ACUMEN BUSINESS LAW

Development Control
Hove Town Hall
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Date 10 September 2012
Your Ref BH2012/00782
Our Ref ABL/LAN002-0001
Tel 08458 678 978
Email office@acumenbusinesslaw.co.uk

And by email: planning.applications@brighton-hove.gov.uk

Dear Sirs

Re: Proposed claim for judicial review: Decision to grant planning permission at the Former Ice Rink Site, Queen Square Brighton on 27 June 2012

We are instructed by a coalition of local residents supported by Wykeham Terrace Residents' Association, the Montpelier and Clifton Hill Association and St Nicholas Green Spaces Association (together, "the local residents") in relation to a proposed claim in judicial review against your authority.

Background

On 27 June 2012, the Planning Committee of Brighton and Hove City Council ("the Council") voted to refuse planning permission for the redevelopment of 11B (the former ice rink) and 11 Queen Square ("the Site"). Following further deliberations, the Committee purported to re-resolve to grant permission. The re-resolution was subject to misdirections of law and contrary to basic procedural propriety including the requirements of the Council's own Procedure Rules. Local residents and objectors are aggrieved, they consider that the first resolution to refuse permission remains good and that it is incumbent on the Council to act on that basis.

The purpose of this letter, which has been drafted by counsel in accordance with the Pre-Action Protocol on Judicial Review, is to set out the basis upon which the Council has acted unlawfully and offer you the opportunity to reconsider your position. In this way, it is hoped that further costs of commencing legal proceedings can be avoided. A copy of this letter has also been sent to the interested parties.

The proposed Claimant

The proposed Claimant is a coalition of local residents supported by Wykeham Terrace Residents' Association, the Montpelier and Clifton Hill Association and St Nicholas Green Spaces Association. These groups and individuals from them objected to the planning application.

Details of the matter being challenged

The resolution of the Council's Planning Committee ("the Committee") at a meeting of 27 June 2012 that it is minded to grant planning permission for the redevelopment of 11B (the former ice rink) and 11 Queen Square, Brighton (planning application ref. BH 2012/00782), subject to a s.106 agreement, and various conditions and informatives.

Factual background

Site context and surrounding area

11B and 11 Queen Square, Brighton ("the Site") is located at the northern end of Queen Square. The building at 11B is a former ice rink (until 2003) with planning permission for recreational use. The building at 11 is currently in use as offices.

The Site adjoins the Montpelier and Clifton Hill conservation area to the north and west and is visible from the West Hill conservation area. On one side it backs onto the rear of Wykeham Terrace including a grade II listed building; on the other side it backs onto the churchyard of St Nicholas of Myra, the oldest church in Brighton and a grade II* listed building. From the churchyard are protected views of Brighton and the sea. It is a valued open space and area of tranquillity in the city centre.

Planning application

As set out in the planning application, the proposed development is for:

> "Demolition of former Ice Rink and number 11 Queen Square and erection of a 5no. storey 56 room serviced apartment hotel with a restaurant/café at lower ground floor level and associated ancillary facilities, incorporating creation of outside seating area, new service area, 3no. car parking spaces and cycle spaces."

If the "lower ground floor" is included in the calculation, the proposed hotel has six storeys. Unconventionally the proposed accommodation includes kitchenettes and sitting areas – as an 'apart-hotel' – this would give guests more independence in their use of the hotel's facilities. One of the residents' concerns was that it would facilitate the marketing of the building for stag and hen parties, a sister 'apart-hotel' run by the applicant in Manchester is marketed for these purposes.

A very large number of objections to the proposal were received, including from the Conservation Area Advisory Group, the Regency Society, Wykeham Terrace Residents' Association, Montpelier and Clifton Hill Association, St Nicholas Green Spaces Association and the vicar of the Church of St Nicholas. The objections covered a number of points, including the loss of a public recreational facility, the impact on the listed church, the impact upon the ancient Elm tree in the graveyard and the impact on residential and public amenity. These are mostly summarised in the officers' report.

The Council owns the Site and it is understood that it has an agreement with the applicant to sell the Site following the grant of favourable planning permission.

