

Application Number

P/2015/0961/MPA
P/2015/0962/LBC

Site Address

Torquay Pavilion And Marina
Car Park And Office And
Adjoining Land
Vaughan Parade
Torquay
TQ2 5EL

Case Officer

Robert Brigden

Ward

Tormohun

Executive Summary

This report relates to Major Planning Application P/2015/0961/MPA and Listed Building Consent application P/2015/0962/LB. It is an update to the resolutions of the Development Management Committees of 27.02.2017 and 08.05.2017; the position report completed by officers in June 2018; and the outcome of judicial review proceedings where planning permission P/2015/0961/MPA and listed building consent P/2015/0962/LBC were quashed. The previous reports are appended for information, as detailed below, and this report should be read alongside those. Taken together, this report and those previously prepared, describe the assessment exercise in relation to these applications. For the reasons set out below, it is recommended that Planning Permission and Listed Building Consent be refused.

Recommendation

That the applications be refused for the following reasons;

P/2015/0961/MPA

1. In the absence of robust, up-to-date information concerning the proposal's viability, economic benefits, and to demonstrate that it would constitute enabling development, its scale and impact on heritage assets are not sufficiently justified. The proposal is therefore considered to be contrary to Policies DE1, DE4, HE1 and SS10 of the Local Plan, and the guidance contained in the NPPF.
2. In the absence of an up-to-date and fully-evidenced Independent Viability Assessment (IVA), along with a fully-justified legal argument to demonstrate that the proposed Section 106 agreement is lawful, there is insufficient information to demonstrate that the proposal is in accordance with the Council's Planning Contributions and Affordable Housing Supplementary Planning Document and Regulation 122 of the CIL Regulations 2010.
3. In the absence of up-to-date ecological surveys and assessment information, it is not possible for the Council to undertake the necessary screening and possible assessment exercises in accordance with the Habitats Regulations, and therefore to conclude whether or not the proposal would have acceptable effects in relation to ecology. As such, the proposal is considered to be contrary to Policy NC1 of the Local Plan, and the guidance contained in the NPPF.

4. The proposal would result in the development of Cary Green, which is designated as a Local Green Space in the Torquay Neighbourhood Plan. The LPA does not have evidence of very special circumstances which would justify this part of the development. As such, the proposal is contrary to Policy TE2 of the Torquay Neighbourhood Plan.

P/2015/0962/LB

1. In the absence of more robust information concerning the proposal's viability, economic benefits, and to demonstrate that it would constitute enabling development, its impact on the character and fabric of the Grade II Listed Pavilion is not considered to be adequately justified. The proposal is therefore considered to be contrary to Policy HE1 of the Local Plan, and the guidance contained in the NPPF.

Site Description

The application site flanks the western side of the Inner Harbour and comprises the existing MDL car park and associated Marina offices, the Pavilion and includes Cary Green and adjacent areas of public realm.

It is a site of particular significance in heritage terms due to its prominence within the Torquay Harbour Conservation Area and its relationship to nearby listed buildings and the Grade II Registered Princess Gardens.

The Pavilion is Grade II listed. Numbers 3-15 Vaughan Parade, the adjacent terrace, is Grade II listed, as is the Cary Estate Office on Palk Street and 1 Palk Street which overlook Cary Green. The quay walls and the Fish Quay which is to the immediate south of the application site are also Grade II listed.

The Grade I listed St Johns Church sits on the nearby hillside which forms backdrop to the harbour and overlooks the site. Part of the application site lies within Princess Gardens, a Grade II entry in the Register of Parks and Gardens. The registered Garden extends to the west of the application site and includes two further (Grade II) listed structures, the Fountain and the War Memorial.

Currently, the MDL car park site comprises a semi basement and top deck car park providing 235 car parking spaces for the associated Marina. The lower level is normally used exclusively by MDL berth-holders with the upper deck often used for public pay and display purposes. The car park forms the western edge of the harbour walkway and includes, at the northern end, retail and catering outlets with associated seating looking out over the inner harbour. It otherwise presents an inactive frontage to the harbour.

