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Our Ref: 14382

19 March 2019

The Planning Inspectorate
3/08b Kite Wing, Temple Quay House
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Dear Sir/Madam

Re: Local Ref P/18/090 - Men-A-Vaur, Church Road, Hugh Town, St Mary's, Isles of Scilly

I write to you concerning the appeal in respect of the above planning application. This letter sets out the grounds of the Appellant's application for a partial award of costs in relation to that appeal and should be read in conjunction with the associated Statement of Case and appendices thereto.

1.0 Introduction

1.1 Planning Practice Guidance advises that, irrespective of the outcome of a planning appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.

1.2 Unreasonable behaviour in the context of an application for an award of costs may be either procedural (i.e. relating to the process) or substantive (i.e. relating to the issues arising from the merits of the appeal) and that costs may be sought and awarded in full or on a partial basis, for instance where relating to one or some of the grounds of refusal but not all of them.

1.3 In this instance, the unreasonable behaviour is substantive and goes to the heart of two of the three reasons for refusal stated in the Local Planning Authority's decision on

application P/18/090. Accordingly, a partial award of costs is sought in respect of the wasted expense in addressing the related matters at appeal.

1.4 As a preliminary note, Reason for Refusal R1 (relating to overlooking) does not form part of the grounds for this application for an award of costs. It should be stressed that the Appellant – like the Local Planning Authority's own Officers – disagrees with the Full Council's judgement in respect of this matter, but nonetheless acknowledges that it is exactly that; an exercise in planning judgement.

1.5 It is acknowledged that the development site lies in reasonable proximity to other dwellings and that the Development Plan contains policies for the protection of residential amenity by way of overlooking. That the Appellant believes that any adverse overlooking impact anticipated by the Full Council could be further mitigated by way of measures secured by condition (see Appeal Statement of Case) – even acknowledging that refusing an application on grounds that could be suitably mitigated by condition may be grounds for an award of costs in itself – is nonetheless a matter of further planning judgement.

1.6 The application for an award of costs therefore focuses on the remaining two reasons for refusal, which it is suggested were reached in a manner that was unreasonable and which has thereby resulted in considerable unnecessary expense addressing by appeal.

2.0 The grounds for the claim

2.1 These shall be addressed individually in turn, broken down by the Reason for Refusal to which they relate.

2.2 Taking the first substantive ground first, Reason for Refusal R2 states as follows:

The proposed development would result in the loss of greenspace and biodiversity habitat, which is not compensated for in the application, contrary to the requirements of emerging Policy OE2 of the Draft Isles of Scilly Local Plan 2015-2030 and paragraph 170 (d) of the National Planning Policy Framework, 2018.

2.3 It is suggested that, as set out below, this reason is the outcome of unreasonable behaviour relating to:

- vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis; and

- refusing planning permission on a planning ground capable of being dealt with by conditions; and
- not determining similar cases in a consistent manner

2.4 S70(2) of the Town and Country Planning Act and S38(6) of the Planning and Compulsory Purchase Act 2004, supported by considerable case law, confirm the primacy of the Development Plan in decision-making. The adopted Local Plan in this instance, and specifically Policy 1 (Environmental Protection), contains a policy for the protection of biodiversity. It is a Development Plan policy that should be afforded full weight in decision-making.

2.5 However, as that Policy does not contain a provision to secure net gains in biodiversity, the Local Planning Authority instead cites emerging policy OE2 as the primary policy basis, also referencing the similarly-worded Paragraph 170(d) of the Framework. Notwithstanding that both are material considerations, the LPA has in this instance essentially disregarded its adopted policy seemingly for convenience.

2.6 In this instance, the Local Planning Authority has also, it is suggested, come to rely on a policy that does not form part of the Development Plan and, owing to the emerging Local Plan's early stage in preparation (i.e. remaining for now at the Regulation 19 consultation stage), should be afforded only limited weight. It is suggested that the weight afforded to the Policy by the LPA in this instance is unreasonably disproportionate. This extends to the point of undermining confidence in the Local Plan preparation itself when, in response to Officer's reminding the Council that the emerging Local Plan carries only 'limited weight', one Councillor states:

"Indeed, but if I would say that as Full Council we fully endorse the principles of the local plan and we understand that they will be in force in the near future."

2.7 That a Council should endorse the principles of an emerging plan is only to be expected, however in this instance it is presented as a *fait accompli* that the emerging plan will be adopted unaltered and therefore no meaningful weighting exercise is required. Clearly, this is an inappropriate response.

2.8 There is no adopted or emerging Local Plan policy whatsoever that seeks to protect 'green space' for its own sake and, as mentioned in the appeal statement of case, such an approach would run counter to the development strategy at the heart of both Plans. This reference in the refusal reason is therefore entirely without basis.

2.9 Moreover, the judgement that the proposals would impact adversely on local green space and biodiversity has been reached without any objective analysis. The proposals were met with no objections from Natural England or any ecologist or arboriculturalist. No specific specie (save for a broad reference to 'bats') is mentioned in the entire course of the Full Council debate leading to that conclusion of harm to biodiversity. Despite officer assurances that all statutory and policy requirements had been complied with in respect of surveys and pre-determination information, an unreasonably assumed level of harm was nonetheless carried through to a refusal reason.

