



**Brighton & Hove  
City Council**

# **PLANNING COMMITTEE ADDENDUM**

**DOCUMENT PACK CONTAINING INFORMATION IN RESPECT  
OF LAND SOUTH OF Ovingdean Road**



## **ADDENDUM**

<b>ITEM</b>	<b>REDACTED MINUTES, OFFICER REPORT, COUNSEL'S ADVICE AND SUPPORTING DOCUMENTATION AGREED FOR RELEASE BY PLANNING COMMITTEE AT ITS MEETING HELD ON 7 MARCH 2018</b>	<b>Page 1-48</b>
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## 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 NO<sub>2</sub> 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.

<b>Subject:</b>	<b>Land South of Ovingdean Road, Brighton : Public Inquiry (Planning Application ref. BH2016/05530)</b>		
<b>Date of Meeting:</b>	<b>7 February 2018</b>		
<b>Report of:</b>	<b>Executive Lead Officer – Strategy Governance &amp; Law</b>		
<b>Contact Officer:</b>	<b>Name:</b>	<b>Hilary Woodward</b>	<b>Tel: 01273 291514</b>
	<b>Email:</b>	<b>hilary.woodward@brighton-hove.gov.uk</b>	
<b>Ward(s) affected:</b>	<b>Rottingdean Coastal</b>		

**NOT FOR PUBLICATION**

~~Note: The public are likely to be excluded from the meeting during consideration of this report as it contains exempt information as defined in paragraph 5 of Schedule 12A, Part 1, to the Local Government Act 1972 (as amended).~~

**1. PURPOSE OF REPORT AND POLICY CONTEXT**

1.1 The Committee is 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, to consider, should those reasons for refusal be withdrawn, whether the planning balance is 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 allow the appeal.

**2. RECOMMENDATIONS**

That the Committee:

- 2.1 agrees to withdraw reason for refusal 2. (heritage) for the reasons outlined in paragraph 3.9 of this report;
- 2.2 agrees to withdraw reason for refusal 3. (air quality) for the reasons outlined in paragraph 3.10 of this report;
- 2.3 considers the planning balance and whether to continue to defend the appeal should it agree that the heritage and/or the air quality reason for refusal be withdrawn;
- 2.4 agrees that the Council enter into a s106 Planning Obligation to include the heads of terms set out in paragraph 3.15 of this report should the Inspector be minded to allow the appeal

### 3. CONTEXT/ BACKGROUND INFORMATION

- 3.1 On the 10 May 2017 Planning Committee considered a report on planning application reference BH2016/05530: Land South of Ovingdean Road, Brighton. The proposed development was "Outline planning application with appearance reserved for the construction of 45 one, two, three, four and five bedroom dwellings with associated garages, parking, estate roads, footways, pedestrian linkages, public open space, strategic landscaping and part retention/reconfiguration of existing paddocks. New vehicular access from Ovingdean Road and junction improvements". A copy of the report is attached as Appendix 1.
- 3.2 The Officer's recommendation was that the Committee be Minded to Grant planning permission subject to a s106 agreement. However, the Planning Committee resolved to refuse the application for four reasons. The reasons for refusal are as follows:
1. The proposed development would have a harmful impact on the ecology and biodiversity of the site, which would not be sufficiently mitigated by the measures proposed, contrary to paragraph 118 of the National Planning Policy Framework, policy CP10 of the Brighton & Hove City Plan Part One and policy QD18 of the Brighton & Hove Local Plan.
  2. The extent of the proposed development would result in the loss of part of the gap between the villages of Ovingdean and Rottingdean and have an adverse impact on the setting of the Ovingdean Conservation Area and Rottingdean Conservation Area, contrary to policy HE6 of the Brighton & Hove Local Plan.
  3. The increased traffic generated as a result of the proposed development would have an adverse impact on air quality within the Rottingdean Air Quality Management Area, contrary to policy SU9 of the Brighton & Hove Local Plan.
  4. By virtue of the scale of development proposed and the site coverage, the development would be harmful to the character and appearance of the appeal site and its surroundings through over-development and associated loss of local open landscape character, contrary to policy SA4 of the Brighton & Hove City Plan Part One.
- 3.3 The refusal of planning permission has been appealed and the appeal will be dealt with by way of public inquiry. The inquiry will commence on 24 April 2018 and has been set down for four days. Insofar as the officer recommendation was "Minded to Grant" and the relevant consultees supported the application the Council has appointed consultants to give evidence on its behalf and counsel has been instructed to act as advocate.
- 3.4 At the beginning of December, and following a conference with the appellant's counsel, the appellant's agent sent a letter requesting that the ecology and air quality reasons for refusal be withdrawn and seeking clarification that it was the Council's intention to refer to a gap between Ovingdean and Woodingdean in reason for refusal 2., and not Ovingdean and Rottingdean. The response given was that reference to Rottingdean in reason for refusal 2. was correct and that



the request to withdraw the ecology and air quality reasons for refusal would need to be considered by the Planning Committee.

- 3.5 The reason why the appellant has requested the withdrawal of the ecology and air quality reasons for refusal is that it considers: “Both of these matters represent technical/scientific matters that are subject to objective assessment by expert witnesses. We consider these matters are demonstrably unreasonable and should form agreed matters between the parties”.
- 3.6 A conference with the Council’s barrister, attended by the Council’s consultant witnesses and relevant officers, was held at the beginning of January 2018. The reasons for refusal were discussed and counsel asked the witnesses to revert to him with their professional views, in detail, as to whether their particular reason for refusal was defensible.
- 3.7 The witnesses responses, and counsel’s advice having considered those responses, is set out in the following paragraphs.
- 3.8 Ecology: The Council’s witness considers that “on balance” the reason for refusal is defensible. However, counsel notes that the appeal site has no formal ecological designation, nor would there be any impact on a protected species: therefore, even should the Inspector agree with the Council’s witness and conclude that there would be harm in ecological terms “it is possible – if not likely – that he would conclude the benefits of the scheme outweigh these harms”. Counsel also advises that as the Council has not objected to the principle of housing on the site there is some merit in the point that will be made by the appellant that even on the Council’s own case some level of ecological harm would be acceptable. Counsel concludes: “Overall, whilst I cannot advise that this reason for refusal is strong, taking into account the expert advice, it does appear to be defensible”.
- 3.9 Heritage: The Council’s witness for this reason is a heritage expert. Her advice, as regards impact on the conservation areas, is “It is my opinion that whilst setting is an important consideration, in this case the appeal site does not fall within the setting of either Conservation Area. As it does not fall within their respective settings, the site does not contribute to the significance of those Conservation Areas. Based on my experience ... the second prong of Reason for Refusal No.2 could not be defended with any success.” Counsel’s advice on this part of the reason for refusal is that it is “entirely indefensible” and “My firm view is that the Council should withdraw the allegation that the appeal proposal would have an adverse impact on the setting of the Conservation Areas.”

Counsel then went 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. His advice was that it could not. It is not a free-standing reason for refusal but is tied into the allegation of harm to the conservation areas; there is no policy protection for protection of the gap between the two settlements; the issue was not raised before the previous Inspector.

Counsel concludes that reason for refusal 2. should be withdrawn in its entirety.

3.10 Air Quality: The Council's witness has reviewed the information in relation to the potential impacts of the scheme on the Rottingdean Air Quality Management Area, undertaking his own modelling of the likely impacts of the development as well as taking into account the latest DEFRA emission factors. The witness's conclusions can be summarised as:

i. The overall trend shows significant improvement in measured NO<sub>2</sub> values in the AQMA;

ii. In 2015/6 the NO<sub>2</sub> values were all below the "limit value" set out in the relevant EU Directive. For 2017 at one receptor there was an exceedance of the limit value, although the data for the year is not completed;

iii. the modelling shows that by 2019 the NO<sub>2</sub> values will all be below the "limit value". This is consistent with the modelling results provided by the appellant's air quality consultant; and

iv. the witness concluded that "there is no discernible difference between the modelled NO<sub>2</sub> pollutant concentrations [for the AQMA] without the development in place [or] with the development in place and fully occupied"

Counsel's advice is that this reason for refusal is "entirely indefensible" and that his "firm view is that the Council should withdraw reason for refusal 3."

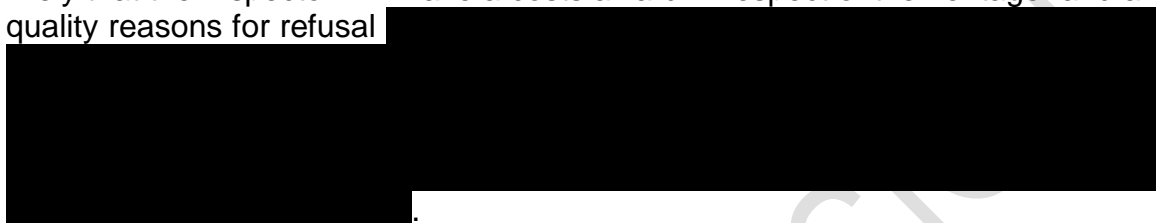
3.11 Landscape: The council's witness has advised that the allegation that the proposal would cause some landscape and visual harm is defensible. So far as this reason for refusal is concerned counsel has advised that although the reason for refusal is not strong, taking into account the witness's expert advice "it does appear to be defensible". Counsel does, however, consider that the reason "will not be easy to defend" in light of a) the Council's acknowledged need to build on urban fringe sites in order to meet its housing requirements; b) the principle of development coming forward on the site has been accepted; c) the Council has previously identified that a slightly larger area than the appeal site is likely to be able to accommodate up to 45 units and d) the previous Inspector's view that the west of the site clearly has capacity in landscape terms to accommodate significant residential development.

