FOLKESTONE HARBOUR
SECTION 73

OPINION

Introduction

1. I am asked to advise the Folkestone Harbour Limited Partnership on its application to the Folkestone & Hythe District Council ("**the Council**") under section 73 of the Town and Country Planning Act 1990 to amend its scheme to redevelop the Folkestone harbour and seafront.

2. For reasons set out below, my view is that:

   (i) The officer's advice in his 3.4.18 report ("**the OR**") to the Council's Planning and Licensing Committee ("**the Committee**") that "the overarching nature of the application is not considered to have significantly changed" was an unimpeachable exercise of planning judgment.

   (ii) The proposed amendments may be dealt with under section 73 so long as they do not fundamentally alter the nature of the consented scheme. That raises matters of fact and degree to be judged against (i) the scale of the 2015 scheme, (ii) the terms of the SS6 Core Strategy allocation, and (iii) the outline nature of the application, with detailed designs to come through reserved matters.

   (iii) The OR addressed the correct legal question (i.e. whether the alterations fundamentally alter the nature of the original scheme) and reached a view on that question which was rational and, given the substantial scale of the original scheme and the limited extent of the alterations now proposed, entirely unsurprising.

(iv) The Council's determination of the section 73 application is confined to the narrow compass of those conditions which are to be varied. Matters which go beyond those issues fall outside the lawful scope of the Council's exercise under section 73, and would not constitute valid reasons to refuse this application.

(v) It is lawful to determine a section 73 application when the originally permitted development is under construction (indeed, it is lawful to do so when such development has been completed).

Background

3. Policy SS6 in the 2013 Shepway Core Strategy allocates the Folkestone Seafront for:

> "mixed-use development, providing up to 1,000 homes, in the region of 10,000 sqm of floorspace comprising small shops and retail services (A use classes), offices (class B1) and other community and leisure (C1, D1, D2 and sui generis) uses; together with beach sports and sea sport facilities and with associated and improved on- and off- site community and physical infrastructure."

4. On 30.1.15, the Council (under its previous title as the Shepway District Council) granted permission under reference Y12/0897/SH for the following:

> "Outline planning application with all matters (access, scale, layout, appearance, landscaping) reserved for the redevelopment of the harbour and seafront to provide a comprehensive mixed use development comprising up to 1000 dwellings (C3), up to 10,000 square metres of commercial floorspace including A1, A3, A4, A5, B1, D1 and D2 uses as well as seasports and beach sports facilities. Improvements to the beaches, pedestrian and cycle routes and accessibility into, within and out of the seafront and harbour, together with associated parking, accompanied by an Environmental Statement [at] Folkestone Harbour and Seafront, Folkestone, Kent"

5. The ambition behind the scheme was summarised at §4.1 of the August 2012 planning statement prepared by Savills:

> "The proposed ambition for the site is to re-establish a vibrant seafront quarter for Folkestone with a dynamic harbour area through the provision of a mix of leisure and residential uses. It is intended that the seafront will become a place to live and work with high quality residential accommodation and a mix of leisure and entertainment facilities offering a unique coastal setting for sports, arts and recreation attractions. It is expected that the development will bring social and economic benefits which extend beyond the site boundary and reconnect the seafront to the town centre of Folkestone."

6. The permission was granted following officer's advice. The report to committee concluded at [21.2] that:

> "The application conforms with national planning policies contained in the NPPF and the Council's own planning policies and strategies, as set out in the Core Strategy Local Plan and those policies to be retained of the Shepway District Local Plan Review. The scheme brings to fruition a major element of the Council's Core Strategy for housing provision and will play a key part in the regeneration of Folkestone."

7. The permission was subject to some 48 conditions. Consents under several of those conditions have already been discharged. In particular, I note that:

   (i) Condition 41 stated that a "Sea Sports Centre shall be provided in accordance with the approved phasing plan unless a revised phasing plan is agreed in writing by the Local Planning Authority"; and

   (ii) Condition 42 stated that a "Beach Sports Centre hereby approved shall be provided in accordance with the approved phasing plan unless a revised phasing plan is agreed in writing by the Local Planning Authority".

