0 CONCLUSION

- 4.1 As set out in the preceding sections of this report, there are clear and robust reasons why both of the identified reasons for refusal should not be pursued..
- 4.2 On the matter of affordable housing, officers have been given clear and unambiguous professional advice from the Council's appointed viability consultants, the DVS, that the revised provision would realise the best value for the Council. Officers consider, in line with DVS advice, that the proposed affordable housing provision is acceptable and in accordance with City Plan One Policy CP20 which allows for a flexible approach to the 40% target having regard to financial viability considerations.
- 4.3 On the matter of transport, the two aspects of the reason for refusal have been directly addressed and overcome to the satisfaction of the Council's Transport Team. The revised proposals are in accordance with Policies DA2 and CP9 of City Plan Part 1, Saved Policies TR7 and TR14 of the Brighton & Hove Local Plan, SPD14: Parking Standards, and paragraphs 108 and 110 of the National Planning Policy Framework.
- 4.4 Accordingly, officers consider that there would be no reasonable basis on which the Council could defend the refusal of the application on these grounds. Officers are clear that the removal of these two reasons for refusal from the Council's case would not harm the strength of the Council's case. The fundamental issues which underpin the Council's case relate to the design, massing, density and general overdevelopment of the site and associated impacts. These matters are retained in the Council's case and will not be impacted by the recommendation not to pursue the two reasons for refusal, the subject of this report.

5.0 EQUALITIES

- 5.1 The revised proposals would not raise equality concerns and it is considered acceptable in this respect that the revised proposals are acceptable in line with the submission scheme.