Council's Procedure Rules

The Council's Procedure Rules are set out at Part 3.2 of its Constitution. Rule 1.1 set out that the Rules apply generally to meetings of the Council, its Committees and Sub-Committees, it notes that "[i]n the application of these rules to Committees and Sub-Committees, greater informality may be exercised at the discretion of the Chair."

Rule 29.1 makes general provision about voting as follows:

> "Except where a requisition is made under the next paragraph, the method of voting at meetings of the Council, or Committees and Sub-Committees shall be by show of hands. Voting may be by an electronic method in the case of Council meetings. Unless this constitution provides otherwise, any matter will be decided by a simple majority of the Members voting and present in the room at the time the question was put. If there is an equal number of votes for and against the motion, the Mayor or Chair will have a second or casting vote. There will be no restriction on how the Mayor/Chair may choose to exercise a casting vote. If the Mayor/Chair does not exercise his/her casting vote the motion or proposal shall fall."

Rule 15.1 makes general provision about debates for all meetings:

> "The rules of debate in this Procedure Rule shall apply to all meetings of the Council, Committees and Sub-Committees. In the case of Committees and Sub-Committees, however, the Council recognises that a greater informality may be exercised by the Chair in order to efficiently transact the business before the meeting. Such informality shall be at the discretion of the Chair."

Rule 13.7 sets out a "6 Month Rule" in the following terms:

> "At a meeting of the Council, no motion or amendment shall be moved to rescind any resolution of the Council which was passed within the preceding six months or which is to the same effect as one which has been rejected within that period. Such a motion may be moved if it is recommended by a Committee or Sub-Committee or notice of such motion has been given by as many Members as will constitute a quorum of the Council (14) on the summons to the meeting."

Consideration by the Planning Committee

The application came before twelve members of the Council's Planning Committee on 27 June 2012. An officers' report recommending approval of the planning application was presented to the Committee by Senior Planning Officer Ms Dubberley. Objections were presented by Alderman Tonks on behalf of the local associations, local businessman Mr Feldman and the Local Ward Councillor. The project architect Mr Zara spoke in favour of the scheme.

After some debate Councillor Hawtree, the Chair, invited those assembled to vote on the recommendation in the officers' report. Voting was by show of hands, in accordance with Rule 29 of the Procedure Rules. The vote was level, five in favour and five against (with two abstentions), therefore the Chair exercised his second or casting vote, again in accordance with Rule 29; he voted against the recommendation and the proposal.

The Committee adjourned so that their reasons for refusing the planning application could be formulated. This was done in a separate room by the Chair, Councillor Hamilton and several officers.

Following the adjournment, the Legal Advisor to the Committee, Ms Woodward, summarised three reasons for refusal formulated by Councillor Hamilton, these were:

> "1. The development by virtue of its design, scale, mass, arrangement and form would result in a scheme which would have a detrimental impact on the setting of the nearby listed Wykeham Terrace and St Nicholas Church and the graveyard contrary to policy HE3 of the Brighton and Hove Local Plan 2005;
> 2. The proposed development would result in an unacceptable loss of sunlight and daylight to the rear of Wykeham Terrace contrary to policy QD27 of the Brighton and Hove Local Plan 2005;
> 3. The proposed development would have an unacceptable adverse impact on an important view namely the view to the south across the city to the sea from St Nicholas Churchyard contrary to policies QD1, QD4 and HE3 of the Brighton and Hove Local Plan 2005."

All three reasons were formally proposed by the Chair and seconded by Councillor Hamilton. At this stage, things went wrong.

First, the Opposition Spokesperson, Councillor Hyde, objected to reason 3 on the basis that in her view it had not been debated. After some discussion, Ms Woodward proposed that a vote be taken by the Committee on reasons 1 and 2 together and then on reason 3 separately. The Chair accepted this approach. The Democratic Services Officer, Ms Jennings, intervened to advise that two votes would be taken: first on reasons 1 and 2, then on reason 3.

Then, Ms Jennings advised in each case that if members voted in favour, they would be voting that the application be refused for the relevant reason(s), however if they voted against they would be voting for officers' recommended resolution of minded to grant.