3.12 Counsel's overall advice on the merits of the Council's case is that it is weak and that in his view the likelihood of successfully defending the decision to refuse is low. He further advises that should the Committee agree that the heritage and/or the air quality reasons for refusal be withdrawn that Members will need to reassess where the planning balance lies. Essentially this means whether the benefits of the scheme, including the provision of market and affordable housing, outweigh the harm to the ecological interests of the site, as well as the landscape and visual harm.

3.13 Members will need to consider whether those benefits justify granting permission for development which, on the Council's case, is in breach of the development plan policy cited in the reasons for refusal. Counsel advises that "when assessing the balance, it is relevant to have regard to the fact that the Council envisages (indeed to some extent relies upon) some form of housing coming forward on this site and therefore, presumably, accepts some level of landscape and visual

harm, and harm to ecological interests, is acceptable in order to meet the Council's housing needs". Should Members come to the view that the planning balance weighs in favour of the appeal scheme the Council should "give serious consideration as to whether it wishes to continue to defend the appeal".

- 3.14 Counsel has further advised on the costs' risk associated with the appeal. The appellant submitted an application for a full award of costs with the appeal and as the inquiry is listed for four days, the appellant has instructed leading counsel and is likely, on the current reasons for refusal, to have to call five witnesses, the costs involved are likely to be substantial. Counsel considers that it is extremely likely that the Inspector will make a costs award in respect of the heritage and air quality reasons for refusal



- 3.15 Should the Inspector be minded to allow the appeal the Council's case is that any approval should be subject to a s106 Planning Obligation to mitigate the impacts of the scheme. The heads of terms of the proposed Planning Obligation were included in the officer's recommendation in the 10 May 2017 Committee report and were:

- 40% affordable housing (55% affordable rent (10 units) and 45% shared ownership (8 units));
- A total contribution of £251,353 towards the cost of providing primary (£105,097) and secondary educational (£146,256);
- A contribution of £20,500 towards the Council's Local Employment Scheme;
- A contribution of £45,000 towards an Artistic Component / public realm;
- Construction Training and Employment Strategy including a commitment to using 20% local employment during the demolition and construction phases of the development;
- A Residential Travel Plan, to include a Residential Travel Pack, to be provided for all first occupiers of the development;
- Walkways Agreement, to agree a means of access and management of the pedestrian and cycle routes within the site which do not form part of the principle estate roads;
- A long-term management and maintenance plan for the proposed horse paddocks and public open space areas; and
- A contribution of £ 191,432 towards open space and indoor sport.

#### **4. ANALYSIS & CONSIDERATION OF ANY ALTERNATIVE OPTIONS**

- 4.1 An alternative option would be for the Council to proceed with its defence of the appeal for the reasons set out in the decision notice. This would be contrary to counsel's advice and with the risk of a substantial costs award being made against it.

#### **5. COMMUNITY ENGAGEMENT & CONSULTATION**

- 5.1 None has been undertaken in view of the nature of the report.

## **6. CONCLUSION**

- 6.1 In view of the representations received by the Council's witnesses on the defensibility of the heritage and air quality reasons for refusal, and counsel's advice on the same, it is considered expedient to recommend to the Committee that those reasons for refusal be withdrawn. The withdrawal of reasons for refusal requires a reassessment of the planning balance and the Committee is asked to consider whether the balance now weighs in favour of the appeal scheme and, if so, whether the Council wishes to continue to defend the appeal. Finally, whether or not the Council defends the appeal, it is recommended that the Council requires a s106 Planning Obligation to secure those matters referred to in paragraph 3.15., should the Inspector be minded to allow the appeal.

### **SUPPORTING DOCUMENTATION**

#### **Appendices:**

1. 10 May 2017 Planning Committee Report on application BH2016/05530;

**LAND SOUTH OF OIVINGDEAN ROAD, BRIGHTON**

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**ADVICE**

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**Introduction**

1. I have been asked to advise in relation to the merits of the Council's case in relation to the Ovingdean appeal and, specifically, to consider whether each of the reasons for refusal advanced by the Council are defensible. I am also asked to advise on the risks of a costs award being made against the Council.
2. On 8<sup>th</sup> January 2017 I attended a conference together with the professional team appointed for the appeal. This team consists of:
  - i. Eimear Murphy (Murphy Associates) – Heritage, Landscape, Planning Balance
  - ii. David Kavanagh- Spall (Arborweald) – Ecology
  - iii. Graham Parry (Accon) – Air Quality
  - iv. Nick Ireland (GL Hearn) – 5 year Housing Land Supply
3. At the conference I asked that the team *inter alia* to provide their expert opinion on the merits of the reasons for refusal with which they are dealing. They have now done so, and I have taken that information into account when drafting this advice.

**Background**

***The application and reasons for refusal***

4. The application in question is for outline planning permission (with appearance reserved) for the construction of 45 dwellings and associated infrastructure at Land South of Ovingdean Road, Brighton ("the Appeal Site").
5. Officers of the Council recommended that permission be granted for the scheme. However, on 10 May 2017 the Planning Committee resolved to reject that recommendation (by a vote of 7 to 5). Instead an alternative recommendation to refuse

the application on four grounds was passed. These grounds were later crystallised in the decision notice issued on 23 May 2017 as follows:

*“1. The proposed development would have a harmful impact on the ecology and biodiversity of the site, which would not be sufficiently mitigated by the measures proposed, contrary to paragraph 118 of the National Planning Policy Framework, policy CP10 of the Brighton & Hove City Plan Part One and policy QD18 of the Brighton & Hove Local Plan.*

*2. The extent of the proposed development would result in the loss of part of the gap between the villages of Ovingdean and Rottingdean and have an adverse impact on the setting of the Ovingdean Conservation Area and Rottingdean Conservation Area, contrary to policy HE6 of the Brighton & Hove Local Plan.*

*3. The increased traffic generated as a result of the proposed development would have an adverse impact on air quality within the Rottingdean Air Quality Management Area, contrary to policy SU9 of the Brighton & Hove Local Plan.*

*4. By virtue of the scale of development proposed and the site coverage, the development would be harmful to the character and appearance of the appeal site and its surroundings through over-development and associated loss of local open landscape character, contrary to policy SA4 of the Brighton & Hove City Plan Part One.”*

6. It is notable that: (a) there was no specialist/technical evidence before the Planning Committee to support the contention that the proposed development would have an adverse impact on Air Quality within the AQMA. Indeed, the Environmental Health Officer concluded that, with appropriate mitigation measures, the scheme should be recommended for approval; (b) the Council’s Heritage Officer not only recommended approval but advised in terms that the Appeal Site did not form part of the setting of Ovingdean Conservation Area or Rottingdean Conservation Area.

### ***The earlier application and Appeal***

7. The application for 45 dwellings on the Appeal Site followed an earlier application for 100 dwellings on the same site which was refused by the Council in January 2015. It is important to note the basis on which the Council refused the application. There were three reasons for refusal, which in essence were a follows:
  - i. Insufficient information had been provided to assess the likely impacts of the development with respect to Air Quality within the Rottingdean AQMA.
  - ii. The LPA had not been able to assess the likely impacts with respect to ecology.

- iii. That by virtue of the scale of development and site coverage, there would be harmful impacts on the (a) local landscape character and (b) setting of the National Park.
8. It is important to note the following:
    - i. There was no allegation of harm to the setting of the Ovingdean Conservation Area and Rottingdean Conservation Areas. In fact, despite the scheme being significantly larger than the current scheme, no heritage reason for refusal was advanced at all.
    - ii. The reasons for refusal in respect of Air Quality and Ecology were based on insufficient information being provided. In the current decision notice there is a positive averment that the proposal will cause harm.
  9. The matter went to appeal in January 2016, with the Inspector issuing his decision on 29 March 2016. The most salient points from his decision letter are as follows:
    - i. **Air Quality** – Following the refusal the Appellant submitted a further Air Quality Assessment report, which showed that there would be a negligible impact on Nitrogen Dioxide concentrations within the AQMA arising from the development. This was accepted by the Council who confirmed that they were satisfied that the scheme would not be harmful to local air quality
    - ii. **Ecology** – The Inspector was of the view that the Appellant’s ecological surveys supported the view that the site was of “limited overall ecological value”; that in absence of management there was no evidence that what value it had would persist; and that the proposed mitigation and management programme (to be secured by condition) would mean that the proposal “*would not be harmful to the ecological significance of the site*”.
    - iii. **Impact on Landscape Character** - (i) The site clearly has capacity (in landscape terms) to accommodate significant residential development to the west ; (ii) however the extent of residential development proposed and its spread to the east would “*introduce an unduly urbanised built form to the east at variance with, at the expense of, the more open rural distinctiveness of the site...*”; (iii) having particular regard to the scale of development and extent of site coverage the development would be harmful to the character and appearance of the appeal site and surroundings.

iv. **Traffic** – the Inspector rejected concerns of third parties with regards to the robustness of the modelling and data inputs. Overall he concluded that the traffic impact would not be severe (which is the key test to be applied by the NPPF)

10. Whilst the previous Inspector’s decision is not be binding it does constitute an important material consideration which the new Inspector will be required to take into account and will most likely form the starting point for his consideration

***Principle of Development on the Site/BHCC’s Plan-making for the site***

11. It is an important consideration that BHCC do not advance any ‘in principle’ objection to housing development on the site. Nor could the Council rationally do so (at least without a material change in circumstances) because it is clear from the following that the Council is expecting – indeed it could be argued is *relying* upon – the Appeal Site providing housing:

- i. **Urban Fringe Assessment** (Jan 2014)- which concluded that the Appeal Site (or rather a slightly larger area) is “*considered suitable for low density residential development in the norther western part of the site*” and recommended that the Appeal Site could accommodate approx.. 45 dwellings.<sup>1</sup>
- ii. **2016 SHLAA** - The 2016 SHLAA identifies the site as being “deliverable” – that is contributing 45 units towards the 5 year supply. Importantly that meant that the Council expected the site to deliver this number of units by 2021. I am told that the updated 2017 SHLAA (which will be published in the next few weeks) will identify the site as being “developable” – that is contributing 45 units towards the projected supply, but in years 6-10 (ie by 2027).

