

TOWN AND COUNTRY PLANNING ACT 1990

AND IN THE MATTER OF PLANNING APPLICATION WA/63/21

AND LAND EAST OF TYE LANE, WALBERTON, BN18 0LU

ADVICE

1. I am instructed by Walberton Parish Council (“the PC”) to advise in connection with the above planning application submitted to the local planning authority, Arun District Council (“Arun”) in relation to the residential scheme at the above site. In preparing this advice I have studied all the relevant background documents including the application and supporting documents (including the planning and heritage statements), previous applications (WA/93/20/PL which was subsequently withdrawn and WA/44/17/OUT) and the development plan. I have also studied the officer’s report to Arun’s Planning Committee of 27 October 2021 where the members resolved to defer the application. The published draft minutes record the decision to defer pending an Officer’s report that addressed Members concerns on the following issues:

- (a) Traffic movements at the junction of Tye Lane and The Street;
- (b) Traffic movements through the village centre along the Street;
- (c) Confirmation that the reduction in width of Tye Lane to accommodate the pavement would not impair the free flow of traffic.

2. I have also seen the advice of my colleague, Dr Ashley Bowes summarised in the PC’s letter of 24 October 2021. I agree with his advice. Whilst I understand that at the meeting on 27 October 2021 the case officer attempted to address Dr Bowes’s advice in relation to the Court of Appeal’s decision in *Hillside Parks Ltd v Snowdonia National Parks Authority* [2020] EWHC Civ 1440, it appears to me from the notes of the debate that my client has supplied that the officer did not grapple with the consequences of the Court of Appeal’s decision. The original outline planning permission (WA/44/17/OUT) did not have access as a reserved matter. It was fixed and approved by that permission – see conditions 4, 8 and

40. The specific location of the access was therefore settled. Whilst the *Hillside Parks* decision may seem to have a rather dramatic effect on this application in line with Dr Bowles's advice it is nevertheless the correct interpretation. This has subsequently been illustrated and reinforced by paragraph 9 the judgment on 11 November 2021 of Steyn J in *R (Gallagher Ventures Limited) v Secretary of State for Housing Communities and Local Government and Torbay Council* [2021] EWHC 3007 (Admin). **The members of the Planning Committee must be made aware of this otherwise they run the risk of falling into legal error and any decision to grant planning permission would be susceptible to challenge by way of judicial review.**

3. Dr Bowes's advice also referred to the *Langley Park School* decision. Once again, I agree with his analysis. I also note that in the draft minutes it is recorded that members were concerned about the "traffic effects to the Conservation Area going through Walberton village" and this appears to be at the heart of the second reason for the deferral. **In my view members are right to be concerned. This is a point of major importance.**

4. As the PC's letter of 24 October 2021 notes: "the use of the consented Yapton Lane access (as part of WA/44/17/OUT) would deliver the same benefits of the development without the same level of harm. Whilst the applicant has sought to cast doubt on the deliverability of the Yapton Lane access, National Highways has confirmed in writing that whatever the ultimate alignment of the A27 bypass, it will ensure access to Avisford Grange is secured (see enclosed letter dated 17 June 2021). **The presence of the consented Yapton Lane access is therefore an important material consideration which needs to be drawn to Members' attention.**"

5. The National Highways clear commitment to maintaining access to the approved residential site, set out in the letter of 17 June 2021, was re-confirmed in the formal consultation reply email from David Bowie of National Highways to Michael Eastham of Arun dated 5 August 2021 timed at 13:57 where it is stated by Mr Bowie: "In bringing forward these proposals we will, of course, ensure that

access to the Vistry Homes Land East of Tye Lane site is maintained during and after construction of the proposed bypass. The alternative access arrangement to the site proposed under this application will provide **additional flexibility** in this regard and as a company we are supportive of it in principle” (*emphasis added*). The following paragraphs of Mr Bowie’s email provide further detail of how access will be maintained. In effect, the evidence from National Highways is that, as a matter of fact, the alternative vehicular access is unnecessary. **This fact is central to the heritage issues.**