8. In September 2017, the Council validated an application under section 73 (ref. Y17/1099/SH) described as:

> "Section 73 application for removal of conditions 41 (Provision of Sea Sports Centre) and 42 (Provision of Beach Sports Centre) and for the variation of conditions 4 (Reserved Matters), 6 (Phasing), 7 (Reserved Matters Details), 15 (Public Realm), 16 (Play Space/

Amenity Facilities), 18 (Public Toilets), 21 (Wind Flow Mitigation), 23 (Heritage Assets), 25 (Bus Stop) and 37 (Wave Wall) of planning permission Y12/0897/SH (Outline planning application with all matters (access, scale, layout, appearance, landscaping) reserved for the redevelopment of the harbour and seafront to provide a comprehensive mixed use development comprising up to 1000 dwellings (C3), up to 10,000 square metres of commercial floorspace including A1, A3, A4, A5, B1, D1 and D2 uses as well as seasports and beach sports facilities. Improvements to the beaches, pedestrian and cycle routes and accessibility into, within and out of the seafront and harbour, together with associated parking, accompanied by an Environmental Statement) to enable changes to the plot shapes, footprints, maximum height, changes to parameter plans, levels, parking arrangements, and alterations to the Environmental Statement [at] Former Rotunda Amusement Park Marine Parade Folkestone Kent."

9. The changes proposed were summarised in section 5 of the August 2017 Savills Planning Statement, and in the table at Appendix 2 to that statement. Their effect was accurately described in the officer's report to the 3.4.18 committee meeting, in particular:

(i) The sea sports centre and beach sports centre are no longer to be provided, so Conditions 41 and 42 are to be removed. They are to be replaced with contribution of £3.5m to additional community benefits directly linked to the scheme to be agreed with the Council.

(ii) The other changes relate principally to amendments to the design and phasing of the scheme: see the summary at [**OR:1.6-1.33**]. They include variations to plot shapes and heights which allow, among other points, for greater areas of open space, and more connectivity between the northern and southern areas of the site: [**OR:1.10**].

10. The application will still provide up to 1000 dwellings and up to 10,000 sqm of commercial floorspace including A1, A3, A4, A5, B1, D1 and D2 uses.

11. The OR noted at [8.4] that the "current application seeks the same number of dwellings and the same uses as per the approved application", and at [8.5] that:

> "As such, the overarching nature of the application is not considered to have significantly changed, what is under consideration are the changes made to the proposal via the variation and removal of conditions, in particularly changes to the Parameter plans and Design Guidelines and the suitability of these changes when considered against development plan policy and the removal of sea and beach sports facilities."

12. The officer considered those changes in section 8 of the OR, and concluded at that:

> "8.85 The application site is a strategic allocation within the Core Strategy as stated in policy SS6 and is needed by the Council to meet its 5 year supply of housing as required by the NPPF and as such would positively contribute to meeting the current and future housing needs of the District. The proposal would provide new open spaces, improved parking facilities and connectivity, over and above the previous approval and includes highway mitigation for the increased traffic. The changes to the parameters including the alterations to the scale, form of the plots and heights have been considered and their impact on heritage assets such as the setting of the conservation area and listed buildings and the demolition of Harbour House, a non-designated heritage asset. The scheme has been assessed as having less than substantial harm as defined by paragraph 134 of the NPPF and as such the public benefits of the scheme, including the delivery of housing, improvements to open space, the restoration of heritage assets and the efficient reuse of urban brownfield lane, together with the additional funding towards community projects such as the refurbishment of the Leas Lift, are considered to mitigate and outweigh any less than substantial harm caused.
>
> 8.86. This Section 73 application is considered an appropriate way of dealing with the changes, however much of the detail will be provided at reserved matters stage. Where officers have concerns with the current illustrative material this has been highlighted in the report, however as a set of parameters, it is considered that they provide a framework on which development on site could be carried out and deliver a high quality, locally distinctive scheme on an important brownfield site in Folkestone.
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> 8.87. No impacts have been identified at this stage that suggests that the scheme would have a significantly more harmful impact than the approved scheme based on the issues identified in this report such as flooding, drainage, ecology, contamination, neighbouring living conditions, highway, the England Coastal Path and through the completion of a legal agreement will provide sufficient mitigation to offset any other impacts of the development. An addendum to the Environmental Statement has been produced and external consultants have confirmed that this is acceptable for the purposes of the EIA

2017 regulations. It is therefore considered that the proposal complies with the policies of the NPPF and the development plan and therefore should be granted subject to the completion of a legal agreement and suitable conditions."

13. The recommendation was for approval, but the Committee deferred its decision pending further advice.

Legal Framework

14. Section 73 of the Town and Country Planning Act 1990 states that:

> "**73.— Determination of applications to develop land without compliance with conditions previously attached.**
>
> (1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.
>
> […]"

15. Five key points from the cases on section 73 are that:

(i) A local planning authority may impose new conditions onto a new planning permission under section 73, but only if those conditions could lawfully have been imposed on the original planning permission, i.e. if they do not amount to a fundamental alteration of the proposal put forward in the original application:

Sullivan J in *R v Coventry City Council, ex p. Arrowcroft Group plc* [2001] PLCR 7, at [33].