12. Given the above at the Inquiry, the Appellant will (rightly) say that the principle of developing the housing on the Appeal Site is not objected to by the Council, and the only issue in dispute is the actual form of development proposed by this scheme.

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<sup>1</sup> The report did recognise that, in terms of ecological effects, the impacts assessed were uncertain “as the potential for effects will depend on the exact nature and design of the new development, as well as the exact details of the ecological value of the site, including presence / absence of protected / notable species.”



## Merits of the Reasons for Refusal

### *RfR 1 – Ecology*

13. The findings of the previous Inspector in respect of what was a larger scheme, and the fact that the County ecologist supported the scheme, undoubtedly make this a difficult reason to defend.
14. However, Mr Kavanagh-Spall, the ecology expert appointed by the Council, considers that *“on balance”* the reason for refusal is defensible. In particular he explains that *“having visited the site with my botanist, we have assessed the site as being plant species rich, invertebrate species rich, important to numerous fauna including bats and reptiles,...important as a wider mosaic habitat...and important as a ‘stepping stone’ to surrounding important habitats”*. This is consistent with his advice at conference to the effect that the previous Inspector was wrong to conclude the site was of *“limited overall ecological value”*;
15. I also note in this regard that Mr Kavanagh-Spall’s assessment is broadly supported by the report submitted by arbeco on behalf of the Deans Preservation Group.
16. On this basis, and subject to Mr Kavanagh-Spall’s evidence coming up to proof at the Inquiry (I have no reason to think he will not do so), I consider to be defensible.
17. However I should add two words of warning:
  - i. Mr Kavanagh-Spall was very clear in conference that there were no *“show stoppers”* (it is not a site which has any formal ecological designation for instance, nor, as I understand it, would there be any impact on a protected species). Therefore even if the Inspector agrees with Mr Kavanagh-Spall and concludes there would be harm in ecological terms, it is possible – if not likely – that he would conclude the benefits of the scheme outweigh these harms
  - ii. As noted above, the Council does not object to the principle of development on the site. It will be said that this means that, even on its own case, some level of ecological harm would be acceptable. There is some merit in this point.
18. **Overall, whilst I cannot advise that this reason for refusal is strong, taking into account the expert advice, it does appear to be defensible.**

## **RfR 2 - Heritage**

### **(1) Impact on the Conservation Areas**

19. Without wishing to stray into hyperbole, the Council's allegation that the proposal would cause harm to the significance of either the Ovingdean or Rottingdean Conservation Areas is **entirely indefensible**.

20. To put the alleged harm in context: (i) the Appeal site is over 300m away from the Ovingdean CA and over 1km away from the Rottingdean CA; (ii) the Appeal Scheme has no inter-visibility with either of the CA, a matter demonstrated by the Appellant's ZTV and confirmed by Ms Murphy on her detailed site visit; and (iii) this reason was not advanced at all by the Council (or anyone else) in respect of the previous, significantly larger scheme.

21. Having undertaken a site visit Ms Murphy, who is a heritage specialist, concluded (as part of a detailed note) as follows:

*"It is my opinion that whilst setting is an important consideration, in this case, the appeal site does not fall within the setting of either Conservation Area. As it does not fall within their respective settings, the site does not contribute to the significance of those Conservation Areas.*

*Based on my experience and by using this well-tested and accepted stepped approach, the second prong of Reason for Refusal No.2 could not be defended with any success.*

*In respect of this site, in dismissing the previous appeal on a greater area of the site, the Inspector did not raise a heritage objection. The Council's own Conservation Officer did not object on heritage grounds and did not consider that site affect either Conservation Area. I therefore consider that this prong of Reason for Refusal 2 is very weak and could not be defended. To attempt to do so would render the Council liable to an Award of Costs."*

22. Therefore, if called to give evidence – which she will be in any event in respect of Landscape and Planning matters – Ms Murphy will be obliged to give her professional opinion on this matter. That is she will be professionally obliged to explain that in her expert view the appeal site does not fall within the setting of either of the conservation areas. This is a view shared by the Council's Conservation Area and the Appellant's heritage expert.

23. The Council would therefore be unable to advance any evidence to support its case on this element of reason for refusal 2.

24. Even if, in the very unlikely event that the Inspector disagreed with the unanimous view of the heritage experts and concluded that the appeal site was in the setting of the conservation areas, this of itself would not warrant the reason for refusal. It would be necessary to show (i) that the setting appeal site contributed to the significance of the conservation area – of which there is absolutely no evidence and (ii) that any harm was not outweighed by the public benefits of the scheme, including providing housing (applying para 134 test in NPPF). I see no rational basis on which the Inspector could come to this conclusion

**25. My firm view is that the Council should withdraw the allegation that the appeal proposal would have an adverse impact on the setting of the Conservation Areas**

***(2) Impact on Gap between Ovingdean and Rottingdean***

26. This is not a free-standing reason for refusal, no doubt because there is no policy protection for the 'gap' between these two settlements. I assume this is why the concern was tied into the allegation of harm to the conservation areas.

27. Nor was it an issue raised before the previous Inspector (whilst an issue was raised about the loss of gap between Ovingdean and Woodingdean, I believe by local residents, this was rejected by the Inspector).

28. I have given thought as to whether this element of the reason for refusal could be incorporated with reason for refusal 4 (ie the Landscape reason for refusal). I would advise against such a course of action for the following reason: (a) there is no gap policy; (b) the concern raised was plainly in relation to heritage impacts, not landscape impacts thus it would appear opportunistic to now argue impact on gap was part of the Council's landscape case; (c) the physical gap (unprotected in policy terms) between Ovingdean and Rottingdean is sizeable and the development would plainly have very limited impact on the extent of the gap, thus it adds very little, if anything, to the landscape case; and (d) if any part of RfR2 is retained the Appellant would be entitled to contend that the reason for refusal has not been withdrawn and to call heritage evidence. This would have cost implications (see below).

**29. It follows that I strongly recommend that reason for refusal 2 is withdrawn in its entirety.**

***RfR 3 – Air Quality***

30. The Air Quality reason for refusal, like heritage, is in my view **entirely indefensible**.

31. The decision by the committee was undertaken without any expert evidence to support their position. It was contrary to the opinion of the Environmental Health consultant. It is also, on its face, inconsistent with the position taken by the Council at the previous Inquiry (in relation to a larger scheme).

32. Following the decision the Council appointed Graham Parry, an experience air quality consultant, to review the information in relation to the potential impacts of the scheme on the Rottingdean Air Quality Management Area. In doing so, he has undertaken his own modelling of the likely impacts of the development, as well as taking into account the latest DEFRA emission factors.

33. In short, his conclusions can be summarised as follows:

- i. The overall trend shows significant improvement in measured NO<sub>2</sub> values in the AQMA;
- ii. In 2015/6 the NO<sub>2</sub> values were all below the “limit value” set out in the relevant EU Directive. For 2017 at one receptor there was an exceedance of the limit value, although the data for the year is not completed
- iii. Mr Parry’s modelling shows that by 2019 the NO<sub>2</sub> values will all be below the “limit value”. This is consistent with the modelling results provided by the Appellants air quality consultant.
- iv. Crucially Mr Parry concluded “*there is no discernible difference between the modelled NO<sub>2</sub> pollutant concentrations [for the AQMA] without the development in place [or] with the development in place and fully occupied*”

34. In light of the above Mr Parry has confirmed that reason for refusal 3, and the allegation that the proposed development would have an adverse impact on air quality within the Rottingdean Air Quality Management Area, is not defensible. If called to give evidence he would be professionally obliged to accept as much.

**35. My firm view is that the Council show withdraw reason for refusal 3.**

36. On a related note, I am aware that the predicted traffic flows from the development have been queried by a member of the public, and a concern raised that they have under-assessed the likely traffic flows through the AQMA. There is no specialist evidence to support this assertion. Nor did the Council refuse the application on the basis of traffic related impacts.

37. However, the concerns raised have been considered by the a Highway expert at the Council, who have found no issue with the assessment undertaken. In particular, they conclude that the proposal will generate a relatively low number of trips and includes appropriate mitigation measures

#### ***RfR 4 - Landscape***

38. Ms Murphy has advised that the allegation that the proposal would cause some landscape and visual harm is defensible.

39. However, in light of: (a) the Council's acknowledged need to build on urban fringe sites in order to meet its housing requirements; (b) the fact the Council accept the principle of residential development coming forward on the site; (c) the Council has previously identified that the Appeal Site (or, rather a slightly larger area than the Appeal Site) is likely to be able to accommodate up to 45 units and (d) the previous Inspector's view that the west of the site clearly has capacity (in landscape terms) to accommodate significant residential development, the contention that the scheme should be refused on grounds of its adverse landscape and visual impacts will not be easy to defend.

**40. Therefore, whilst I cannot advise that this reason for refusal is strong, taking into account the expert advice it does appear to be defensible.**

41. However, I am concerned that the reason for refusal, as drafted, may restrict what Ms Murphy can say. In particular the harm is said to arise from "*the scale of development proposed and the site coverage*". Given that only appearance is reserved, it is likely to be argued by the Appellant that because no reference has been made to layout or landscaping causing harm, that these elements of the scheme are not harmful.