The vote taken gave a majority (of seven to five) against reasons for refusal 1 and 2. There was confusion as to the implications of this. Accordingly the vote was repeated after Ms Jennings had reiterated her above advice in identical terms. The result was the same. Ms Jennings commented that she was confusing herself. Councillor Cobb who had originally abstained stated that she had voted against the reasons because she was concerned the prospect of challenge on appeal.

In light of Ms Jennings advice, at this stage Ms Woodward proposed that the Committee reconsider the officers' recommendation. On this occasion, members voted in favour of the officers' recommendation, by the same margin that they had rejected reasons 1 and 2 – seven votes to five.

Accordingly, the Committee moved onto the next matter. The resolution was recorded in the minutes:

> "RESOLVED – That the Committee has taken into consideration and agrees with the reasons for the recommendation set out in the report and the

policies and guidance in section 7 of the report and resolves that it is MINDED TO GRANT planning permission subject to the completion of a S106 Agreement and to the Conditions and Informatives set out in the report [with some additional conditions]"

Post-meeting correspondence

The Secretary of the Wykeham Terrace Residents' Association subsequently complained about how the meeting was handled. By a letter of 6 July 2012, Ms Woodward replied substantively as follows:

> "Unlike decisions made at other Council Committees the decision-making process relating to the determination of a planning application is not complete until reasons to support that determination have been agreed. This is because the law requires that a decision on a planning application, whether the decision be to grant or refuse permission, must include the reasons for that decision and it is always possible for Councillors to change their minds in the process. Failure to give reasons would mean that a valid planning decision had not been made. I am therefore unable to confirm, as you request, that the first vote, namely the vote whereby a majority on [sic] Councillors voted not to accept the officer recommendation, was valid as that vote was not supported by reasons."

Legal background

s.70 of the Town and Country Planning Act 1990 sets out a local planning authority's general discretion in determining a planning application, as amended, it provides:

> "(1) Where an application is made to a local planning authority for planning permission—
>
> (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> (2) In dealing with such an application the authority shall have regard to—
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

This must be read in conjunction with the duty at s.38(6) of the Planning and Compulsory Purchase Act 2004:

> "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."

Material considerations are not a closed category, but should primarily be considerations that relate to the use and development of land (see eg Stringer v Minister of Housing and Local Government [1971] 1 All ER 65).

Where a local planning authority gives notice of a decision to grant or refuse planning permission it must set out its reasons; Art.31(1)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 provides

> "where planning permission is refused, the notice shall state clearly and precisely [the authority's] full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision"

There is a similar duty to provide a "summary of … reasons for the grant of permission" (etc) under Art.31(1)(a).

The duty to provide reasons under Art.31 only arises on the grant of permission by issue of a notice, not the making of a resolution to grant permission (see by analogy R (Richardson) v North Yorkshire CC [2003] EWHC 764 (Admin); [2004] Env LR 13 approved by the Court of Appeal at [2003] EWCA Civ 1860; [2004] 1 WLR 1920).

Until the time that a decision notice is issues, a local planning authority is under a statutory duty to have regard to all material considerations (see R (Kides) v South Cambridgeshire DC [2002] EWCA Civ 1370; [2003] JPL 431) and provided it has grounds for doing so, it may revoke or withdraw a resolution to grant planning permission prior to the issue of a formal written notice (see eg R v Yeovil BC Ex p Trustees of Elim Pentecostal Church (1972) 23 P & CR 39).

In R (Wall) v Brighton and Hove City Council [2004] EWHC 2582 (Admin); [2005] 1 P & CR 33 Sullivan J (as he then was) quashed a decision to grant planning permission where there had been a failure by the Council to include its summary of reasons in a decision notice. Citing Brayhead (Ascot) Ltd v Berkshire CC [1964] 2 QB 303, the judge noted that "[a] failure to include the summary reasons in a decision notice will not render the grant of planning permission null and void" but that remedial action was required and in appropriate cases the court has a discretion to quash a notice for the failure to provide reasons. At para.57, Sullivan J drew a distinction between the provision of "summary reasons" for granting permission and "full reasons" for refusing permission:

> "The failure to give "full reasons" for refusing planning permission or for imposing conditions could, in theory, be the subject of judicial review proceedings but it is likely that in almost every case there will be a more effective alternative remedy: appeal to the Secretary of State, coupled with the Secretary of State's power to award costs in respect of unreasonable behaviour, which would include failure to give proper reasons for refusing planning permission or for the imposition of a condition."

