

## IN THE MATTER OF

### DUVER MARINA, THE DUVER ST HELENS, RYDE, AND BEMBRIDGE MARINA, EMBANKMENT ROAD, BEMBRIDGE, ISLE OF WIGHT

---

#### FURTHER OPINION

---

#### Introduction

1. We are instructed by Mr Oliver Goodwin, Consultant Barrister at Keystone Law on behalf of Bembridge Harbour Trust, in relation to an application before the Isle of Wight Council (“the Council”) seeking the following planning permission (reference P/00637/14 TCP/11822/Y) on land at Duver Marina, the Duver St Helens, Ryde PO33 1YB and Bembridge Marina, Embankment Road, Bembridge (“the sites”):

*Bembridge Marina - Demolition of harbour office; outline for terrace of 5 houses; terrace of 3 houses; floating shower and toilet facilities; associated parking (Additional information relating to ecological impacts, flood risk and requirement for floating shower and toilet block; revised access arrangements, revised ownership plans relating to Embankment Road ecological mitigation area)*

*Duver Marina - Demolition of harbour office and toilet facilities and removal of septic tank; outline for terrace of 5 houses; new harbour office with shower and toilet facilities; sewerage treatment plant; associated parking (Additional information relating to ecological impacts; revised plans relating to the footprint for proposed houses, revised vehicle parking and turning areas)(further re-advertised application)*

*Revised plans confirming the omission of a proposed dwelling house at The Old Boat House and 6 industrial units at Selwyn boatyard (Revised description; revised site area; updated ecology report) (“the application”)*

2. We have previously advised on this matter and so do not propose to repeat the full background details here. It suffices to say the main issues before the Council were the viability of the scheme as “enabling development”, the quantum and nature of the public benefits of the scheme, the application of the sequential test for areas at high risk of flooding (the site lies within Flood Risk Zone 3), and the potential of an adverse effect on a large number of sites designated due to their national and/or international importance for nature conservation. Bembridge Harbour is designated as the “Solent and Southampton Waters” SPA and Ramsar site. The lagoon to the east of the access road to the marina (Embankment Road) and the south-east corner of the harbour is designated as the “Solent and Isle of Wight Lagoons” SAC. “Brading Marshes to St Helen’s Ledgers” is also nationally important as a designated SSSI.
  
3. The application was first submitted to the Council in May 2014. The Council resolved to grant planning permission on 1 December 2015. This was then deferred in order for the Council to review viability, address outstanding environmental issues, and apply the sequential test for flood risk. From late 2016 officers informed the applicant that the Council was minded to refuse the application due to the likely availability of alternative funding for the enabling development. This position changed around August 2017 for an unspecified reason. The application then came back before the Council’s Planning

Committee which resolved to grant permission on 12 December 2017 subject to a section 106 agreement being signed.

4. We are instructed to advise on the legality of the Council's consideration of the application.

### **Enabling Development**

5. The Council accepts, as set out in the officer's report to the Council's Planning Committee regarding the application, that development proposals which are not in accordance with the development plan (comprising the Island Plan, adopted March 2012 and – in relation to Bembridge Marina- the Bembridge Neighbourhood Development Plan, made 28 July 2014) should be refused unless they qualify as enabling development.
6. The application is not in accordance with the development plan: this is accepted. Paragraph 2.72 of the officer's report states "*[t]he proposed development is considered to be contrary to the requirements of the Island Plan due to a lack of justification for the proposed housing and its location within an area at high risk of flooding.*" The site is located outside of and remote and/or divorced from the settlement boundaries (thus contrary to policy SP1 of the Island Plan and – in relation to Bembridge Marina- policy BNDP.H.1 of the Neighbourhood Plan). does not propose any contribution towards affordable housing ((thus contrary to policy DM4 of the Island Plan and policy BNDP.H.4 of the Neighbourhood Plan), and is at risk of flooding (thus contrary to policy SP5 of

the Island Plan). There are also outstanding issues regarding nature conservation such that it cannot be concluded there is no risk of a significant adverse effect on protected sites (the latter two issues are dealt with further below).