42. Moreover, scale is defined within the within The Town and Country Planning (Development Management Procedure) (England) Order 2015 as "the height, width and length of each building proposed within the development in relation to its surroundings" . It therefore may be said that this is the only concern raised by the Council.

43. I would ask that Ms Murphy reflect on this and consider whether the wording of the reason for refusal should be amended, particularly to include a reference to layout (and perhaps to amount of development).

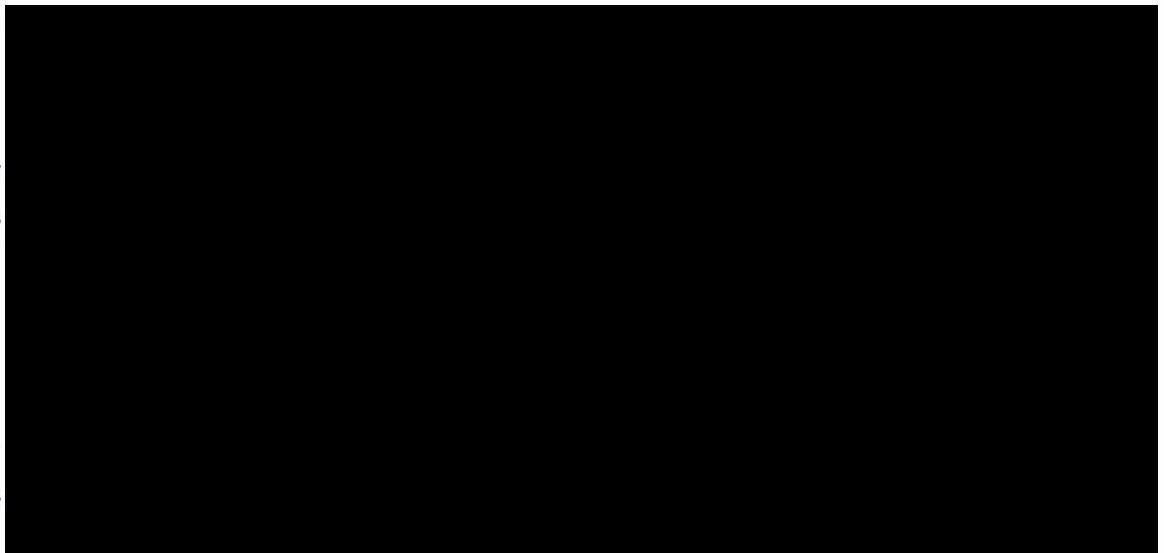
**Overall advice on Merits and reassessing the planning balance**

44. The Council's case is undoubtedly weak. In my view, the likelihood of successfully defending the decision to refuse is low.

45. Reasons for refusal 2 and 3 are indefensible and should be withdrawn. Indeed, in light of the opinion of the relevant experts on heritage and air quality, the Council would not be able to advance any evidence to support these reasons for refusal.

46. If this advice is accepted, members will need to reassess where the planning balance lies. In particular they will need to consider whether the benefits of the scheme (including, but not limited its provision of market and affordable housing) outweigh the harm to the ecological interests of the site, as well as the landscape and visual harm? And do those benefits justify granting permission for development which (on the Council's case) is in breach of development plan policy? When assessing this balance, it is relevant to have regard to the fact that the Council envisages (indeed to some extent relies upon) some form of housing coming forward on this site and therefore, presumably, accepts that some level of landscape and visual harm, and harm to ecological interests, is acceptable in order to meet the Council's housing needs.

**Strategic considerations –** 



[REDACTED]

**Costs Risk**

49. The Appellant has already submitted an application with the appeal for an award of full costs. Given that the appeal is listed for a 4 day Inquiry, the Appellant is likely to be represented by leading counsel, and (at the moment) they are likely to have to call a5 witnesses, the costs involved are likely to be substantial.

50. In my view, it is extremely likely that an Inspector would make a costs award in respect of reason for refusal 2 and 3. [REDACTED]

[REDACTED]

[REDACTED]

**Conclusion**

53. In conclusion my advice is that the Council should:

- i. Withdraw reasons for refusal 2 and 3 at the earliest opportunity;
- ii. If so advised by Ms Murphy, give consideration as to whether the reason for refusal 4 needs to be redrafted;
- iii. If it does withdraw reason for 2 and 3 consider where the planning balance lies in light of that change in circumstances and, ultimately, give serious consideration as to whether it wishes to continue to defend the appeal.

**ROBERT WILLIAMS**

**Cornerstone Barristers**

**24 January 2018**





## **Technical Note responding to points raised at Case Conference held on 8<sup>th</sup> February 2018 in respect of air quality.**

ACCON UK Limited (ACCON) have been commissioned by Brighton & Hove Council to provide assistance with respect to the air quality impacts of a proposed residential development at Ovingdean. A number of points were raised at the recent case conference and accordingly we have carried out specific air quality modelling and assessment in order to provide advice to the client team.

Specific points raised are addressed below.

### **Previous Inspector decision in respect of BH2014/02589**

This decision related to the Appeal Site with almost twice the number of properties now proposed.

*The Framework advises that planning decisions should ensure that any new development in AQMA's is consistent with the local air quality action plan and, in this regard, I note references made to the Brighton and Hove City Council Air Quality Action Plan.*

*In refusing planning permission, the Council considered it was unable to fully assess the likely impacts upon air quality with regard to the Rottingdean AQMA which lies some 1.45 km to the south of the application site.*

*The Guidance advises that it is important that the potential impact of new development on air quality is taken into account where the national assessment indicates that relevant limits have been exceeded or are near the limit. Mitigation options, where necessary, will be locationally specific, will depend on the proposed development, and should be proportionate to the likely impact. Appeal Decision APP/Q1445/W/15/3130514*

*In response, the appellant submitted a further Air Quality Assessment report dated December 2015 and, following discussions with the Council, additional sensitivity testing was undertaken and with reference to the Environmental Protection UK and the Institute of Air Quality Management guidelines, Land-Use Planning & Development Control: Planning For Air Quality (the EPUK and IAQM Guidance). The results of that work show a negligible impact arising from the development with regard to absolute and relative changes in Nitrogen Dioxide concentrations within the AQMA as a consequence of the development. This assessment is accepted by the Council and, accordingly, the authority is now satisfied that the scheme would not be harmful to local air quality.*

*A range of concerns have been raised by third parties, however, including details relating to the methodology of the assessment, to underlying traffic data, and to the relevance of local physical characteristics, such as the local road pattern and attendant features, and these were identified at the hearing. The appellant's methodology has been broadly explained, and no objections are raised by the Council. The assessment follows national guidelines and the most up-to-date Defra toolkit, and reflects the cumulative effects of other development within Brighton and Hove City. The Council also accepts existing traffic data for Rottingdean High Street as a basis for the assessment, and data for additional daily trip generation into the AQMA. I have also had regard*

*to recent decisions and actions relating to the UK's non-compliance with the Ambient Air Quality Directive 2008/50/EC.*

*The development would be accompanied by a range of mitigation, which would include various measures to promote sustainable transport and to reduce private vehicle trips. The section 106 agreement includes in Schedule 4 significant measures to promote sustainable transport in connection with occupation of the development, including financial contributions for purchases of bicycles, provision of temporary bus season tickets, promotion of a car club, and provision of general information relating to local public transport, walking and cycling. The section 106 agreement also includes a walkways agreement to safeguard public pedestrian access to and through the site. Should the development be acceptable, planning conditions may also be considered in relation to cycle parking and other matters.*

### **Summary**

*I therefore conclude that the proposed development would not be harmful to air quality. Accordingly, the scheme would not be contrary to Policy SU9, or to the expectations of the Framework. Policy SU9 states, amongst other matters, that development liable to cause air pollution will only be permitted where human health and related matters are not put at risk, where it does not reduce the authority's ability to meet relevant air quality targets, and where it does not negatively impact upon the existing pollution situation. It also refers to development within an air quality management hotspot, although the appeal site actually lies outside the AQMA. I have also had regard to county guidance set out in the Air Quality and Emissions Mitigation Guidance for Sussex Authorities 2013 which seeks to ensure that the air quality in AQMA's is not worsened and which recommends that planning permission be refused if, after mitigation, high to very high air quality impacts remain.*

### **High Court Decision in Respect of Gladman Developments Limited (October 2017) within Swale Borough Council**

This is an important decision as it deals with the weight to be applied to exceedances of the Air Quality Limit Values and whether mitigation can be taken into account when the effects of such mitigation are not capable of being quantified.

*The Inspector at the appeal dealt with issue 8 at DL90-106. The High Court Appeal only dealt with Air Quality (the eighth issue) defined as "The effect of the appeal proposals, including any proposed mitigation measures, on air quality, particularly in the Newington and Rainham Air Quality Management Areas" within the Appeals (Refs: APP/V2255/W/15/3067553 and Ref: APP/V2255/W/16/3148140*

The grounds and responses of the High Court are summarised below:

### **Ground 1(a)**

The Claimant contends that the Inspector failed to apply the outcome of Client Earth (No.2) in his understanding of the effectiveness of air quality action plans.

### **Response**

I consider that the Inspector properly engaged with the Client Earth (No.2) decision. He understood what the judgment required, and carefully analysed the evidence that was presented before him (DL99-106). He formed a judgment as to what the air quality is likely to be in the future on the basis of that evidence. He was entitled to consider the evidence and not simply assume that the UK will soon become compliant with the Directive.

### **Ground 1(b)**

Mr Kimblin submits that the Inspector failed to give effect to the principle that the planning system presumes that other schemes of regulatory control are legally effective.