It is therefore important that reasons are clear and robust. In cases of non-determination of a planning application, where the applicant has a right of appeal, it is usual practice for a planning authority to formulate its reasons post facto.

Potential grounds of judicial review

There are four main grounds of challenge that the local residents will seek to rely upon.

Ground 1: misdirections as to reasons

What was required was a fair process for recording members' reasons in light of the fact that they had resolved to refuse permission. However, the Committee were misdirected (or misdirected themselves) to impose an unjustifiable fetter on the process, which compelled reconsideration, rather than justification of their decision. The decision-making process was therefore procedurally biased. Three principal errors can be identified in the process.

1a. Misdirection as to the significance of the reasons for refusal

The members of the Committee were twice advised by the officer that if they could not reach consensus on reasons 1 and 2 that amounted to a vote in favour of the officers' recommendation. This was misconceived and illogical. However, it had the effect of confusing and misleading members so that they abandoned their attempt to formulate reasons for their decision.

The subsequent decision of the Committee resolving to grant planning permission (subject to various conditions) is inseparable from the unlawful advice. That conclusion was mandated by the improper direction.

It is important that careful advice is given so that the reasons reflect the decision taken by the individuals who voted with the majority. An approach that requires consensus is always liable to distort the process and undermine valid planning decisions. The approach adopted in this case not only required consensus, but mandated an absurd result and distorted the democratic process.

1b. Misdirection as to the scope of reasons that may be relied upon

The Committee's approach was further undermined by the fact that it wrongly limited the reasons it could rely upon for refusing permission. The Committee proceeded on the basis that reason 3 (namely that the development would have an unacceptable impact upon an important view from the church) had to be considered separately from reasons 1 and 2. This misdirection weakened the position of those who had resolved to refuse planning permission. It may also have caused Councillor Cobb's concern that the reasons put forward would not withstand appeal – it is noteworthy that one of Councillor Cobb's particular concerns during the debate was the loss of the public recreational facility of the ice rink.

The only justification appears to have been the suggestion that reason 3 was not debated before the Committee. This justification does not stand up to scrutiny for three reasons.

First, the impact on views was set out in detail before the Committee. The officers' report related concerns over the "[l]oss of classic views from the Montpelier and Clifton Hill Conservation Area" (p.22) and "loss of important views from the churchyard" (p.24). Images of the views lost from the churchyard were shown to the Committee during Ms Dubberley's presentation. Councillor Deane presented objections to the Committee including the loss of views. The officers' report concludes on the matter at pp.32-33. Reason 3 therefore was plainly before the

Committee and there is no reason why it could not properly be relied upon as a reason for refusal.

Secondly, to the extent that it was not expressly debated between Committee members, this is no reasons for excluding an otherwise valid reason. There is no question of unfairness arising – the officers' report dealt with the issue comprehensively and the applicant had the opportunity to respond. There is no provision in the Council's standing orders or Constitution that requires debate of an issue before it may be used as a reason for refusal. It is easy to see why not – a requirement for debate would work against efficient decision-making and potentially undermine the democratic process (there is no such requirement in Parliament). This was therefore a clear misdirection which prejudiced the decision-making process.

In any event, the impact on views was a reason particularly relied upon by the Chair; it is obvious that the Chair plays less of a role in any debate, because of his position. A requirement that there be "debate" therefore potentially undermines the Chair's dual role, for which a certain level of informality in order to efficiently undertake Council business is needed (see Rule 15.1). It is also contrary to authority (see eg R (Wilson) v Bradford CC [1990] 2 QB 375).