7. It is evident that the Council considered that the conflict with the development plan was outweighed by material considerations. However, without correctly carrying out an assessment of whether or not the application is “enabling development” the Council cannot safely conclude whether or not it has complied with its statutory duty under s.38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) to determine applications in accordance with the development plan unless material considerations indicate otherwise.
8. A number of facts underlying the Council’s consideration of this issue are either incorrectly stated in the officer’s report or have materially changed since the resolution to grant, calling the Council’s compliance with its statutory duty into question.
9. In respect of the first matter (the error), paragraph 2.7 of the officer’s report states that the overall conclusion of the district valuer was that the proposed development (the housing and improvements) would make a marginal loss of £3,058. That is not correct. The conclusion of the district valuer was that the scheme would only fall short of a 20% benchmark profit by £3,058. The officer therefore confused a profit of £1,244,300 with a loss of £3,058. This error was pointed out by those instructing in their submission to the Council of 7 December 2017 but was not thereafter corrected in the officer’s report to the

Committee. Whilst orally the officer stated to the Committee that the applicant would secure a 20% profit, there was no explicit correction of the conclusion in the officer's report and so we do not know how members considered the matter: it may be they attributed the 20% profit to the sale of the housing aspect of the scheme but assumed the officer's report's conclusion of an overall net loss. In light of the clear conclusion in the officer's report that there would be an overall net loss, the position before the Council was muddled at best and the officer's report was misleading. It was clearly important that the Council had the correct profit/loss figures before them, particularly when they are presented with a figure representing a loss when in fact the district valuer's conclusion was a seven-figure profit.

10. Further and in any event, based on the applicant's own figures the information used by the district valuer is now incorrect. The applicant now claims (as of 28 July 2017) it will make at least 35% profit (this is what it would take to pay off all debts as indicated: the Harbour Trust identified debts in excess of £1.5million from public sources in its legal and financial report and the applicant has acknowledged in writing that this sum is accurate). This should be contrasted to the 17.1%-20% profit used by the district valuer in his viability appraisal. The district valuer's report in turn formed the basis of the Council's resolution to grant planning permission. The higher predicted profit figure was not updated before the Committee. As the profit is now predicted to be well above 20% the scheme no longer qualifies as enabling development, rather, it is far in excess of what could be justified. As is noted in the officer's report itself (at paragraph

2.3): “it is important that the amount of housing [is] commensurate to the cost of the improvement works to the harbour.”

11. Because this issue relates to a prior decision on policy-compliance it is no answer to refer to a claw-back clause in the s.106. Further, the policy requirement for affordable housing should be considered and taken into account, but has not been. The matter also has implications in terms of the sequential test, which had concluded that, in light of the figures representing the profit of the scheme, purchasing more appropriate land for the housing development would render the scheme unviable (see officer’s report, paragraph 2.47).
12. Additionally, the Director of Bembridge Investments Limited (“BIL”) and Bembridge Harbour Improvements Company Limited (“BHIC”) has now confirmed in the course of the s.106 negotiations, post-resolution, that BHIC may now be in funds to purchase the new properties upon completion. This is in stark contrast to the submissions before the Committee when it determined the application and, again, entirely undermines the “enabling development” aspect of the application.
13. A further source of alternative funding was put to the officer in representations by BHT; conventional funding in the form of borrowing against future income. In relation to conventional development funding, the applicant in its business case of December 2014 stated on behalf of the harbour authority that “*we are not prepared to pursue such routes*”. The officer is silent on this issue in his report to Committee, and it cannot be discerned from his report whether he failed to consider this, or that he accepted the harbour authority’s rejection of

conventional funding without further query. Further, in correspondence on 30<sup>th</sup> January 2018 in relation to the section 106 agreement the applicant now expressly confirms that the harbour authority may purchase the new facilities upon completion. This is supported by the applicant's statement to the Committee meeting to the effect that the number of boats mooring in the harbour had recently increased by in excess of 70%. If not fundable from income it is likely to be funded by borrowing. The applicant also asserts in the email of 30<sup>th</sup> January 2018 that he informed the officer of this intention prior to consideration by Committee, in which case the officer failed to take this relevant information into account in his report.

14. The officer wrote to the applicant in December 2016 pointing out that alternative funding was a key issue. This could potentially come from the sale of new houseboat plots (nine new unoccupied plots are proposed as part of an application for planning permission, submitted in 2016, at a potential gain of, on average, around £100,000 per plot). This has been put on hold by the applicant, who has failed to provide adequate information so as to allow the Council to validate the application.
15. It is clear from the officer's update report to the Planning Committee that it was advised in August 2017 that the Council should not place weight on the income to be generated from the houseboat plots arising from an application that had not even been validated, let alone positively determined. We consider that advice to be sound. However, shortly after December's Committee resolution, on 12<sup>th</sup> January 2018 the harbour authority submitted a revision to its separate

application for a certificate of lawful use relating to houseboats, explicitly to provide for 34 houseboats or other vessels. This is the same number as in the harbour authority's contemporaneous planning application for 34 houseboats and confirmed the quantum of financial benefit the applicant stood to gain. It also crystallises the fact that the harbour authority intends to obtain significant income from the sale of nine new houseboat plots. This is a new material planning consideration. Though the officer was aware of the proposed change of description of development in the application for a certificate of lawful use or development prior to the Committee's consideration he failed to take this into account. This was confirmed in an email of 21<sup>st</sup> November 2017 from the officer to the Chairman of BHT.