### **Response**

I reject this submission. Paragraph 122 is clear. I agree with Mr Moules that the principle referred to in paragraph 122 concerns situations where a polluting process is subject to regulatory control under another regulatory scheme in addition to the planning system. It is directed at a situation where there is a parallel system of control, such as HM's Inspectorate of Pollution in Gateshead MBC, or the licensing or permitting regime for nuclear power stations in *R (An Taisce) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin). The point being that the planning system should not duplicate those other regulatory controls, but should instead generally assume that they will operate effectively. The Directive is not a parallel consenting regime to which paragraph 122 is directed. There is no separate licensing or permitting decision that will address the specific air quality impacts of the Claimant's proposed development.

### **Ground 1(c)**

The Claimant contends that the Inspector failed to explain why application of the DEFRA damage cost analysis and associated contribution was not likely to be effective.

### **Response**

I consider that at DL104-106 the Inspector reached a conclusion that on the evidence he was entitled to reach and that he explained what was wrong with the mitigation. The contributions had not been shown to translate into actual measures likely to reduce the use of private petrol and diesel vehicles and hence reduce the forecast NO<sub>2</sub> emissions (DL104).

### **Ground 1(d) and Ground 1(e)**

The Claimant contends that the Inspector was obliged to consider whether the issue which concerned him in relation to mitigation could be overcome by the imposition of a Grampian condition (Ground 1(d)); and that he failed to give the Claimant an opportunity to address the matter at the Inquiry or prior to issuing the appeal decision (Ground 1(e)).

The Claimant never suggested it would agree to be bound by a Grampian or any such condition. Nevertheless, Mr Kimblin submits that a condition which required the submission of a scheme of mitigation measures could have been drafted and imposed in a manner which precluded development until the planning authority accepted that the scheme would address the air quality impacts. That, he submits, would have been a reasonable condition (see *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125, per Lord Keith at 128 & 132; NPPG on Grampian Conditions; and witness statement dated 22 February 2017 of Mr John McKenzie, the Claimant's planning director, at para 5). It is irrelevant, Mr Kimblin submits, that such a condition was not canvassed by any party before the Inspector.

### **Response**

I am satisfied from the evidence to which I have referred that the Claimant knew the case which it had to meet and had an opportunity to adduce evidence and make submissions in relation to mitigation measures (which included suggesting a *Grampian* condition if he had wished to do so). I consider that the principle of fairness was satisfied in this case.

### **Ground 2**

The Claimant contends that the Inspector erred in failing to explain how the proposal is in conflict with the air quality action plan, read as a whole. It is the Claimant's case that its proposed mitigation measures were consistent with the local action plan, and that the Inspector ought to have explained where the inconsistency with the plan arose.

### **Response**

The Inspector found that the proposed development would be likely to have an adverse effect on air quality, particularly in the AQMAs. That being so, I agree with Mr Moules that it is obvious why the Inspector concluded that the proposed development was inconsistent with the local air quality action plans that sought to ensure development did not harm air quality. The decision letter read as a whole makes it clear to the parties (*Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at paragraph 19, per Lindblom J (as he then was)) that the inspector followed national policy, found there to be a breach of the air quality action plans, and accordingly concluded that both proposals would conflict with the guidance in NPPF paragraph 124.

### Ground 3

The Claimant contends that the Inspector failed to have regard to the fact that the emerging development plan contained an allocation for 115 dwellings in Newington within the AQMA.

### Response

I reject these submissions. First, it is clear that the Inspector did deal with the emerging plan (DL21-22) and he considered that little weight should be given to it. He noted that over 400 main modifications to the emerging local plan (“ELP”) had been published for consultation in response to the Inspector’s Interim Findings, and that some 2,220 representations had been made on the main modifications that will need to be considered by the Inspector (DL22). Further hearings were held before the Inspector completed her report and recommendations. In those circumstances the Inspector was entitled to conclude, as he did, that “substantial uncertainty remains about exactly which site allocations will appear in the adopted ELP and at what scale” (DL22).

Second, whilst emerging Policy AX6 proposes an allocation of 115 dwellings in Newington, it provides that the development must “Address air quality impacts arising in the Newington AQMA, including the implementation of innovative mitigation measures” (Main Modification 161, para 5). New development must thus be judged on its merits according to its air quality impacts. I consider that is what the Inspector did in relation to the Claimant’s proposal.

For the reasons I have given none of these grounds of claim succeed. Accordingly, this claim is dismissed.

### Diffusion tube monitoring trends within the AQMA

It is useful to examine the long-term trends of measured NO<sub>2</sub> values at each diffusion tube within the Rottingdean AQMA.

Ref	Location	2009	2010	2011	2012	2013	2014	2015	2016	2017*
E21	Vicarage Lane	41.5	47.6	40.9	38.4	36.5	28.6	26.4	27.5	n/a
E22	High Street (east side)	46.0	48.5	44.0	42.5	44.5	39.7	31.6	39.1	41.3
E23	High Street (west side)		53.7	48.4	46.2	47.0	41.3	37.7	38.4	37.3
E24	Marine Drive Rottingdean								34.9	32.2

\*the 2017 data (which is preliminary) does not include the December 2017, as the diffusion tubes have not yet been analysed, or the anomalous data which was recorded in July and August of 2017. Additionally, as a result of this a bias factor from 2016 has also been applied to this data, as the 2017 bias adjustment factor is not yet available.

The highest monitored concentrations of NO<sub>2</sub> are at E22 and E23 which are located on the façades of buildings less than 1 metre from the kerb of Rottingdean High Street. Both these diffusion tubes recorded exceedances of the air quality objective (AQO) consistently until 2013. Since 2013 the overall trend shows significant improvement of measured NO<sub>2</sub> values. In both 2015 and 2016 the NO<sub>2</sub> values were below the AQO (although close at E22 and E23 in 2016). An

additional diffusion tube E24 situated at Marine Drive, within the AQMA, shows a non-exceedance value of  $34.9\mu\text{g}/\text{m}^3$  for 2016. The 2017 data (although not complete) shows an increase in  $\text{NO}_2$  pollutant concentrations at E22, which is above the AQO, but a slight reduction at both E23 and E24.

In practice, what this means is that whilst there has been a general downward trend in  $\text{NO}_2$  pollutant concentrations within the AQMA that trend cannot be relied upon in all cases such that from 2015 to 2016 there was an increase in pollutant concentrations and an exceedance of the AQLV in 2017.

### **Implementation of site specific mitigation measures**

The EPUK/IAQM guidance advises that good design and best practice measures should be considered, whether or not more specific mitigation is required. The Air Quality Consultants Report (Ref: J2438/2/F1), dated 30/09/2016) states that the proposed development will incorporate the following good design and best practice measures:

- setting back of the development buildings from roads by at least 5 m;
- provision of a detailed travel plan, to be produced during the application timetable, or secured via S106, setting out measures to encourage sustainable means of transport (public, cycling and walking) via subsidised or free-ticketing, improved links to bus stops, improved infrastructure and layouts to improve accessibility and safety;
- provision of pedestrian and cycle access to the new development, including cycle parking;
- no provision of appliances for solid or liquid fuel burning; and
- Installation of ultra-low  $\text{NO}_x$  boilers only, with emission rates below  $32\text{mg}/\text{kWh}$ .

### **Dispersion modelling to consider November 2017 DEFRA revised emission factors and background pollutant concentrations**

ACCON have carried out dispersion modelling for the proposed development to take into account the updated emission factors and background pollutant concentration maps which were produced by DEFRA in November 2017.

The dispersion modelling has concentrated on the impact of the development on the Rottingdean AQMA. The most recent Emissions Factor Toolkit (EFT, version 8.0, November 2017) issued by DEFRA was used to derive emissions factors (in grams per kilometre) for vehicle movement along roads incorporated into the model. This version of the EFT includes updates to COPERT  $\text{NO}_x$  and  $\text{PM}_{10}$  emissions factors for road traffic which are taken from the European Environment Agency EEA COPERT 5 emissions calculation tool, including new EURO 6 subcategories.

There have also been updates to the vehicle fleet and age information. Version 8.0 was produced by DEFRA in response to changes in 'real world' vehicle emissions. As such, it has been assumed that the EFT produces reliable emission factors which are suitable for dispersion modelling as it

is the most up-to-date tool provided by DEFRA. A comparison is provided between ACCON’s dispersion modelling and that produced by AQC (the applicants air quality consultants).

**Table 1: Ovingdean 2019 Without Development Site**

Site	ACCON Total NO <sub>2</sub>	AQC Total NO <sub>2</sub>
R1	17.7	24.3
R10	16.6	25.0
R25	23.8	25.9
R30	25.4	23.4
R40	23.5	25.2
R50	31.4	30.4
R60	36.2	33.6
R67	26.0	21.9
R68	22.7	19.4
R69	20.5	20.4
R70	18.5	19.9

**Table 2: Ovingdean 2019 with Development Site**

Site	ACCON Total NO <sub>2</sub>	AQC Total NO <sub>2</sub>
R1	17.7	24.4
R10	16.6	25.0
R25	23.8	26.0
R30	25.4	23.4
R40	23.5	25.2
R50	31.5	30.4
R60	36.2	33.6
R67	26.0	18.8
R68	22.7	20.2
R69	20.5	20.9
R70	18.5	20.3

**Table 3: Ovingdean 2019 with Development Related Traffic Flows into the AQMA Reduced by 50%**

Site	ACCON Total NO <sub>2</sub>
R1	17.7
R10	16.6
R25	23.8
R30	25.4
R40	23.5
R50	31.5
R60	36.2
R67	26.0
R68	22.7
R69	20.5
R70	18.5

As identified in **Tables 1, 2, and 3**, there is no discernible difference between the modelled NO<sub>2</sub> pollutant concentrations without the development in place, with the development in place and fully occupied, or with the development in place with half the proposed traffic entering the AQMA at Rottingdean High Street.