Thirdly, as noted above, the resolution of the Committee and the reasons given are separate matters, a resolution is not invalid because there has been no debate on a particular reason for it. This may be a basis on which the applicant could challenge the fairness of the process, but it did not prevent reason 3, if otherwise valid, from being considered together with the other reasons.

1c. Failure to consider reason 3 (or any other reasons)

In any event, the Committee wrongly did not go on to consider reason 3. This was procedurally improper. Given that a motion to consider reason 3 had been made and seconded, it was also contrary to the Council's Procedure Rules on how motions should proceed (Rules 13.1-13.6): the Council unlawfully negated its own motion.

Nor did the Committee reformulate or consider any other reasons in light of their discussions. A number of other reasons had been raised by Committee members and objectors which could and should have been considered.

In reality, all of these options were precluded by the implications of Ms Jennings' unlawful misdirection.

Ground 2: failure to comply with constitutional arrangements

Rule 13.7 of the Council's Procedure Rules restricts the circumstances in which a motion may be brought rescinding an earlier resolution on the same motion. This may only take place within a six month period if a recommendation is made by the Committee or notice is given by the quorum of the Council.

This important protection was avoided in this case. A lawful motion was moved, and on that basis it was resolved to reject the officers' recommendation. The repeat motion was imposed upon the Committee without following the terms of Rule 13.7. Therefore in addition to the above errors of law, the resolution to grant permission was *ultra vires* the Council's own Constitution.

While there is no doubt that the Chair has a discretion to apply the Procedural Rules flexibly (see Rule 1.1), in this case there was no acknowledgement of the implications of the Committee overruling its previous decision, something that should not be done lightly or without good reason. From whatever perspective it is viewed, the re-resolution was procedurally improper and unfair.

Ground 3: failure to correct absence of reasons for first resolution

The only lawful resolution made by the Committee on 27 June 2012 was the first resolution to refuse planning permission.

This resolution remains good. Ms Woodward's letter of 6 July 2012 wrongly states with regard to the first resolution that "the decision-making process relating to the determination of a planning application is not complete until reasons to support that determination have been agreed". In fact, reasons do not need to be supplied under Art.31 of the Development Management Procedure Order until a formal decision notice is issued.

While it is desirable that reasons be recorded at the time that a resolution is made, there is nothing to prevent that omission being corrected now. To adopt the summation of Richards J in Richardson: "it is simply a matter of being satisfied that the reasons now put forward were the actual reasons that motivated the decision-makers at the time". A minute of the proceedings is available together with a web cast of all that was said. The meeting was still relatively recent. The three reasons for refusal formulated at the Committee meeting provide at least a good starting point, especially if taken cumulatively (as they ought originally to have been). Provided, therefore, that the Council acts promptly to record the Committee's reasons, there is no need to doubt that in due course it will be able to comply with its duty to attach reasons to a decision notice refusing planning permission. It is incumbent on the Council to do this.

Ground 4: failure to have regard to material considerations

For the reasons set out above, the Council acted unlawfully and beyond its jurisdiction in resolving to grant planning permission on 27 June 2012. Without prejudice to those arguments, it is noteworthy that there are additional reasons for refusal that the Council may have relied upon had it had any or any proper regard to material considerations before it.

The failure to consider these matters are additional reasons for quashing the re-resolution of the Committee. Those instructing me would expect that they be fully taken into account on any substantive reconsideration of this matter. For the purposes of this letter, they need only be briefly set out:

- Open space: the officers' report failed to advise members at all on this issue. The churchyard is an important public green space which will be impacted by the proposal, however no mention was made of this or of any relevant policies (such as policies HE11, HE6, NC2-NC4 or SR20), no consultation occurred with an officer from the Council's Cityparks or other open spaces officer.

- Impact on the rare and ancient (150-year old) Wych Elm: there was no critical appraisal of the applicant's report to the effect that the Elm tree in the graveyard needed to be severely lopped or consideration the importance

of affording protection to this tree. The report was wholly inadequate, merely asserting that all affected trees have low amenity value. The officers' report proceeded on the simple basis that the developer has a "right" to lop the tree. However, the tree is both special in its own right and falls within a conservation area and the setting of the grade II* listed church, its protection requires proper consideration and protection (see eg the notification requirements under s.211 of the Town and Country Planning Act 1990). No thought was given to these matters. This also ignored the Council's responsibilities as land-owner of both the Site and the graveyard. An informative that there be "discussions" with the Council's arboricultural officer is wholly inadequate.