The Pavilion, constructed as a theatre in 1911, has been vacant for several years having previously been in use as a small specialised retail outlet and is now in a very poor structural condition. This largely arises due to corrosion of the innovative steel frame used in its construction and is a common problem in other similar buildings of this era.

Cary Green, a public open space, was laid out in its current form following the construction of the Fleet Walk Shopping Centre in the 1980's comprising a mix of hard and soft landscaping. It is overlooked on three sides by listed buildings, The Pavilion to the south, the Cary Estate Office and 1 Palk Street to the north and 3-15 Vaughan Parade to the east. Cary Green is designated in the emerging Torquay Neighbourhood Plan as a Local Green Space. To the north west of the open space lies the Ziggurat, a rather unappealing means of achieving pedestrian and disabled access from Fleet Walk Car Park to the sea front, which dominates this space. There is a detached single storey building with a pitched roof on the southern side of Cary Green in use as a taxi office.

The site is located within the defined Town Centre and adjacent to the harbour with high levels of pedestrian and vehicular traffic. It is very prominent within the townscape both in short and long distance views.

Description

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The descriptions of the proposals are provided below.

P/2015/0961/MPA - Torquay Pavilion and Marina Car Park and Office and Adjoining Land, Vaughan Parade, Torquay –

Change of use and restoration of Pavilion to form hotel reception and spa including restaurant, bars and function rooms. Construction of 4/5 storey 60 bed hotel, 5 and 11 storey block of 43 residential apartments, with ground floor restaurant and retail uses adjacent to harbour. Link between Pavilion and new hotel. Construction of new harbour walkway, provision of 289 car parking places including 74 spaces on Cary Green (42 seasonal; 32 for hotel). Construction of Marina Office and berth holder facilities and erection of Dock masters Office and associated landscaping (proposal revised 5 July 2016), and;

P/2015/0962/LB - Torquay Pavilion, Marina Car Park and Office and adjoining land, Vaughan Parade, Torquay -

Refurbishment of building including repairs to corroded structure and works to prevent water penetration. Internal and external works to listed Pavilion to enable use as hotel foyer, including function rooms, bars, restaurant and spa. Construction of linked access from first floor level to proposed waterfront hotel (proposal revised 5 July 2016).

Background

Development Management Committee 27.02.2017

The relevant committee reports are provided at Appendix A, and the committee minutes are provided at Appendix B.

The committee resolution for planning application P/2015/0961/MPA was that conditional planning permission be granted subject to:

- a. clarification of the impact of 'shadowing' on the amenity of public spaces, and revised plans/clarification of detailed design matters relating to:
 - i. Opportunities for mitigating the impact of the lift shaft;
 - ii. Confirmation that the balconies will be constructed as a continuous curve;
 - iii. Detail in relation to the harbour walkway and strategy for relocating the traditional railings and form and extent of new railing detail;
 - iv. Inclusion of extended resurfacing between Offshore and the stone setts adjacent to the northern elevation of the hotel building; and
 - v. External plant in relation to listed building
- b. completion of a Section 106 Agreement to include the matters set out in the Minutes of the Development Management Committee held on 27.02.2017; and
- c. final drafting of conditions delegated to the Executive Head of Business Services.

With regard to the Listed Building Consent application P/2015/0962/LB, it was resolved that the Executive Head for Business Services be authorised to agree the extraction and ventilation details and the final drafting of conditions.

First Application for Judicial Review

On 24th March 2017 an application for permission to apply for a Judicial Review of the decision made by the Development Management Committee on 27th February 2017 was made. This application was refused on 20th June 2017 because the matters complained of were criticisms of the planning judgement of the Authority, rather than errors of law in the decision-making process, and any lack of clarity in the original report would be rectified by a further report to committee before the formal permissions were issued.

Development Management Committee 8th May 2017

The relevant update committee reports are provided at Appendix C, and the committee minutes are provided at Appendix B.