Rob,

Further to our telephone conversation this afternoon and the clarification in respect of my Technical Note dated 19/01/2018 I am able to confirm the following points:

1. The pollutant concentration modelling that we have carried out, using the latest DEFRA data as published in November 2017, has identified that within the AQMA (principally receptor R60 where the highest modelled concentration occurs) there would be no significant change in pollutant concentrations with the development in place. At Receptor R50 there would be an increase of  $0.1\mu\text{g}/\text{m}^3$ , however that increase occurs at a location where the predicted pollutant concentration is relatively low ( $31.5\mu\text{g}/\text{m}^3$ ) and significantly below the Air Quality Limit Values (AQLV).
2. The pollutant concentration modelling has identified that at no location would the AQLV be exceeded. It should be noted however that the preliminary monitoring (not as yet official) of  $\text{NO}_2$  within the AQMA for 2017 does indicate that there is presently an exceedance of the AQLV.
3. The exceedance of  $0.1\mu\text{g}/\text{m}^3$  would be considered at best to be negligible and for that reason would not be supported by the decision in respect of Gladmans v Swale BC.
4. The sensitivity test to replicate potential mitigation measures which we have carried out, using 50% less traffic into the AQMA, does not result in a predicted difference in pollutant concentration levels. This of course is not unsurprising given the very

For these reasons following my discussion with Rob we have concluded that there is not a defensible case to be made at Inquiry in respect of air quality. This is slightly different to my discussion with Hilary yesterday, when without having my Technical Note in front of me I erroneously thought that the increase in pollutant concentration occurred at a location where the monitored levels potentially exceeded the AQLV.

Should you require any further information then please do not hesitate to contact me.

Best regards,

Graham

Graham A Parry  
Managing Director

**ACCON UK**  
ENVIRONMENTAL CONSULTANTS

EIA • Noise • Vibration • Air Quality • Lighting • Ecology





Hi Hilary,

Email sent on the 15 Jan. Also, now having visited the site with my botanist, we have assessed the site as being plant species rich, invertebrate species rich, important to numerous fauna including bats and reptiles, is important as a wider mosaic habitat which is linked to current use and is important as a 'stepping stone' to surrounding important habitats. The UFA had not conducted detailed surveys and did not have sufficient data at hand when it made its recommendations. Had it had the data now currently available, I believe that it would not have recommended this site for development. Reason for refusal is supported and arguable in Inquiry. We believe if access concerns are overcome the site should be designated as a Local Wildlife Site.

Any queries please call.

Kind regards David

Arborweald Environmental Planning Consultancy

LANDSCAPE, ARBORICULTURE & ECOLOGY

SURVEYS\* PLANS\* ASSESSMENTS\* MITIGATION\* SOLUTIONS & METHODOLOGY\*

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Website: [www.tree-planning.co.uk](http://www.tree-planning.co.uk)

**Email sent on 15/01/2018**

Dear All,

Please can you also forward this to Robert Williams.

Refusal Reason 1; points and whether the Ecological elements of the Planning Application accord or not. I'm providing basic responses which will be fleshed out in my P of E.

**Summary/paraphrase of Policy Points and Applicant's Accordance with**

Reason 1: The proposed development would have a harmful impact on the ecology and biodiversity of the site, which would not be sufficiently mitigated by the measures proposed contrary to paragraph 118 of the National Planning Policy Framework, policy CP10 of the Brighton and Hove City Plan Part One and Policy QD18 of the Brighton and Hove Local Plan. DK-S: ON

BALANCE I CONCUR WITH THIS REASON FOR REFUSAL AND IT IS MY PROFESSIONAL OPINION THAT WE CAN ARGUE THIS IN THE INQUIRY.

**NPPF 118: LPA should aim to conserve and enhance biodiversity applying the following principles:**

- **If significant harm resulting from development cannot be adequately mitigated, or, as a last resort, compensated for, then planning permission (pp) should be refused.** *Appellant has not provided demonstrable evidence that, 1) there won't be significant harm and 2) the harm that will be caused (accepted by Appellant that will be a level of deleterious impact [low in their view]) can be sufficiently mitigated.* DK-S: THERE IS A POSSIBILITY THAT SOME OF THEIR MITIGATION MAY BE TO THE BENEFIT OF SOME SPECIES HOWEVER, THE DEVELOPMENT AND THEIR MITIGATION WILL BE TO THE DETRIMENT OF OTHERS. MOST LIKELY TO THE DETRIMENT OF RED STAR-THISTLE OR OTHER SPECIES WHERE IT IS TRANSLOCATED TO ALSO, ANTS, REPTILES, LEPIDOPTERA (BUTTERFLIES & MOTHS) – ALTHOUGH SOME LEPIDOPTERA MAY BENEFIT, LIKELY DELETERIOUS IMPACT ON ROBBER FLY AND DUNG BEETLES AND THEREFORE DELETERIOUS IMPACT ON SOME BATS

PARTICULARLY, SEROTINE AND NOCTULE. THERE IS A GENERAL ECOLOGICAL PRESUMPTION THAT IF YOU REDUCE THE SIZE OF A HABITAT YOU THEREFORE REDUCE ITS BIODIVERSITY VALUE. RESIDENTIAL LIVING WILL UNARGUABLY HAVE A DETRIMENTAL IMPACT; CATS (PREDATE ON A WIDE RANGE OF FAUNA INCLUDING BIRDS, SMALL MAMMALS AND REPTILES), NUTRIENT ENRICHMENT FROM DOMESTIC GARDENING INCLUDING FERTILISERS, WEED KILLERS ETC., INTRODUCTION OF INAPPROPRIATE EXOTICS INTO THE ENVIRONMENT (GARDEN PLANTS) AND THE DESIGN IS TERRIBLE IN TERMS OF GARDEN ARISING BEING DISPOSED OF STRAIGHT INTO THE BROADLEAF WOODLAND AREA.

- **Proposed development on land within or outside a SSSI likely to have an adverse effect on a SSSI (either individually or in a combination with other developments) should not normally be permitted. Where an adverse effect on the site’s notified special interest features is likely an exception should only be made where the benefit of the development at the site, clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSI. *There is an absence of evidence from the Appellant on this matter. They have widely discounted impacts on any other habitats.* DK-S: THE SITE IS WITHIN THE SSSI RANGE WHERE IT COULD IMPACT. HOWEVER, IT IS DIFFICULT TO ARTICULATE WHAT THAT IMPACT MAY BE WITHOUT SIGNIFICANT RESEARCH. WHAT WE CAN DO IS LOOK AT THE RANGES OF IMPORTANT SPECIES ON SITE AND WITHIN RANGE OF SSSIs, ASSESS HOW THE DEVELOPMENT WOULD AFFECT THEM AND THEN SEE IF IT IS WORTH CONSTRUCTING AN ARGUMENT THAT SURROUNDING SSSIs WOULD BE DETRIMENTALLY IMPACTED UPON. I NEED TO LOOK AT WHAT NATURAL ENGLAND AND OTHER CONSULTEES HAVE SAID (COMMENTS AVAILABLE?).**
- **Development with the primary objective to conserve and enhance biodiversity should be permitted. *The Appellant has not provided evidence that the primary objective is to conserve and enhance indeed, they acknowledge that there would be a deleterious impact.* DK-S: SAME AS MY COMMENTS AFTER FIRST BULLET POINT.**
- **Opportunities to incorporate biodiversity in and around developments should be encouraged. DK-S: NO RELEVANT COMMENT NEEDED FROM ME AT PRESENT.**
- **Planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats including ancient woodland and the loss of aged or veteran trees found outside of ancient woodland unless the need for and benefits of, the development in the location clearly outweighs the loss. *The Appellant has not demonstrated that this habitat will not be lost through the changes in management and through development.* DK-S: PART OF THE SITE WILL BE LOST TO DEVELOPMENT. IF WE CAN SHOW THAT THE SITE HAS SUFFICIENT ECOLOGICAL VALUE TO MERIT A WILDLIFE DESIGNATION THEN WE CAN ARGUE THE LOSS OF AN IRREPLACEABLE HABITAT. BHCC MAY THEN HAVE TO REVISIT THEIR DECISION THAT THE SITE CAN BE DEVELOPED (I WOULD LIKE TO VISIT THE SITE ON SUNDAY 21 JAN IF POSSIBLE?).**
- **The following wildlife sites should be given the same protection as European sites;
 
  - **Potential SPA and possible SAC**
  - **Listed or proposed RAMSAR sites; and**
  - **Sites identified, or required as compensatory measures for adverse effects on European sites, potential SPA, possible SAC, and listed or proposed RAMSAR sites.****

DK-S: PROBABLY NOT APPLICABLE BUT I RULE NOTHING OUT AT THIS STAGE.

