

In the Matter of:

THE TOWN AND COUNTRY PLANNING ACT 1990

-and-

THE TOWN AND COUNTRY PLANNING GENERAL REGULATIONS 1992

-and-

LAND SOUTH OF STAFFERTON WAY AND EAST OF VICUS WAY, MAIDENHEAD

LPA REF: 18/02105/FULL

ADVICE

INTRODUCTION

1. The Council of the Royal Borough of Windsor and Maidenhead ("the Council"), as local planning authority ("LPA"), instructs me in relation to an application for planning permission ("the Application"), submitted on behalf of the Council as landowner ("the Applicant") to develop Land to the South of Stafferton Way and East of Vicus Way, Maidenhead ("the Land").
2. The Application (Ref: 18/02105/FULL) was reported to the 17 December 2018 meeting of the Maidenhead Development Management Panel ("the Panel"). Following consideration of the Application, the Panel resolved to refuse the Application by way of a single vote majority. Subsequently, the Chair of the Panel informed the Council's Monitoring Officer that he had cast his vote in error.
3. The LPA now seeks my advice on the proper approach to the determination of the Application. Specifically, I am asked to consider a written Advice from Christopher Lockhart Mummery QC dated 20 December 2018, which the Applicant submitted to the LPA on 21 December 2018. In that Advice, Leading Counsel advises the Applicant that, in the circumstances, the Application must be reconsidered by the Panel.
4. Following receipt of Leading Counsel's written advice, Councillor Wilson made a statement to the Maidenhead Advertiser, which was published on 21 December 2018. In that statement, Councillor Wilson asserted that the Application would be reported back to the Panel to reconsider the Application in the new year.

5. On 21 December 2018, at the request of the Council's Head of Planning, Mrs Jenifer Jackson MRTPI, I provided the LPA with advice by telephone, the substance of which I confirm and supplement in this Advice.
6. The Application, I am instructed, will be reported back to the Members at the Panel meeting on 16 January 2019 and, as I understand matters, this Advice will be included within the Agenda papers made available to the public ahead of that meeting as required by Part VA of the Local Government Act 1972 (as amended).
7. In the circumstances, the written Advice from Leading Counsel dated 20 December 2018 must be considered as advice to the Applicant to determine whether a refusal of the Application would be lawful where a member of a Panel states that a mistake was made. That advice does not bind the Panel sitting as the LPA. Properly, the Head of Planning was not involved in the decision to instruct Leading Counsel and was not present when Leading Counsel provided advice in consultation by telephone on 20 December 2018.
8. As this is an application by an 'interested planning authority' under Regulation 3 of the Town and Country Planning General Regulations 1992 (as amended) it is appropriate for the LPA to seek independent advice from Counsel to determine how best to proceed.

BACKGROUND

9. As those instructing me are very familiar with the factual background relevant to my advice, which is set out in the draft Panel reports prepared by the Head of Planning, it is not necessary for me to reproduce that background here, save as is necessary and appropriate to do so.
10. The Periscope video recording of the 17 December 2018 Maidenhead Development Management Panel ("the Panel") meeting confirms that the Chair, Councillor Derek Wilson, was confused about the vote he cast in respect of Councillor Stretton's motion to refuse the Application and its effect on the determination of the Application. The spontaneous reaction of those present vehemently disagreeing with Councillor Wilson's interpretation of the outcome of the vote demonstrates conclusively that he did not intend to vote "for" the resolution to refuse the Application proposed by Councillor Stretton.

11. Also, it is clear from the recording that, in his role as chair of the Panel, Councillor Wilson declared over the Public Address system in open session that the Panel had resolved to refuse the Application and that he made that declaration before taking any advice from the legal adviser in attendance.
12. As a majority of the Panel voted in favour of Councillor Stretton's motion to refuse the Application, the second motion was not put to a vote. It follows, therefore, that the video recording of the Panel meeting does not reveal how Councillor Wilson would have voted on the motion to grant planning permission in accordance with the officer recommendation.

THE PROPER APPROACH

13. In the present case, as Councillor Wilson's erroneous vote was decisive, the LPA cannot lawfully issue a decision notice refusing planning permission in accordance with the Panel's resolution to refuse, and the Application must be reported back to the Panel for reconsideration and determination. The Agenda papers must explain why the Application should be reconsidered. To this general extent, I agree with the advice from Leading Counsel for the Applicant, which accurately summarises the relevant legal framework (within paragraphs 5 and 6).
14. However, I do not agree with Leading Counsel's suggestion (at paragraph 7) that "[...] *in the present case the Council [...] is almost certainly under a duty to [change its mind] in view of the erroneous voting.*"
15. That suggestion appears to be at odds with Leading Counsel's advice (in paragraph 9) that:

"[...] There need be no attempt to secure that the members who sat on the last Panel should sit on the new Panel"

and that

"The Panel should be constituted of those members who are naturally available on the due date (and thus may include some of the previous members)."
16. Likewise, the suggestion that LPA *must* grant planning permission (which is the only alternative available to the LPA) cannot be reconciled with Leading Counsel's advice

concerning the proper approach to the Panel's reconsideration of the Application in paragraph which states (so far as relevant):

"[...] The first resolution will be to the effect for members to consider whether or not they wish to rescind the previous resolution in view of the error. The normal Council procedures relating to the ability of those who wish to address the Panel, should be followed. If the first resolution is rescinded, the Panel will then proceed to vote on the Application in the normal way."