- Impact on residential amenity: the officers' report failed properly to consider the role of planning law in safeguarding local amenity by ensuring that only appropriate uses take place on land (or by controlling such uses through appropriate conditions). The officers' report wrongly relied upon the assertion that "[a]ny noise or disturbance issues that may or may not arise would be dealt with by other legislation such as Environmental Health or the Police." While some further conditions were added by the Committee, there was not proper consideration of local residents' legitimate fears about use of the Site once occupied (see eg West Midlands Probation Committee v SoSE (1998) 76 P & CR 589 and Newport BC v SoSW and Browning Ferris Environmental Ltd [1998] Env LR 174).

Conclusion on grounds

The attempt to agree reasons for the resolution to refuse permission followed a misconceived and unlawful path. At best, it is good practice to agree reasons within a Committee, it is not an opportunity for redetermining a motion by default. The importance of good and fair advice cannot be overstated. Here the advice was far from careful, it was illogical, confusing and founded upon misunderstandings as to the nature of a Committee's role.

Those instructing and other objectors are substantially prejudiced by the course adopted. While it may be possible in some circumstances for motions to be reconsidered (where, for example, there has been a material change of circumstances), it must be within the scope of the constitutional rules and based upon law and logic. There is a need for judicial intervention, because had a proper approach been followed, it is likely that no re-resolution would have been made on 27 June 2012 and certainly it is impossible to be sure that the outcome would have been the same (see R (Tromans) v Cannock Chase DC [2004] EWCA Civ 1036 at para.17 and Simplex GE (Holdings) Ltd v SoSE (1989) 57 P & CR 306).

Details of the action that the Council is expected to take

The above represents a legitimate grievance that is strongly supported in law. In order to avoid the need to issue proceedings, the Council is expected to do the following:

i. Revoke the resolution to grant planning permission (subject to various matters) recorded in the minutes of the meeting of 27 June 2012.

ii. Undertake to issue a formal notice of refusal on the basis of the first resolution made on 27 June 2012.

iii. Make appropriate arrangements to ensure that the reasons for refusal are adequately recorded so that they can be included in the formal notice.

There is no doubt that the Council has the power to revoke its purported re-resolution (see R v Yeovil BC Ex p Trustees of Elim Pentecostal Church (1972) 23 P & CR 39, above). There should be no practical difficulty in carrying out the other steps.

It is acknowledged that an alternative way of correcting the unlawfulness might possibly be to reconsider the application afresh, taking into account the matters identified under ground 4, above, following the requirements of Rule 13.7 and avoiding the misdirections given on 27 June 2012. This would have to be done properly and allow a full opportunity for objectors to present their case. Those instructing reserve their right to challenge any further decision if it appears that the prejudice and unlawfulness set out above have affected the decision.

Details of legal advisers if any dealing with this claim

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Audley House
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Details of any interested parties

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The Light Brighton LLP (applicant)
c/o Mr Clive Lynton
Stonehurst Estates Ltd
4th Floor, 1 Heathcock Court
415 Strand
London

Details of information sought

In addition to a response to the above grounds, the local residents seek:

- Details of any correspondence between the Council and the applicant not available online, especially any correspondence relating to the procedure and time limits for considering the application.

- Any further arboricultural report or related assessment produced internally by the Council or disclosed to the Council by the applicant.

Details of any documents that are considered relevant and necessary

The key documents are the officers' report to the Committee for 27 June 2012, the minutes of that meeting and the associated web-cast. It is also necessary to refer to the various parts of the Council's constitution mentioned in this letter.

Address for reply and service of court documents

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Proposed reply date

We require your response by 24 September 2012 otherwise our client reserves the right to issue proceedings without further notice.

Yours faithfully

ACUMEN BUSINESS LAW

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