**BHCC Policy CP10 1: Holistically conserves, develops restoration and enhances biodiversity through promotion of partnership work within South Downs Way Ahead Nature Improvement Area (NIA), which incorporates parts of the urban area, the urban fringe, the seafront and surrounding downland. Within the NIA, a strategic approach to nature conservation enhancement will be taken, objectives of;**

- Linking and repairing habitats and nature conservation sites to achieve landscape scale improvements to biodiversity.** *Appellant has not provided evidence, based on peer reviewed published research/best practice e.g. They have not established evidence to define the probability of success in translocating red star-thistle into areas where it currently does not persist. In order to produce such evidence, proper receptor site investigation is required including sufficient flora and fauna recording, soil and hydrology testing. Conducting these investigations demands time, possibly taking account of all seasons and therefore possibly in excess of a year's study. The cumulative impact of the proposed development and ecological mitigating management has not been adequately assessed and demonstrated to accord with this policy point.* DK-S: THERE WILL BE AN ACKNOWLEDGED DAMAGING IMPACT TO THE SITE WITHOUT ADEQUATE RESEARCH TO PROVIDE AN EVIDENCE BASE THAT ADEQUATE MITIGATION CAN BE PROVIDED ON AND OFF SITE. ON BALANCE THE APPELLANTS SUBMISSIONS DO NOT ACCORD WITH THIS POLICY POINT. SURVEYING OF RECEPTOR SITE SUFFICIENT TO SUPPORT SUCCESSFUL TRANSLOCATION CANNOT BE CONDITIONED AS THERE IS NO GUARANTEE OF SUCCESS.
- Conserving, restoring, recreating and managing priority habitats and protecting and recovering priority species populations to contribute to local Biodiversity Action Plan targets.** *Appellant's mitigation and management proposals has not provided demonstrable evidence that this policy point can be accorded with indeed, they acknowledge harm to the overall habitat.* DK-S: THERE ARE A NUMBER OF PRIORITY AND RED DATA BOOK SPECIES ON SITE THAT THE APPELLANTS MAKE AN UNCOMPELLING ARGUMENT FOR CONSERVATION IN ASSOCIATION WITH DEVELOPMENT. THE GRASSLAND HABITAT IS NOT LISTED ON NATURAL ENGLAND'S 'MAGIC MAP' AS A PRIORITY HABITAT (LOWLAND MEADOWS) HOWEVER, THAT DOES NOT PREVENT A FUTURE LISTING AND IT APPEARS FROM SURVEY WORK CONDUCTED THAT IT SHOULD NOW BE LISTED AS A 'PRIORITY HABITAT' (FURTHER STUDY/ASSESSMENT TO BE CONDUCTED) IN ADDITION TO A 'LOCAL WILDLIFE SITE'.
- Enabling people to have improved access to and understanding of local habitats and species.** DK-S: THE DEVELOPMENT CERTAINLY PROVIDES IMPROVED PUBLIC ACCESS HOWEVER, THERE IS A DICHOTOMY REGARDING THE OBJECTIVES OF RESIDENTIAL GARDENS AND THE NATURAL MEADOW; MANY OF THE MEADOW SPECIES MAY BE VIEWED AS PESTS IN DOMESTIC GARDENS AND MANY OF THE RESIDENTIAL GARDEN SPECIES OFTEN ESCAPE AND BECOME DOMINANT IN THE WILD AREAS; WHETHER THIS LEADS TO BETTER PUBLIC UNDERSTANDING OR NOT OF LOCAL HABITATS AND SPECIES CAN BE ARGUED. ALSO, INTERPRETATION OF THE SPIRIT OF THIS POLICY POINT IS CONSERVATION WHICH DEVELOPMENT IN A LOWLAND MEADOW DOES NOT SUPPORT.
- Ensuring development delivers measurable biodiversity improvements.** *Appellant's mitigation and management proposals has not provided demonstrable evidence that this policy point can be accorded with indeed, they acknowledge harm to the overall habitat.* DK-S: THE APPELLANT MAY BE ABLE TO ARGUE SOME SPECIES ECOLOGICAL BENEFITS BUT NOT THE OVERALL BIODIVERSITY OF THE SITE AND SURROUNDING HABITATS.

**BHCC Policy CP10 2: Ensure that all development proposals: a) Provide adequate up-to-date information about biodiversity which may be affected.** *The Appellants have not provided sufficient evidence in regard to clause a), particularly in relation to translocation and, the development footprint and associated implications of development.* DK-S: IN SHORT, THERE IS INSUFFICIENT REQUIRED ECOLOGICAL DATA PROVIDED BY THE APPELLANT.

**b) Conserve existing biodiversity protecting it from the negative indirect effects of development, including noise and light pollution.** *Appellants have not provided demonstrable evidence of biodiversity conservation. They have made proposals regarding mitigation of light pollution but there will be inevitable light pollution associated with development including, footpath lighting across the site. Residential development will also bring an increase in noise.* DK-S: BHCC CAN PLACE CONDITIONS FOR MITIGATION TO BE IN PLACE REGARDING PARTICULAR SPECIES BUT

NOTWITHSTANDING SUCH CONDITIONS, THE PROPOSED DEVELOPMENT WOULD STILL RESULT IN HARM TO BIODIVERSITY. EQUALLY CONDITIONS REGARDING LIGHT POLLUTION CAN BE PUT IN PLACE BUT THERE WOULD STILL BE AN INCREASE IN LIGHT.

**c) Provide net gains for biodiversity wherever possible taking account of the wider ecological context of the development and of Biosphere objectives.** *Appellant has provided some evidence to support focussed ecological gains but not, biodiversity net gains. With regard to Biosphere objectives; the Appellants evidence is lightweight at best and in specific areas there is insufficient evidence.* DK-S: NO NEED FOR ME TO REPEAT NET LOSS OF BIODIVERSITY COMMENTS. WITH REGARD TO BIOSPHERE OBJECTIVES; NATURE CONSERVATION IN PART MET AND IN PART NOT MET BY APPELLANTS, SUSTAINABLE SOCIO-ECONOMIC DEVELOPMENT THIS IS MORE NUANCED AND I SUSPECT PARTIALLY MET AND THEREFORE PARTIALLY NOT MET & KNOWLEDGE, LEARNING AND AWARENESS THROUGH A HOLISTIC APPROACH THE APPELLANTS' APPROACH FALLS SHORT OF AN HOLISTIC APPROACH AND WITH REGARD TO LEARNING AND AWARENESS THEY HAVE DONE LITTLE TO DEMONSTRATE THIS HOWEVER, PLANNING CONDITIONS COULD SEEK TO ADDRESS THIS.

**d) Contribute positively to ecosystem services, by minimising any negative impacts and seeking to improve the delivery of ecosystem services by development.** *Appellant has proposed mitigation for negative impacts nevertheless, negative impacts would result. Applicant has no measures proposed which would result in improving the delivery of ecosystem services.* DK-S: THERE IS NOTHING IN THE APPELLANTS SUBMISSIONS THAT WOULD RESULT IN AN OVERALL POSITIVE CONTRIBUTION TO ECOSYSTEM SERVICES E.G. NATURAL POLLUTION REDUCTION, NATURAL IMPROVEMENTS TO AIR AND WATER QUALITY, AND GREEN ROOVES ETC. THEY MAY ARGUE THAT TREE PLANTING CAN HELP IN IMPROVING AIR QUALITY BUT THIS IS DOUBTFUL WHEN ASSESSED AGAINST THE IMPACTS OF NEW DEVELOPMENT. THE MEADOW PROVIDES AN ECOSYSTEM SERVICE WITH REGARDS TO POLLINATION, THEY COULD ARGUE THAT THEY CAN ENHANCE THIS THROUGH SPECIFIC PLANTING BUT THIS COULD HAVE IMPLICATIONS FOR BIODIVERSITY PER SE.

**BHCC Adopted Local Plan Policy QD18: Direct and/or indirect affecting of fauna and/or flora protected under National and/or European legislation and/or categorised as 'a declining breeder', 'endangered', 'extinct', 'rare' or 'vulnerable' in the British 'Red Data' books, the applicant will be required to undertake an appropriate site investigation. Developer required to implement measures to avoid harmful impact of a proposed development on such species and their habitats. Where practicable it is expected that habitat of respective species is enhanced.....Permission will not be granted .....that would be liable to cause demonstrable harm to such species and their habitats.** *Appellants have conducted insufficient surveying effort regarding British Red Data Book species, including invertebrates (1 x beetle and 2 x bugs) but in particular, red star-thistle. Appellant has not demonstrated that Nationally protected and Red Data Book species habitat would be enhanced. Appellant has not provided evidence that harm would not be caused to such species and their habitat.* DK-S: OUR ARGUMENT REGARDING THE RED DATA BOOK INVERTEBRATES IS NOT PARTICULARLY STRONG AS GIVEN THEIR REQUIRED HABITAT NEW PLANTING (BY PLANNING CONDITION) CAN BE IMPLEMENTED TO CONSERVE THEIR HABITAT INDEED, THE PLANTING OF NATIVE SHRUBS/TREES WILL ENHANCE THE HABITAT FOR THE NATIVE BOX BUG. HOWEVER, THE DEVELOPMENT ITSELF WILL REDUCE THE SIZE OF THESE FAUNAL SPECIES' HABITAT OVERALL. THE RED STAR THISTLE IS A STRONGER ARGUMENT AS THE APPELLANT'S ARGUMENTS FOR ENHANCING THIS SPECIES' HABITAT IS WEAKER AND THERE IS ACKNOWLEDGED DAMAGE/LOSS ON SITE OF THIS PLANT'S HABITAT.

I will look at the previous Inspector's decision next and report back to you regarding the Inspector's view on ecological value and why this has changed. Please confirm if I can visit the site on Sunday accompanied by our botanist?

Kind regards David

Arborweald Environmental Planning Consultancy  
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**Confidential:**

**Advisory Note responding to Reason for Refusal 2:**

Murphy Associates have been commissioned by Brighton & Hove City Council to act as an expert witness and manage the appeal process in respect of the decision of the Council to refuse planning permission for the development of 'Land South of Ovingdean Road, Brighton' under reference BH2016/05530.

As a result of queries raised by the Appellant's Agents, and discussions during the case conference, Murphy Associates was asked to consider whether or not Reason for Refusal No. 2 could be successfully defending at appeal and under examination.

