

APPENDIX I

Sent: Tuesday, December 12, 2023 12:29 PM

To: Melanie Beech <Melanie.Beech@buckinghamshire.gov.uk>

Subject: [EXTERNAL] RE Application Ref. PL/22/4074/FA Redevelopment of Chesham Bois Parish Centre

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Dear Ms Beech

Below and attached is a letter written by Iain Purvis KC regarding the possible costs order on appeal against Planning Authority if they refuse the new application by St Leonard's, which we believe is important to the decision-making process in the Planning meeting Wednesday 13th December at 6.30pm, and we would ask you to take this into consideration.

Many thanks

Best regards

Peter Williams & Colin Whipp (on behalf of the Protect Chesham Bois Group)

Iain Purvis KC
Manor Lodge, North Road, Chesham Bois, HP6 5NA

7 December 2023'

I have been asked to consider the email of Mr Shires of 12 July and the point he makes there about a possible costs order on appeal against the Planning Authority if they refuse the new application by St Leonards.

It is of course correct that Planning Authorities must act reasonably, and that an Inspector may make an award of appeal costs against a Planning Authority if it has been guilty of unreasonable behaviour in refusing an application. The Planning Guidance issued by the Government includes as one potential example of this (amongst many) '*unreasonably refusing*' an application by '*persisting in objections to a scheme or elements of a scheme which...an Inspector has previously indicated to be acceptable.*' Of course, this does not mean that refusing a new application where an Inspector may have previously indicated that he would regard it as acceptable is inherently unreasonable. On the contrary, as I shall show, it may be eminently reasonable to conclude on the evidence and as a matter of judgment that such an application should be refused.

The whole question needs to be understood in the overall context of the duties of the Planning Authority, the circumstances in which any indication by a previous Inspector was given, and the precedential value of previous decisions. The following points are relevant:

- (a) The duty of the Planning Authority is to exercise its own independent judgment to determine planning applications in the light of the appropriate laws and policy considerations. In doing so it has to consider the evidence put before it.
- (b) Where a new application is made after the refusal of a previous application, the Planning Authority must assess it on its own merits, bearing in mind the evidence which is filed on the new application. This evidence may of course be new or different from the evidence on the previous application.
- (c) When an Inspector refuses an appeal, they may of course make comments on aspects of the application which they would have regarded as acceptable, or indicate disagreement with some of the reasons given by the Planning Authority for refusing the application. This is what happened in the present case. However it should be borne in mind that those comments or indications are strictly '*obiter dicta*' (ie they are not relevant to the actual decision made) and therefore neither binding nor of the same persuasive value as the actual reasoning of the decision. Furthermore, and importantly, the comments are made purely on the basis of the evidence on that application. It cannot be assumed that the same comments or indications would necessarily have been made if the evidence had been different.
- (d) Comments or indications in an Inspector's decision in one application are not binding on either Inspectors or Planning Authorities in another application. On the contrary, the new application must be decided independently as a matter of personal judgment on its own merits. The reasoning may of course be persuasive but often of course it may not be. Any decision making body presented with such a decision must consider whether the reasoning is in fact cogent and convincing.
- (e) 'Consistency' is of course an important aspect of decision making in the public sphere which applies to planning applications. However, it is also important to note that this does not demand that the decisions of Inspectors on similar issues must be the same. The leading case, often cited, on consistency in planning decisions is North Wiltshire District Council v. Sec of State for the Environment and Clover (1993) 65 P & CR 137. There Mann LJ said this, having explained that consistency was an important factor in planning decisions:

'I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.'

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate.'

(f) It will be noted that Mann LJ is making three important points here. One is that each decision must be taken on the basis of the inspector's own judgment. The second is that if the second application is distinguishable from the first then the relevance of consistency falls away. I would add that a case may be distinguishable not only on the basis of what is being applied for, but also on the basis of the evidence which is before the decision making body. The third is that an inspector can disagree with a previous inspector's decision on a wide range of bases. This include the interpretation of policies, aesthetic judgments and assessment of need. Where there is such disagreement, there is nothing preventing the inspector from coming to their own view, provided that they weigh the previous decision and give some reasons for departing from it (which may be shortly stated).

It follows from all this that a Planning Authority, confronted with a new application, must consider an Inspector's decision on a similar earlier application as part of their overall consideration. However:

1. If the opposition to the new application includes new and relevant evidence or material which the previous Inspector did not consider, then the case is inherently distinguishable from the previous decision, and the significance of 'consistency' as a factor falls away.
2. The Planning Authority should not shy away from disagreeing with commentary in a decision of an Inspector on an earlier application if it regards the reasoning of the Inspector as wrong or it disagrees with it on reasonable grounds. To do so would fail to comply with its obligation to exercise its own independent judgment.
3. There is no guarantee that an Inspector on an appeal against a decision of a Planning Authority will go along with the reasoning of an earlier Inspector on a similar application, so it would be wrong for the Planning Authority to take its decision on that assumption.

So far as the question of costs is concerned, it would be intolerable for a Planning Authority approaching its duties in a lawful and reasonable way to be affected in its decision making process by a fear that an application for costs would be made by a disaffected party. This is why the legislation only provides for the award of costs where the Planning Authority has acted 'unreasonably'. It will be apparent from the above that it may be perfectly reasonable to uphold objections to a new application even on subject matter which appeared to have been considered acceptable by an Inspector on a previous case. This will be the case where the evidence is different or where the Planning Authority disagree with the reasoning of the Inspector on reasonable grounds. Both of those positions may be regarded as perfectly justifiable in this case.

Given the new evidence in the present case, and the strength of the arguments against what were strictly 'obiter' comments from the Inspector on the previous application, the Planning Authority would be well within its rights to refuse the present application with an appropriate explanation. An Inspector on appeal from such a refusal would assess the validity of the reasoning against the previous Inspector's comments and come to his own view, but I can see no reason why the conduct of the Planning Authority in such circumstances could be deemed 'unreasonable' such as to attract a costs penalty.

Iain Purvis KC
7 December 2023'