17. The Applicant's barrister accepts that the outcome of the Panel resolution on 17 December 2018 does not preclude the reconsideration of the Application, or fetter the LPA's discretion either to grant or refuse planning permission in the present case. Leading Counsel also accepts, correctly in my view, that the Application must be reconsidered at an ordinary meeting of the Panel, observing the rules, procedures and practices in accordance with the relevant statutory framework and the Council's Constitution.
18. On any view, read fairly and as a whole, Mr Lockhart-Mummery QC's written Advice makes clear beyond doubt that, however Councillor Wilson intended to vote on 17 December 2018, the outcome of the LPA's reconsideration of the Application is not a foregone conclusion and Members of the Panel must determine the Application having regard to the material planning considerations as they exist at the time of their decision.

THE WAY FORWARD

19. Against that background, the reconsideration of the Application should accord with the conventional approach, which requires the Head of Planning to report the matter back to the Panel. In my view, the Head of Planning's report(s) should include two distinct recommendations that generally reflects the advice of Leading Counsel. Put simply, the first recommendation should be to the effect that the Panel resolves to rescind its resolution to refuse the Application dated 17 December 2018 and the second recommendation should be to grant planning permission in accordance with officers' previous recommendation.
20. It is important here to note that the first recommendation engages matters of law and procedure relating to the conduct of meetings under the relevant legislative framework and the Council's Constitution. The first recommendation does not engage the planning merits of the Application, which must be considered separately.

Accordingly, the first recommendation must be considered by the Panel, voted upon and a decision made *before* progressing to consider the planning merits of the Application, if the Panel decides to rescind the 17 December 2018 Panel resolution.

21. To that end, it would be permissible and prudent for this recommendation to be presented to the Panel in a separate report from the Head of Planning. In my view, having regard to the proper approach to the determination of applications for planning permission under Part III of the Town and Country Planning Act 1990 Act ("the 1990 Act") and the Council's Constitution, I do not consider that the first recommendation engages the public speaking rights within the Protocol for Public Speaking at Meetings.¹
22. Paragraph 1.3 of the Protocol for Public Speaking concerns public speaking at Development Management Panel Meeting and states (so far as relevant):
 - 1.1 *Planning applications are determined by either a Development Management Panel or officers acting under delegated authority.*
 - 1.2 *Each application is subject to a public consultation exercise which enables the public and other bodies to comment in writing on the application before it is determined.*
 - 1.3 *The Council provides the opportunity for the public and for applicants (or their agents) to speak at the planning meeting before the Development Management Panel makes their decision.*
 - 1.4 *If objectors speak at the meeting, the applicant must be allowed to speak. An applicant may speak at a meeting even where there are no objectors wishing to speak (but if the applicant is in agreement with the Officers' recommendations to the Panel the Chairman will request the applicant to restrict any comments to matters not covered, or not covered fully, in the Officer's Report).*
 - 1.5 *Anyone who has written to the Council with objections or comments to a planning application will be contacted at least one week before the relevant meeting is due to take place when the application will be considered. They will be invited to tell the Council if they wish to speak at the meeting."*
23. The relevant provisions within the Council's Constitution are clearly intended to ensure that members of the public who object to development proposals described in an application for planning permission are provided with an opportunity to address the Panel responsible for determining the application. However, the right to address the Panel is not unlimited in terms of the subject matter, which is restricted to planning considerations that are material to the determination of the application.

¹ RBWM Constitution, Part 7, Chapter F, Section 1, pages 283-285

24. It must follow, therefore, that public speaking rights do not extend to the business of a Panel meeting generally and certainly do not require the Chair of a Development Management Panel to afford members of the public the opportunity to address the Panel on motions or recommendations that do not involve the determination of a planning application.
25. For these reasons, in my view, it would be lawful and appropriate for the Panel to consider the first recommendation as a separate agenda item, upon which a vote must be taken and a decision made *before* proceeding to consider the Application as a separate item, *but only if* the Panel first decides to rescind the 17 December 2018 Panel resolution.
26. In the usual way, the Head of Planning's Panel report on the Application must take account of all material planning considerations relevant to the determination of the Application, including any material change in circumstances since 17 December 2018, if any exist.
27. It is important to note that the advice provided by Leading Counsel to the Applicant does not address the proper approach to the conduct of the Panel meeting in any detail. The extent to which it will be necessary for the officers to introduce the Application in full detail will depend upon the attendance of members at the meeting.
28. As I understand matters, only one member of the Panel (Councillor Bullock) was absent on 17 December 2018. Should the absent member be present when the Panel reconsiders the Application, or indeed if any substitute members are present, it will be necessary for the Application to be presented in full again. Likewise, it will be necessary for the Panel to debate the merits of the Application in full having regard to any oral deputations made at the meeting, pursuant to the exercise of public speaking rights under the Constitution.
29. In the event that the next Panel is comprised of the same members present on 17 December 2018, a truncated approach to the presentation and consideration of the Application will be permissible. In those circumstances, Members' discussion and debate may properly be confined to the any material change in circumstances identified in the Head of Planning's report, if any, together with any additional representations material to the determination of the Application, made orally or in writing.

CONCLUSION

30. For the reasons set out in this Advice, the LPA cannot lawfully rely upon the Panel's 17 December 2018 resolution to issue a decision notice refusing to grant planning permission in the present case. The Application must, therefore, be reconsidered by the Panel in accordance with the advice provided above.
31. Should those instructing me require anything further, they should not hesitate to contact me in Chambers.

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MARK BEARD

8 January 2019