Reason for Refusal No. 2 states:

*'The extent of the proposed development would result in the loss of part of the gap between the villages of Ovingdean and Rottingdean and have an adverse impact on the setting of the Ovingdean Conservation Area and Rottingdean Conservation Area, contrary to policy HE6 of the Brighton & Hove Local Plan.'*

Dissecting Reason for Refusal No. 2 there are two parts to contained therein:

- loss of the gap between the villages of Ovingdean and Rottingdean
- adverse impact on the setting of the Ovingdean and Rottingdean Conservation Areas.

Prior to visiting the site and the area in which it is located, I familiarised myself with the location of each of the settlements and the relationship between the two. I took note of the location and boundaries of the respective Conservation Areas and their key characteristics. I also took note of the location of listed buildings and other heritage assets in the area.

The PLBCAA contains the primary legislation relating to the determination of planning applications relating to the historic environment. Section 72(1) of the Act sets out the statutory duty in respect of conservation areas in the exercise of planning functions. It states:

*" In the exercise, with respect of any buildings or other land in a conservation area, of any powers under any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."*

Courts have held that "preserve" in the context of the Planning Acts means ensuring that there is an absence of harm and if so, the minimum requirements of the Act would be met if this were to be achieved (South Lakeland DC v SSE & Carlisle Diocesan Parsonages Board [1992] AUE R 573) . Of course we also have had the Barnwell Manor judgment and more recent judgments since 2013 that have reinforced the fact that setting is a consideration and can contribute to the significance of a heritage asset.

This statutory requirement relates to designated heritage assets. However, the NPPF and Historic England's Good Practice Guide in Planning No. 3 - The Setting of Heritage Assets (Historic England, July 2015) [GPA3] makes it clear that the setting of a heritage asset in the surroundings in which a heritage asset is experienced is a material consideration. Attention is drawn to the fact that:

*"The Courts have held that it is legitimate in appropriate circumstances to include within a conservation area the setting of buildings that form the heart of that area (R v Canterbury City Council ex parte David Halford, February 1992; CO/2794/1991) and NPPF paragraph 80, for example, makes it clear that historic towns are regarded as having a setting."*  
(GPA3, 'The extent of setting' Box 1, page 2)

And

*"In primary legislation, the setting of conservation areas is not a statutory duty. However, the NPPF states that the setting of a designated heritage asset can contribute to its significance."*  
(GPA3, 'The extent of setting' Box 2, page 2)

Having taken account of the statutory duties set out in the PLBCAA and good practice advice and guidance notes from Historic England (and its predecessor) as well as Local Policy, and applying the stepped approach advised by GPA3, it cannot be said that the appeal scheme would have an adverse effect on the setting of the Conservation Areas.

Having regard to the subject of setting, the GPA3 sets out a stepped approach to assessing setting and the role that it plays in contributing to the significance of a heritage asset/s. Under the heading 'Views and setting' we note that the contribution of setting to the significance of a heritage asset is often expressed by reference to views which can be static, dynamic, include a variety of views across or including that asset, and views of the surroundings from or through the asset.

Section 2.1 expands on the explanation given in the introduction stating that the extent of setting

*"... is not fixed and may change as the asset and the surroundings evolve' and that 'Elements of a setting may make a positive or negative contribution on the significance of an asset, may affect the ability to appreciate that significance or may be neutral'. (page 4)*

Section 2.2 elaborates further on the "extent of setting" which can embrace:

*"all of the surroundings from which an asset can be experienced or than can be experienced from or within the asset" as "setting does not have fixed boundaries "; "cannot be definitively and permanently described as a being spatially bounded area or as lying within a set distance of a heritage asset."*

At the same time it is noted that one does not need to be in direct view of a heritage asset to be within its setting. It does not depend on public rights or the ability to access it. Surroundings can evolve. Diurnal, nocturnal and seasonal change are also considerations. It is within this document that we are reintroduced to the references such as "immediate" and "extended" settings of heritage assets which takes account of long distance views.

Section 2.4 at GPA3 explains that *"the importance of setting lies in what it contributes to the significance of the heritage asset"*. This can depend on *"a wide range of physical elements ... as well as perceptual and associational attributes, pertaining to the heritage asset's surroundings ."*

This process requires one to have an understanding about the significance of the asset/s in order to be able to determine if harm would arise. GPA3 recommends a stepped approach where matters of setting are concerned which have been tried and tested at appeal:

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- Step 1: identify which heritage assets and their settings are affected;
- Step 2: assess whether, how and to what degree these settings make a contribution to the significance of the heritage asset(s);
- Step 3: assesses the effects of the proposed development on that significance;
- Step 4: explore the way maximising enhancement and avoid minimising harm;
- Step 5: make and document the decision and monitor outcomes.

#### Steps 1 and 2

In that regard, I have familiarized myself with the respective Conservation Areas by reading through the Council's Character Statements. I have undertaken my own research noting the fact that the setting where once quite distinct and separated by the surrounding countryside. The original settlement of Ovingdean which is within the defined Conservation Area, is quite distinct and contained particularly to its immediate south, north and west sides. Further to the south, south east and north east, development has risen up and over the ridge of the South Downs, engulfing the landscape and in parts dominating the hillsides. Equally, th wn that overtime, development has increased to the south, east and south east of Ovingdean, rising up the slopes of the South Downs landscape to the ridge at Longhill Road and down to The Vale and to the rear of Longhill School and Dean Leisure Centre where It meets the expansion of the settlement of Rottingdean.

The Rottingdean Conservation Area is generally based on the settlement as shown between the 1789 – 1805 Draft OS Map and the 1830 Tith Map. Expansion was more prolific during the interwar and post war periods and today we see the two settlements practically merging but for the constraints of topography, the physical presence of the Leisure Centre, School and the appeal site

I went to each Conservation Area and walked to and from the appeal site. For Ovingdean, I parked close to the Church, and walked uphill in an easterly direction to the point where the public footpath/bridleway left Ovingdean Road. The distance between the closest point of the Conservation Area and appeal site was noted as being approximately 0.5km via a steep incline and then descent. Walking 1km northwards along the public footpath/bridleway to Mount Pleasant and then toward Old Parish Lane, views can be obtained of the settlement of Ovingdean and the Conservation Area from certain points. However, I was not able to view the Conservation Area and appeal site together. There are views along this public footpath/bridleway where the appeal site is experienced. Those views are progressive and sequential. Holding an impression of it in my mind as I moved through the immediate and wider landscape, I considered the Conservation Area had an extended setting but that did not encompass the appeal site. The perceptions of the area were such that the landscape of the South Downs LCA and South Downs Natural Park dominated. The impression of old Ovingdean, although memorable, was not lasting. That impression had diminished once in the vicinity of the appeal site and continued to do so when walking along Falmer Road toward Rottingdean.

Walking southwards along Falmer Road, it was noted that the distance between the nearest point of the appeal site and the start of the Rottingdean Conservation Area was approximately 1.3km. To the centre within the High Street was approximately 2km. Along this route, whether walking north to south or vice-versa, there is no perception or awareness of the setting of the Rottingdean Conservation extending physically, visually or perceptually to include the appeal site. Indeed, there is no perception that the setting of the Ovingdean Conservation Area would extend to include Rottingdean. There were other elements of built form and countryside that created positive receptors that drew attention to themselves.

A return route via Beacon Hill to Longhill Road and walking southwards toward the Windmill afforded wide views and vistas across the landscape including across to Roedean School to the west, the windmill to the

south, parts of Woodingdean to the north and north east. The views included long views of Ovingdean and its listed church. One had to walk further southwards along the paths to gain a view of the Rottingdean Conservation Area. The appeal site was not noted nor seen.

### Step 3

Moving through the landscape in which the Conservation Areas are located and experienced did not lead to the impression that the appeal site was within their immediate or extended settings. The appeal site has as a role to play in contributing to the remaining sense of rurality that the area exhibits and the environs of the Ovingdean Conservation Area more so than Rottingdean. On that basis and even by a far stretch of the imagination, the appeal site would perhaps be on the very periphery of the extended perceptual setting of Ovingdean Conservation but this is a weak stance.

Therefore and bearing in mind Step 3 requires an assessment of the effects of the proposed development on the role that setting plays in contributing to the significance of the Conservation Area, the conclusion is that no harm would arise.

There is no requirement to proceed to Steps 4 and 5 as a result.

### Conclusion

It is my opinion that whilst setting is an important consideration, in this case, the appeal site does not fall within the setting of either Conservation Area. As it does not fall within their respective settings, the site does not contribute to the significance of those Conservation Areas.

Based on my experience and by using this well-tested and accepted stepped approach, the second prong of Reason for Refusal No.2 could not be defended with any success.

In respect of this site, in dismissing the previous appeal on a greater area of the site, the Inspector did not raise a heritage objection. The Council's own Conservation Officer did not object on heritage grounds and did not consider that site affect either Conservation Area. I therefore consider that this prong of Reason for Refusal 2 is very weak and could not be defended. To attempt to do so would render the Council liable to an Award of Costs. On that note, I am reminded of the Public Inquiry at Land to the North of Old Guildford Road, Broadbridge Heath, W.Sussex (APP/Z3825/A/14/2224668) which related to the residential site within the setting of a listed building that had a proven relationship with the wider landscape. Despite a strong case, the Inspector, whilst not totally in disagreement with the Council considered the effects of a residential scheme on setting were overstated and even though less than substantial harm would arise, he considered this would be outweighed by the public benefits. In this case, the Inspector awarded the Appellant a full award of costs. That case was not straightforward as heritage was a matter raised late in the day. I attach the Costs Decision Letter for your attention.

I would therefore recommend that reference to the adverse impact on the setting of the Ovingdean and Rottingdean Conservation Areas be deleted from Reason for Refusal 2.

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