The committee resolution for planning application P/2015/0961/MPA was that conditional planning permission be granted subject to:

- a. receipt of the following additional information
 - i. strategy for relocating the traditional railings and form and extent of new railing detail;

- ii. strategy for external and internal plant in relation to the listed building;
 - iii. further details relating to the extended resurfacing between Offshore and the stone setts adjacent to the northern elevation of the hotel building approval of which is to be delegated to the Executive Head – Business Services;
- b. completion of a Section 106 Agreement to include the matters set out in the Minutes of the Development Management Committee held on 27.02.2017; and
 - c. final drafting of conditions delegated to the Executive Head of Business Services.

With regard to the Listed Building Consent application P/2015/0962/LB, it was resolved that the Executive Head for Business Services be authorised to agree the extraction and ventilation details and the final drafting of conditions.

Position Report, June 2018

In June 2018, officers produced a position report, which is provided at Appendix D. The key issues considered related to whether the information submitted was sufficient to meet the requests for further information from the Development Management Committee of 8th May 2017, and whether the details so provided were acceptable. Information was requested in relation to both P/2015/0961/MPA and P/2015/0962/LB as detailed above. It was concluded that the submitted information was acceptable and met the requirements of the committee resolution.

Planning Permission and Listed Building Consent were formally issued on 15th June 2018, following completion of the Section 106 agreement.

Second Application for Judicial Review

On 10th July 2018 the Council received a letter from solicitors acting for an objector to the Pavilion scheme claiming various legal flaws in the way the Authority had handled the applications. After taking the advice of a specialist Town Planning QC the Authority conceded that one ground, namely an incorrect reliance on mitigation measures in relation to the impact of the development on the Marine SAC at habitat screening stage, could not be defended by the LPA. As a result, the Authority agreed to a Consent Order made by the Court on 02.08.2018 which quashed both the planning permission and the listed building consent. As a result of this, both applications have effectively been 're-opened', and are before Members for re-determination.

Request for Further Information from the Applicants

Following the quashing of the planning permission and listed building consents, and in the light of legal advice provided by the Council's advisors, officers wrote to the applicants on 10th October 2018 to request additional information to support their applications and address all grounds of the July 2018 legal challenge. This letter is provided at Appendix E. The legal advice received is that all other grounds of challenge must be fully reviewed and, where possible, addressed before the applications are determined again. It was explained to the applicants that, going forward, any issues which are not satisfactorily addressed have the potential to be reasons for refusal of

the applications. The following information was requested by officers, in addition to any other details that the applicants considered necessary to support their applications.

1. *An up-to-date and fully-evidenced Independent Viability Assessment (IVA). The IVA should not only justify the scale of development and proposed planning obligations, but also address the specific points raised by the Save Cary Green group. Please note that the IVA must take into account the Council's adopted CIL Charging Schedule (May 2017) and accord with the Planning Practice Guidance on viability in planning which was issued on 24th July 2018 <https://www.gov.uk/guidance/viability>.*
2. *An up-to-date and fully-evidenced Employment and Economic Impact Report, including construction costs and jobs created. The contents of this report must correspond with the IVA, for instance, using the same construction and other figures as those detailed in the other document.*
3. *A fully-justified legal argument to support your position that the terms of the proposed Section 106 agreement are lawful and accord with the provisions of Regulation 122 of the CIL Regulations; and/or your proposals to vary the Section 106 agreement so that it does accord with Regulation 122.*
4. *The application will need to be screened in accordance with the Habitats Regulations, to ascertain whether the proposed development should be the subject of a Habitats Regulations Assessment (HRA). If it is concluded that an HRA is necessary, then the Council, as the Competent Authority, will need to complete the appropriate assessment, which would consider whether the proposed development is likely to have significant effects on the Special Area of Conservation (SAC). In order to support the screening exercise and possible assessment, and, in any case, given the passage of time since the application was originally submitted, up to date information about the proposal's ecological effects will need to be submitted for our consideration.*
5. *A fully-justified legal argument to support your position that the proposals are 'enabling development' within the terms of Historic England's guidance, along with the guidance contained in the new NPPF and Planning Practice Guidance.*
6. *Where appropriate, the proposals should address the provisions of the emerging Torquay Neighbourhood Plan.*

The applicant was ultimately given a deadline of 31st January 2019 for the submission of this information, however, no details have been received by planning officers.