2.10 Furthermore, Officers recommend at Conditions C7 and C8 of their report suitable wordings to secure compensatory measures for the limited loss of trees and incidental habitat comprised in the proposed scheme. Thus, any adverse impact anticipated is more than capable of being overcome by such conditions, or a variation thereof. This, in itself, amounts to a further example of unreasonable behaviour.

2.11 The Inspector's attention is drawn to application P/18/044 (Land adjacent to Ocean View, Old Grimsby, Tresco – documents appended to main Statement of Case), which was approved by the same Full Council on 10 July 2018, having regard to the same Development Plan. The scheme in question involved the removal of a similar limited array of low-quality trees and vegetation to provide a detached holiday let unit on a verdant infill plot situated 115m from the Isles of Scilly Special Area of Conservation (SAC) and 370m from the Pentle Bay, Merrick and Round Island Site of Special Scientific Interest (SSSI).

2.12 Councillors in that instance voted to approve the application, accepting the Officer's advice (Para 34 of report) that *"It is likely that bats and birds will be active in and around this site due to the fact that birds and bats are present on all of the islands. It is not considered necessary however to carry out a protected species prior to the determination of this application. It is acceptable to ensure that the applicants are aware of the law in relation to ceasing operations should any protected species be found during the course of construction works".* In approving that application, the LPA applied a condition very similar to C7 as recommended to Councillors in respect of the application at Men-a-Vaur.

2.13 As a matter of complete transparency (as the record appears on a different page of the Full Council Minutes that is not reproduced in this submission) Councillor R Dorrien-Smith – also the applicant for P/18/044 – declared an interest at the start of the meeting and withdrew for the duration of the item. Full transcriptions of the items are attached.

2.14 In the light of the above, the Local Planning Authority – and its Full Council specifically – has demonstrably failed to determine planning applications in a consistent manner with regard to at least one previous similar application considered less than eight months prior. In that instance the site was of similar likely ecological significance and decisionmakers – quite rightly – relied upon an approach derived from relevant policy, the appropriate use of conditions and the existence of other relevant legislative regimes. Councillors will not have been unaware of these factors on 5 March and yet approached the proposals subject of this appeal altogether differently.

2.15 Turning to the second ground of the application for an award, Reason for Refusal R3 states as follows:

The proposed development would provide up to 12 bedspaces of holiday letting accommodation that would be served by an access road that is inadequate for service vehicles, number of pedestrians and the proximity of that access to other properties.

2.16 It is suggested that, as set out below, this reason is the outcome of unreasonable behaviour relating to:

- preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; and
- vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.

2.17 As set out in the Appellant's Statement of Case, Reason for Refusal R3 cites no policies in support of the assertion that the development would result in an unacceptable use of the existing right of way from Church Road to the site, which in practice would be foot, bicycle or wheelchair traffic only. R3 cannot sensibly relate to amenity impacts, or an 'amenity' policy would be cited; the impacts must therefore be perceived to be transport/highways-related.

2.18 When having regard to the policies of the Development Plan – which it should be noted supports the *principle* of development in this location as an agreed matter – and applying the 'severe' test of Paragraph 109 of the Framework, it is apparent that the proposed development demonstrably complies with these. This point is expounded further in the Appellant's Statement of Case. No other material considerations are identified that would lead to any alternative reasonable conclusion.

2.19 Again, the CIOS Infrastructure consultee raised no objection to the proposals in respect of access, transport or highways, nor did Cornwall Fire and Rescue object to the proposals, instead primarily noting the requirements of the Building Regulations. There is no other objective analysis apparent that would lead rationally to the conclusions set out at R3.

2.20 In the Full Council meeting, the summation of critical discussion prior to the vote was broadly that the access is 'inadequate'. This is despite evidence being presented, apparently unchallenged, that emergency vehicles in particular would be able to attend the site if necessary and that a <45m clear route for fire hoses was the appropriate requirement, and that other regimes such as the Building Regulations would provide the necessary safeguards against inappropriate vehicular access.

2.21 The assertions made in moving to refuse the application on these grounds are therefore vague at best, but potentially also inaccurate. In this instance, they amount to unreasonable behaviour incurring unnecessary wasted expense in challenging them through the appeal process.

3.0 Conclusions

3.1 For the reasons set out above, the Local Planning Authority in determining application P/18/090 has acted in a way that amounts to unreasonable behaviour, incurring unnecessary wasted expense on the part of the Applicant in addressing the relevant matters through the appeals process.

3.2 This unreasonable behaviour is substantial and goes to the heart of two of the three stated reasons for refusal. Accordingly, a partial award of costs is sought in respect of the direct expense incurred in addressing these matters at appeal.

3.3 It should be noted that Officers present at the Full Council meeting on 5 March explicitly warned Councillors of the risks that overturning the reported recommendation without sound planning reasons could not only result in the proposed development being allowed at appeal but also potentially incur an award of costs against the Local Planning Authority. Regrettably, it does not appear that this warning was heeded at the time and, reluctantly, the Appellant has no choice in this instance than to pursue both at this time.

3.4 It is therefore respectfully requested that a partial award of costs is awarded in this instance.

Yours sincerely
For and on behalf of Evans Jones Ltd

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