16. The consequences are as follows. The lawful development application should be determined. Then, not only must the matter be brought back to the Committee for re-determination in light of the updated financial information, it must also be consulted on again (R (Holborn Studios Ltd) v Hackney LBC [2017] EWHC 2823 (Admin)). Holborn Studios concerned an application for planning permission that had been amended without notification of the amendment to others. It was held that, in the circumstances, it was unlawful not to consult on the amendments. This was, *inter alia*, because the party complaining about not being consulted had particular expertise that had a bearing on the application and the amendments were significant such that the development was no longer in substance that which was applied for (although the latter was not an explicit requirement to establish a duty to re-consult).

17. In light of the above it follows that a fresh consultation is required. Those instructing have a particular expertise and ability to provide useful information to the Council on the public benefit and enabling elements of the application, and the new information is of fundamental significance to the Council's decision.

### **Sequential Test for Flooding**

18. We raised this issue in our previous Opinion. We consider that the issues flagged therein have not been resolved. A revised report was submitted by AECOM which included new material on site availability. This report concluded, in essence, that although alternative sites were available, these were not appropriate because the harbour facility elements of the scheme could not be located remote from the harbour and/or purchasing third party land would render the scheme unviable.
19. Our previous Opinion noted that it is only once the outcome of the sequential test is known that the Council should move on to consider other features of the application which might, nevertheless, justify a departure from the policy of restraint which flows from the sequential test. The approach taken by the Council was contrary to national planning policy and so was unlawful. The updated officer's report (at paragraphs 2.42-2.47) contains further justification of the approach this time around but still employs the same, erroneous, approach. It is stated that the new harbour facilities are dependent on the viability of housing to fund the works, which in turn is dependent on the

applicant already owning the land for housing, and which would provide no funds for the new facilities if new housing sites had to be bought. However, the position on viability has changed significantly since consultants carried out the assessment (see paragraphs 12 and 15 above). Therefore, whilst potentially correct, the matter is still not lawfully considered.

20. The first step is to consider whether the test is passed (it is not), and then the Council must consider any exceptional circumstances. This principle was set out in our earlier Opinion and has not been rectified in the Council's latest determination. The decision remains, therefore, susceptible to legal challenge on this basis.

### **Appropriate Assessment**

21. The Council carried out an appropriate assessment in September 2016. Yet this assessment failed to consider at all the risk of oil from the car park polluting the protected sites (which is within Flood Zone 3 and adjoining the SSSI and SAC, therefore there is a risk of such an event occurring). It should be noted that in 2008 the risk arising to the SAC from flooding of the car park led the Council to refuse to grant the RSPB's application for a car park on the same site (that site partly overlapped the current site). The appropriate assessment also failed to consider the effect of car park lighting on the adjoining protected areas (consideration of external lighting related to the buildings only: see officer's report, paragraph 2.67 sixth bullet point).

22. These omissions represent a failure to take into account material considerations and a failure to comply with the Council's duty under regulation 63(1) of the Conservation of Habitats and Species Regulations 2017, as well as s.38(6) of the 2004 Act as there is no consideration of whether the proposals comply with policy SP4 of the Island Plan and policy BNDP.T.1 of the Neighbourhood Plan in this respect.

### **Conclusion**

23. In conclusion;

- There are clear errors of law in relation to the enabling development aspect of the scheme (which does not, on the present facts, appear to comprise enabling development at all);
- There are two material changes of circumstance since consideration by Committee which are highly relevant to the merits of any enabling development in the context of alternative funding; the first is the applicant's confirmation that the harbour authority may have funds to purchase the new facilities upon completion and the second is the formal amendment by the harbour authority of its application for a certificate of lawful use or development to 34 houseboats or other vessels, which the officer advises is to be determined imminently and which could provide substantial income;
- The appropriate assessment has failed to consider a material pollution pathway which formed a previous reason for refusal for a car park on, in part, the same site, as well as an aspect of the development that may give rise to adverse effects (the lighting of the car park);

-The Council's approach to the sequential test has not been corrected in line with our previous advice.

24. If these matters are not resolved, we consider that the Council's grant of planning permission will be susceptible to challenge by way of judicial review.

**Richard Kimblin QC**

**Nina Pindham**

No5 Chambers

24<sup>th</sup> May 2018

**IN THE MATTER OF**

**DUVER MARINA, THE DUVER ST  
HELENS, RYDE, PO33 1YB,  
BEMBRIDGE MARINA,  
EMBANKMENT ROAD,  
BEMBRIDGE,  
ISLE OF WIGHT**

---

**FURTHER OPINION**

---

Oliver Goodwin  
Consultant Barrister  
Keystone Law  
48 Chancery Lane  
London, WC2A 1JF

Tel: 0203 319 3700