Policy Context

Section 38(6) of the Planning and Compulsory Purchase Act 2004 places a duty on local planning authorities to determine proposals in accordance with the development plan unless material considerations indicate otherwise. The following development plan policies and material considerations are relevant to this application:

Development Plan

- The Adopted Torbay Local Plan 2012-2030 ("The Local Plan")

Material Considerations

- Emerging Torquay Neighbourhood Plan
- National Planning Policy Framework (NPPF)
- Planning Policy Guidance (PPG)
- Published standing Advice
- Planning matters relevant to the case under consideration, including advice and representations, planning history, and other matters referred to in this report and the appended reports, which this report should be read alongside.

Neighbourhood Plan

Since planning permission and listed building consent were first granted in June 2018, the Torquay Neighbourhood Plan has completed its Independent Examination. Section 70(2) of the Town and Country Planning Act 1990 (as amended) provides that a local planning authority must have regard to a post-examination draft neighbourhood development plan, so far as material to the application. The Neighbourhood Plan cannot be accorded the full weight of an adopted development plan, until it has passed a Referendum, however, it is still a material consideration in the determination of this planning application.

Assessment

The assessment exercise detailed in this report is in addition to, and complements, that already undertaken and detailed in the previous reports, which are appended. The purpose of this report is not to revisit and re-assess all aspects of the proposals, but to update and re-assess those elements which were challenged as part of the legal challenge. The factors requiring further consideration are as follows.

1. *Impact on Character and Heritage Assets*

Policy DE1 states that proposals will be assessed against their ability to meet design considerations such as whether they adopt high quality architectural detail with a distinctive and sensitive palette of materials and whether they positively enhance the built environment.

Policy DE4 (Building Heights) states that the height of new buildings should be appropriate to the location, historic character and the setting of the development. New development should be constructed to the prevailing height within the character area in which it is located, unless there are sound urban design or socio-economic benefits to justify a deviation from this approach.

The policy goes on to state that new buildings above the prevailing height will be supported where they;

- *Enhance the vitality of an area*
- *Contribute to the regeneration of Torbay*
- *Strengthen the character of an area*
- *Are appropriate in terms of their visual impact*

- *Provide wider urban design or socio-economic benefits*
- *Make a positive addition to the built form, townscape and surrounding landscape; and*
- *Preserve or enhance local and long-distance view, and key vistas.*

Policy SS10 states that developments within conservation areas should preserve or enhance their character. Paragraph 193 of the NPPF states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. Policy HE1 states that proposals should have special regard to the desirability of preserving any listed building and its setting.

Policy TH8 of the post-examination Neighbourhood Plan states that development must be of good quality design, respect the local character in terms of height, scale and bulk; and reflect the identity of its surroundings.

The applicants have been asked to provide a fully-justified legal argument to support their contention that the proposal would constitute 'enabling development' within the terms of Historic England's guidance, along with the guidance contained in the new NPPF and Planning Practice Guidance. Enabling development is that which would generally be considered harmful, but is deemed acceptable as the benefits it would give rise to would outweigh the identified harm. The information requested has not been provided to date.

The proposal would result in less than substantial, but nevertheless significant, harm to heritage assets, including the Torquay Harbour Conservation Area and the settings of listed buildings. It was previously concluded that public benefits existed to justify the harm identified, in particular, economic and regeneration benefits, and that the proposal needed to be of the scale proposed in order to ensure its viability. However the accuracy of the claimed benefits has been questioned as part of the legal challenge and must be verified if any subsequent permissions are to stand up to further challenges. In the absence of an up-to-date and fully-evidenced Independent Viability Assessment (IVA) and a fully-evidenced Employment and Economic Impact Report, it is considered that there is insufficient information to justify the scale of development proposed, and demonstrate that there are sufficient public benefits to justify the less than substantial harm that the proposal would cause to heritage assets.

In the absence of more robust information concerning the proposal's viability, economic benefits, and to demonstrate that it would constitute enabling development, its scale and impact on heritage assets are not sufficiently justified. The proposal is therefore considered to be contrary to Policies DE1, DE4, HE1 and SS10 of the Local Plan, Policy TH8 of the emerging Torquay Neighbourhood Plan, and the guidance contained in the NPPF.