6. In the officer’s report the comments of Arun’s Conservation Officer are noted. It states that: “There are concerns regarding the impact that additional traffic would have on the conservation area, the development could have some negative impact upon the conservation area. The application is considered to cause less than substantial harm in accordance with paragraph 202 of the NPPF (2021). The level of harm is considered to be on the lower end of the scale. You will also need to take into account the contents of the Planning (Listed Buildings and Conservation Areas) Act 1990 (as amended).”
7. Further on in the report is a more extensive section dealing with the impact on the Walberton Conservation Area and the setting of listed buildings. It concludes: “in terms of the Conservation Area it is acknowledged that there would be an impact on the setting of the Conservation Area resulting from the development proposed and conflict with paragraph 72 of the act (sic). Overall, the proposal does cause some harm to the Conservation Area, but this level is such that the impact can be described as leading to less than substantial harm. The public benefits sufficiently outweigh the harm caused to the Conservation Area....”
8. With regard to listed buildings, the officer’s report concludes that: “in terms of listed buildings it is acknowledged that there would be an impact on the setting of the Listed Buildings resulting from the development proposed (in conflict with section 66 of the aforementioned act). Overall, the proposal does cause some harm to the Heritage Assets, but this level is such that the impact can be

described as leading to less than substantial harm. The public benefits sufficiently outweigh the harm caused to the listed buildings....”

9. In my opinion this analysis is woefully inadequate and fundamentally legally flawed.

10. First, there are no public benefits flowing from this proposal. The provision of new homes bringing new residents into the village and boosting the local economy was already taken into account when granting the outline planning permission (WA/44/17/OUT). Thus, Arun is double counting the benefits from a development already permitted. Second, as a matter of fact, the alternative access is not needed – National Highways has confirmed that access to the residential site as already permitted will always be maintained. It describes the application as providing “additional flexibility”. Third, the officers are now on record as confirming that there will be harm to both the Conservation Area and the listed buildings. Fourth, it follows that in the exercise of balancing harm against the public benefits, there are no public benefits whatsoever. In other words, there are no public benefits that could outweigh the identified harm.

11. Furthermore, Arun’s approach as set out in the officer’s report is clearly contrary to case law and does not address the issue of harm correctly. As there will be harm to the Conservation Area, Arun is bound by the statutory duty set out in section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990: “In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character and appearance of that area”.

12. Whilst the statutory duty with regard to preserving or enhancing may only require that no harm be caused, it nonetheless creates a “special presumption” and “considerable weight and attention” should be given to any harm found to arise with regard to the character and appearance of the area – see the judgment of Lindblom J in *R (Forge Field Society) v Sevenoaks District Council* [2014] EWHC

1895 (Admin) where he held that, following the Court of Appeal judgment in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, the duty in section 72(1) does not allow a local planning authority to treat the desirability of preserving the character and appearance of conservation areas as a mere material consideration to which it can simply attach such weight as it thinks fit. He went on to say at paragraph 48: “If there was any doubt about this before the decision in *East Northamptonshire* it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.” Furthermore, he held that as the Court of Appeal emphasized in *East Northamptonshire*, a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.

13. Lindblom J then noted that, in paragraph 22 of his judgment in *East Northamptonshire* Sullivan L.J., said this: “... I accept that ... the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment [in *The Bath Society v Secretary of State* [1991] 1 WLR 1303] is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give “considerable importance and weight””. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 141 (at p.146 E-G) that if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area “there will be a

strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest". Sullivan L.J. said "[there] is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"

14. Thus, a finding that a development would cause harm to the conservation area, creates a strong presumption against granting planning permission. The recent decision of Sir Duncan Ouseley in *Safe Rottingdean Ltd v Brighton & Hove City Council* [2019] EWHC 2632 (Admin) is also relevant. The judge explained that even though the statutory duty in section 72, unlike in section 66, does not extend to protect the 'setting' of a conservation area, it is protected as a material consideration by the NPPF: "This is because section 72 applies "with respect to any buildings or other land in a conservation area". This, however, is one aspect where the Framework goes further than the legislation: it makes the setting of a conservation area part of what may make it significant. This makes it significant to planning decisions. It appears to make harm to the setting of a conservation area of equivalent importance, in terms of the justification required, to the setting of a listed building. But it does so as a matter of policy rather than of statutory duty, which does have different legal consequences."

