Planning Appeal by Cayuga 011 LLP

Land at former 5 Brighton Road, Shoreham-by-Sea

PINS reference APP/Y3805/W/23/3320322

HEARING 1-2 NOVEMBER 2023

APPLICATION FOR COSTS

1. This is a written application for a full award of the Appellant's costs incurred in pursuing the second of two appeals currently before the Planning Inspectorate (reference above). It is made at the hearing of the appeal in accordance with guidance set out within the PPG Costs Guidance at §027 and following [commencing ID 16-27-20140306], including the timings set out at §035 of that guidance.
2. The basis of the application is that the Council behaved unreasonably in refusing the application the subject of Appeal 2, and that this unreasonable decision led directly to the need to appeal that application, and the associated expense which would – naturally enough – have been unnecessary had the unreasonable conduct not occurred.
3. The Appellant is also critical of the way the Council has conducted the appeal, especially in relation to the planning obligations proposed by the Appellant and submitted with each appeal. The lateness and inconsistency of requests for drafting changes by the Council and WSCC have caused additional and unnecessary costs. This remains a moving picture at the time of writing, but the Appellant puts the Council on notice that it is considering whether to make an application for a partial award at the hearing. This written application concerns only the application for a full award of the costs of Appeal 2.

Factual context

4. The appeal site is a 0.47ha brownfield site in a sustainable location within the Shoreham Harbour Western Arm Regeneration Area (refer to Policy 8 of the Adur Local Plan 2017 and CA7 of the Joint Area Action Plan 2019).

5. Policy 8 of the Local Plan seeks to deliver a 'comprehensive redevelopment' of the area, and for development to 'maximise intensification' in the Western Harbour Arm Character Area (Character Area 7). CA7 contains more detailed guidance in order to deliver the significant change envisaged for the area. It is important to appreciate that CA7 imposes no height or storey limit, requiring only that the lighthouse's setting "be considered" where development exceeds three storeys, while the supporting text expects a "strong edge" to the regeneration area [4.7.68 of the JAAP].

6. The site has been cleared for health and safety reasons, and is ripe for development.

7. The Council acknowledges that the Appellant has engaged constructively with its professional officers and responded to advice, repeatedly tailoring its proposals to the aspirations of the authority (see section 6 of the Planning Statement submitted in support of the application the subject of Appeal 2). Even before Cayuga's involvement in the site, which began in 2021, there had been a series of consultations which the scheme architects were involved with (beginning as long ago as 2017) and which informed the series of proposals which have been put to the authority. The timeline is as follows:-

    - Oct 2017 - Key Stakeholder meeting
    - Nov 2017 - Design Review Panel
    - Dec 2017 - Public consultation
    - Dec 2017 - Planning submission: 136-unit scheme (all flats)
    - Feb 2018 - Public consultation
    - May 2018 - Revised proposals (reduced in height): 86-unit scheme (all flats)
    - Aug 2018 - Application withdrawn
    - Sep 2018 - Public consultation revised scheme: 24 houses and 24 flats
    - July 2021 – Public consultation: 21 houses and 24 flats
    - November 2022 – Design Review Panel (2nd meeting)
    - August 2022 – Public consultation event: amended proposals following liaison with officers and consultees through the application process
    - November 2022 – Public consultation event: revised development for resubmission (21 houses and 24 flats)

8. In August 2021 the application the subject of Appeal 1 was submitted, and was supported by the Council's professional officers. However, the members of the Committee refused permission for two reasons in September 2022, against officer advice. The second of these reasons reflects the need for planning obligations and would not have prevented a resolution to approve in itself as, and this is common ground, the Appellant has always been willing to make appropriate contributions to local infrastructure in accordance with relevant law and policy.

9. Accordingly, the sole concern as expressed by the Council in the first reason for refusal imposed in the application the subject of Appeal 1 was the harm said to be caused to the setting and significance of the Kingston Bucci Lighthouse.

10. In December 2022, after further consultation with officers and further changes to the development, the application the subject of Appeal 2 was submitted.

11. Notably, the changes were made specifically in order to address the Council's concerns as expressed in the refusal of the first application. The Heritage Statement sets these out clearly at §1.3-1.9 and §5.10-5.12. Other matters of concern were also addressed including the affordable housing offer, as set out at §4.12 of the Planning Statement, resulting in an improved offer.

12. On 9 March 2023 the Council refused permission for identical reasons to those imposed on the application the subject of Appeal 1. Hence Appeal 2.

13. No development occurs without finance. The financing of the development of this allocated site and the delivery of development the Plan is seeking to encourage is on a knife edge: not only does the FVA make this clear but delay is itself expensive. And the delays here have been extreme. This obvious fact explains the efforts the Appellant went to avoid the need for appeal, and makes the submission that, had the December 2022 application not been refused it would not have been necessary to proceed with Appeal 1 (then a written representations appeal), plainly right [see the Appellant's letter to PINS 12 April 2023].

14. In accordance with good practice, the Appellant warned the Council that an application for costs would be likely to be made [see the Appellant's letter to PINS of 12 April 2023]. As §7.8 of the Appellant's Full Statement of Case stated:-

> The appellant is likely to make an application for a full award of costs since the conduct of the Council in refusing permission appears to have been unreasonable in at least two

ways: (1) the Council appears to have ignored the affordable housing policy implications of the agreed financial viability assessment; and (2) the Council's conclusion on the planning balance is completely unexplained, and does not appear to reflect the way Members reached their decision to refuse permission against the advice of their professional advisers.