(ii) Whether an alteration is fundamental is a question of fact and degree. Like such questions generally in planning law, it is one which falls primarily to the decision-maker to assess. Its assessment will only be questioned by a Court if it is irrational: *R. (Wet Finishing Works Ltd) v Taunton Deane BC* [2018] P.T.S.R. 26, Singh J at [48].

(iii) Alterations under section 73 are not restricted to "minor" amendments, whatever that may mean in the context of the wider scheme: Collins J in *R. (Vue Entertainment Ltd) v City of York Council* [2017] EWHC 588 (Admin) at [19].

(iv) Section 73 alterations may increase the quantum of development allowed by the original permission, so long as that increase does not constitute a "fundamental alteration": *Wet Finishing Works* at [48]

(v) Although a section 73 application is an application for a new planning permission, it requires consideration only of the conditions subject to which planning permission should be granted. That is a more limited exercise than the consideration of a 'normal' application for planning permission under section 70. How much more limited will depend on the nature of the conditions themselves: see Sullivan J in *Pye v Secretary of State for the Environment, Transport and the Regions and North Cornwall DC* [1999] P.L.C.R. 28 at p.45, endorsed by Schiemann LJ in *Powergen UK Plc v Leicester City Council* (2001) 81 P. & C.R. 5 at [27].

Analysis

16. I am asked to comment particularly on:

    (i) Whether the officer's report is correct to conclude that the proposed variations are legally permissible under section 73; and

    (ii) If so, what matters are material to the Council's decision.

(i) Are the variations permissible under s.73?

17. In the context of a strategic regeneration scheme on a site allocated for significant levels of development in the Council's Core Strategy, amendments over the course of a scheme's delivery are common. Alterations to e.g. plot footprints or parameter plans covering maximum building heights are regularly dealt with under section 73.

18. Local planning authorities are perfectly entitled to deal with variations in that way – even if the overall quantum of development were to increase (which it will not in this case) – so long as the amendments do not fundamentally alter the nature of the original scheme: see *Arrowcroft* and *Wet Finishing Works* above.

19. In this case, the officer correctly recorded that the key elements of the scheme are unchanged, i.e. the quantum of residential units and commercial floorspace remain at the levels prescribed by the Core Strategy allocation.

20. In my view, the officer's opinion that "the overarching nature of the application is not considered to have significantly changed" was an unimpeachable exercise of planning judgment, and certainly not one which betrays any error of law.

21. On the contrary, the officer addressed himself to the correct legal question (i.e. whether the alterations fundamentally alter the nature of the original scheme) and my view is that he reached a view on that question which was plainly rational. Indeed, given the substantial scale of the original scheme and the limited extent of the alterations, the officer's advice to the Committee is entirely unsurprising.

22. Finally, to state what may be obvious, the fact that this application has required a full suite of application documents including an Environmental Statement, and has been properly consulted on by the Council, does not prevent it from being handled under section 73. It is an application for a new planning permission, so all of the procedures prescribed by e.g. the Town and Country Planning (Development Management Procedure) (England) Order 2015, and the EIA Regulations must be observed. The officer's advice on this at [8.6] is correct.

23. The relevant question, as I have indicated above, is whether the amendments now proposed would fundamentally alter the nature of the consented scheme, and that raises matters of fact and degree for the Council to be judged against (i) the scale of the 2015 scheme, (ii) the Core Strategy allocation, and (iii) the fact that the application is outline, so questions of detailed design will be addressed by reserved matters.

24. In my view, the officer's advice to the Planning and Licensing Committee on this issue was legally unimpeachable.

25. A section 73 application may be determined notwithstanding that the originally permitted development has started (or even where it has been completed).

(ii) What matters are material to the s.73 decision?

26. A section 73 application is focussed on the conditions to be varied, not on the principle of the permission itself. The Council's determination is confined to the "narrow compass" of those conditions which are to be varied: see *Pye* at p.45.

27. In addressing that question, the Council must take account of the development plan and other material considerations, but only to the extent they relate to proposed variations of condition: see *Powergen* at [45].

28. For those reasons, the officer was correct to advise the Committee at [8.5] that:

> "what is under consideration are the changes made to the proposal via the variation and removal of conditions, in particularly changes to the Parameter plans and Design Guidelines and the suitability of these changes when considered against development plan policy and the removal of sea and beach sports facilities."

29. Matters which go beyond those issues fall outside the lawful scope of the Council's exercise under section 73, and would not be valid reasons to refuse this application.

30. If the Committee were to refuse the current application against the clear officer advice, they would have to provide legally justified and appropriate planning reasons, defensible on appeal.

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