15. Further judicial guidance on what may constitute the character or appearance of a conservation area can be found in the judgment of Dove J. in *R (Historic Buildings and Monuments Commission for England (known as Historic England) v Milton Keynes Council* [2018] EWHC 2007 (Admin) which concerned proposed development in a conservation area that involved significant demolition. In paragraphs 62 – 64 Dove J held that:

"62.....The starting point for consideration of this issue is what is meant by paying special attention to "the desirability of preserving or enhancing the character or appearance" of the Conservation Area. The first matter to

be observed, albeit obvious, is that this requires a judgment (informed by an understanding of the significance of the historic asset represented by the Conservation Area) of the effect of the proposal on its "character or appearance". The issue which then arises is as to the role of a historic use of a Conservation Area, or part of it, within that judgment.

63. In my view it is clear that the phrase "character or appearance" is not confined simply to the historic built fabric of the area. Whilst undoubtedly that historic built fabric will be integral to the "appearance" of the area, it is important to note that the statutory test is quite deliberately not confined to simply visual matters. The inclusion of the area's "character" clearly broadens the range of qualities which can be relevant to the evaluative judgment, and in my view plainly incorporates within the test matters such as historic uses and the contributions which they make to the character of the area by influencing the understanding of that area and reflecting experiences that are not simply visual.

64. The further question which then arises is as to whether or not there is any warrant from the statutory language for concluding that built fabric is to be regarded as of paramount importance, or is pre-eminent over, other dimensions of the historic interest of the area such as the uses that historically have taken place within it. I can see no warrant within the statutory language for any such approach. What is called for is an evaluative judgment which will incorporate a broad range of historic influences and features bearing upon the character and appearance of the area, and the relative priority which may be given to any of those aspects will depend upon an understanding of the historic interest underlying the designation of the Conservation Area. It is not possible to be definitive as to the range of those matters which could bear upon historic interest. They will be many and various, but will undoubtedly in many cases include within them the uses which have a historic association with the area and which add to its character, not only in terms of the way in which those uses may have influenced the built form or appearance of the area, but also in how they have impacted upon the experience of the area in ways which are other than visual. What is clear from the statutory language is that the judgment needs to be comprehensive, and to include all of those historic aspects of the area which bear upon its value and the appreciation of it. It follows that I am unable to accept the argument made in principle that it is not possible to form a judgment in relation to the duty under section 72 of the 1990 Act which might in particular factual circumstances afford greater significance to the preservation of a use over the preservation of a particular building. The weight to be attached to each of the relevant historic dimensions or ingredients of the judgment is a matter which section 72 clearly leaves to the decision-maker in each individual case."

16. In conclusion, it is beyond doubt that, as a matter of fact, the alternative access is unnecessary. At best it gives the developer "additional flexibility". There are no

new public benefits that flow from the proposal – the benefits of the residential development were already taken into account when Arun granted outline planning permission. Whilst in an undesignated area this might not be a problem, in the case of this application the officers have identified that the proposal will cause harm to both the Conservation Area and to the listed buildings. As a result, sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 mean that this harm is a matter of considerable importance and creates a strong presumption against granting planning permission. **In circumstances where there are no countervailing public benefits, let alone benefits sufficient to outweigh the identified harm, the only option to Arun is to refuse this application.**

17. I have no objection to a copy of this advice being supplied to Arun's officers and members.

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15 November 2021