2. Planning Obligations

It was previously concluded that the scheme would not be able to support the provision of on-site affordable housing, however, a limited financial contribution (the exact amount to be determined towards the completion of the development when the majority of the apartments had sold) towards off-site affordable housing was found to

be financially viable. The officer report of March 2017 recommended that this contribution would be more appropriately directed towards improvements to the public realm surrounding the development. Following the legal challenge, the Council's legal advisors have recommended that a fully justified legal argument be provided by the applicants to demonstrate that their legal agreement, and the obligations it would secure, would be lawful. An up-to-date Independent Viability Assessment would also be required to justify the proposed planning obligations.

In the absence of an up-to-date and fully-evidenced Independent Viability Assessment (IVA), along with a fully-justified legal argument to demonstrate that the current Section 106 agreement is lawful and accords with the provisions of Regulation 122 of the CIL Regulations, there is insufficient information to demonstrate that the proposal is in accordance with the Council's Planning Contributions and Affordable Housing Supplementary Planning Document.

3. Ecology

Policy NC1 seeks to conserve and enhance Torbay's biodiversity and geodiversity through the protection and improvement of terrestrial and marine environments and fauna and flora, commensurate to their importance.

The proposal needs to be screened in accordance with the Habitats Regulations, to ascertain whether the proposed development should be the subject of a Habitats Regulations Assessment (HRA). If it is concluded that an HRA is necessary, then the Council, as the Competent Authority, will need to complete the appropriate assessment, which would consider whether the proposed development is likely to have significant effects on the nearby Marine Special Area of Conservation (SAC). In the absence of up-to-date ecological surveys and assessment information, it is not possible for the Council to undertake the necessary screening and possible assessment exercises, to conclude whether or not the proposal would have acceptable effects in relation ecology. As such, the proposal is considered to be contrary to Policy NC1 of the Local Plan, and the guidance contained in the NPPF.

4. Local Green Space

Policy TE2 of the post-examination Torquay Neighbourhood Plan designates Cary Green, which forms part of the site, as a Local Green Space. The policy states that in such spaces

"...development is ruled out, other than in very special circumstances.

Very special circumstances may include the provision of a new railway station at Edginswell, the provision of a new structure providing a café, beach facilities and toilets at Hollicombe Park. In addition, minor improvements to community access, or facilities that support their use for public recreation or amateur sports, or development allowing reasonable small extensions in a style that reflects the setting and the local area which would be consistent with the LGS designation, will be supported."

The proposed development would involve the creation of a 69-space car park on Cary Green. Although the regeneration of this neglected area of Torquay harbourside has

the potential to be a 'very special circumstance', in the absence of up-to-date evidence of the economic benefits of the proposals it has not been demonstrated that 'very special circumstances' exist and the proposals are therefore considered to be contrary to Policy TE2 of the Torquay Neighbourhood Plan.

Statement on Human Rights and Equalities Issues

Human Rights Act - The development has been assessed against the provisions of the Human Rights Act, and in particular Article 1 of the First Protocol and Article 8 of the Act itself. This Act gives further effect to the rights included in the European Convention on Human Rights. In arriving at this recommendation, due regard has been given to the applicant's reasonable development rights and expectations which have been balanced and weighed against the wider community interests, as expressed through third party interests / the Development Plan and Central Government Guidance.

Equalities Act

In arriving at this recommendation, due regard has been given to the provisions of the Equalities Act 2010, particularly the Public Sector Equality Duty and Section 149. The Equality Act 2010 requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. Protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race/ethnicity, religion or belief (or lack of), sex and sexual orientation.

Proactive Working

In accordance with the requirements of Article 35(2) of the Town and Country Planning (Development Management Procedure) (England) Order, 2015, in determining this application, Torbay Council has worked positively with the applicant to try to ensure that all relevant planning concerns have been appropriately resolved. However, in this case, it has not been possible to recommend the grant of planning permission, or listed building consent.

Conclusions

These planning and listed building consent applications are considered unacceptable, having regard to the Local Plan and all other material considerations, and should be refused for the reasons outlined under the recommendations at the beginning of this report.