The Council's Statement of Case

15. Despite the warning above, the Council has chosen not to obtain evidence of the committee's reasoning. The reason for refusal is all we have, identical to that imposed on the first scheme, despite the fact material changes were made to the scheme to improve its effect on the setting of the grade II listed lighthouse, while delivering a package of improved benefits required by policies governing development within the regeneration area.

16. Neil Holdsworth (who we understand is responsible for presenting the Council's case at this hearing) was not at the meeting and can not speak with any authority on the question how the decision was taken and what now needs to change to meet the Council's aspirations for the site. Remembering that this is an allocated site in a regeneration area, the Council's decision was perverse.

17. This submission is reinforced by the fact the Council now withdraws the reference to conflict with the policy for provision of affordable housing in the first reason for refusal [SOCG §2.8]. the SoC explains this with a jaw-dropping statement that, despite compliance with policy 21, the failure to meet the target in that policy was given "particular weight" in the planning balance. This makes it quite clear that the Council was making its decision entirely outside the constraints of s.38(6), and that it took an arbitrary decision independent of its duty to take decisions in accord with the development plan unless material considerations indicate otherwise.

18. Further, the Council supports its decision with no specialist advice on the heritage impact of the proposals on the setting and significance of the lighthouse. The Council has not said whether it disagrees with the advice it was given by officers that a "fairly low level of less than substantial harm" would be caused, leaving real doubt over whether the Council reached a sensible balance of harm and public benefit. Nor does the SoC address (despite the acknowledgement in the SOCG) the following:-

a. That the proposals will improve the ability to appreciate the lighthouse from newly created public vantage points [§2.47]; and

b. That fact the Design Review Panel – the Council's own specialist advisers – support the proposals [see §§2.39-2.41] (this is acknowledged but simply avoided by the statement that their advice is not binding); and

c. That every heritage expert or consultee who has looked at this has supported both appeals [see §2.42-2.46].

19. The Council's SoC acknowledges repeatedly that the Council does not have a five year supply of housing and that the 45 dwellings proposed would be a significant contribution and a significant public benefit in that context.

20. However, nowhere does it grapple with the decision making implications of this policy failure. If the approach taken in the SoC was taken by members their decision to refuse was tainted by an error of law (a classic example of an unreasonable decision). It is agreed [SOCG] that the Council's latest figures suggest it has only 3.45 years' supply (as at April 2022). This engages NPPF §11(d) and the presumption in favour of sustainable development.

21. While the development plan remains an important material consideration, the planning balance should be tilted in favour of the grant of permission: permission should be granted unless either the policies of the NPPF itself provide a "clear" reason for refusal (which is not the case here), or the adverse impacts of doing so significantly and demonstrably outweigh the benefits.

The decision to award costs

22. The broad statutory power to award costs is exercised in accordance with the guidance in the PPG [specifically the paragraphs beginning ID16-27-20140306]. The simple test in §30 requires a finding that the Council has behaved unreasonably, and that the unreasonable conduct has directly caused the Appellant to incur costs unnecessarily.

23. The chronology shows that the Appellant behaved reasonably and went to great lengths to secure permission without the need to appeal, but that is not sufficient for a costs award. Hence, the focus of this application is on the Council's conduct and its effects.

24. As §028 of the PPG states, the aim of the costs regime is to:

- encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case
- encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay,
- discourage unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections.

25. The application needs to show clearly how the unreasonable behaviour resulted in unnecessary expense [§032].

Submissions in support of the application for costs

26. The paragraphs above make the case for this application clearly, and it can be seen that the application aligns closely with the aims of the costs regime.

27. The starting point is that this is a site the Council's own development plan requires in order to deliver the uses proposed and the associated infrastructure it brings forward. Not only that but the development plan includes a Joint Area Action Plan – with detailed policies designed to guide investors in an area destined for significant change. Not only that, but it is agreed that the Council cannot identify a sufficient supply of housing to meet the expectations of the NPPF.

28. As a result, the tilted balance in NPPF §11(d)(ii) applies unless the policies of the NPPF itself provide a clear reason for refusal. The Council does not argue that they do but there is no acknowledgement of this in the Council's SoC, nor does the tilted balance appear to have been provided by the Council in refusing permission.

29. The costs of development and the significant benefits it delivers are all agreed. It is also agreed that the affordable housing proposed is policy compliant in both cases.

30. Our planning system is a Plan led system of development management, whereas the Council's decision seeks to thwart the realisation of development required within its own Plan.

31. While the acknowledged (and in the Appellant's view, low level) of less than substantial harm, deserves considerable importance and weight in the planning balance, the Council seeks to preserve to an unreasonable degree the status quo, relying heavily

in its evidence to one particular view of it, a view which is bound to change significantly if the policies of the development plan are to be realised, and which is said by experts to be of secondary importance to its significance as a heritage asset (the more important views being obtained from the water).

32. Turning to causation, the Appellant did all it could to avoid an appeal. It made it clear in its letter of 12 April 2023 that it had hoped to be able to withdraw Appeal 1. It would have done so had the application the subject of Appeal 2 been granted. It is only the costs of pursuing Appeal 2 which are sought, but it is submitted that a full award should be made for the payment of those costs by the Council. Because the Council has acted unreasonably in refusing planning permission for the very same reason as it refused the application the subject of Appeal 1; and because that unreasonable behaviour led directly to the need to appeal.

Harriet Townsend

Cornerstone Barristers

31 October 2023