

BRIDLINGTON AREA ACTION PLAN

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Proposals for the Harbour and Marina do not comply with the National Framework as regards the terms “sustainable” and “substantial”

*“At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking” (Para 14)*

1 The Bridlington Area Action Plan was formulated long before the National Planning Policy Framework (‘Framework’) was published on 22 March 2012. Some of the ‘Planning Policy Statements’ which the Plan originally relied upon, or took note of, have been replaced by the Framework (see Annex 3).

2 The proposals in the AAP for the Harbour Top and the Marina do not meet the policy requirements set out in the Framework. Therefore, these proposals must be excluded from the AAP, even if this means that a new Plan must be prepared. The Framework states at paragraph 213 *“Plans may, therefore, need to be revised to take into account the policies in this Framework. This should be progressed as quickly as possible, either through a partial review or **by preparing a new plan**” (my emphasis).*

3 In his “foreword” to the Framework the Minister for Planning, Rt. Hon. Greg Clark M.P. says *“The purpose of planning is to help achieve sustainable development”*. He then defined the word “sustainable” : *“Sustainable means ensuring that better lives for ourselves don’t mean worse lives for future generations” and “ Sustainable development is about change for the better, and not only in our built environment”*.

4 He continues and states the importance of both “Our natural environment” and “Our historic environment”. He concludes that *“sustainable development is about positive growth - making economic, environmental and social progress for this and future generations” . . . and . . . “The planning system is about helping to make this happen”*

5 The key word is therefore the word “**sustainable**”. The word “sustain” is defined in the ‘Shorter Oxford English Dictionary’ as including *“To provide for the upkeep of an institution or estate” . . . “To keep in being, to cause to continue in a certain state, to preserve the status of”*. To these definitions may be added the

words of the Minister *“sustainable development is change for the better, and not only in our built environment”*.

6 These definitions are relevant to the ERYC’s policies for the Harbour Top and Marina. For the Council do not propose to sustain the Harbour Top, or the Listed Pier, or the irreplaceable prime beach environment, from negative change. Instead of *‘keeping and preserving’* the status of what now exists, the Council proposes to wilfully not sustain them. Indeed, it sets out to impair and destroy them. It has learned nothing from the rejection of its former plans for a Marina. Thus ERYC fail to meet the Framework policies for the natural environment and historic environment. As such the Plan cannot be approved.

7 Section 12 of the Framework at paras 126 to 141 deals with *“Conserving and enhancing the historic environment”*. Para 126 requires local planning authorities to *“recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance”*. ERYC have consistently failed to recognise the importance of the Listed Piers and their setting within the ancient Harbour of Refuge. Indeed, when I sought their listing in 2000 the Council was the only objector and said that they were of no significance whatsoever (see Dr Moseley - Listed Building report 2003 at para 6.21). Little had changed over the last decade. Not only do ERYC seek to cut a huge chunk out of the South Pier, famous for the spectacle of its “Great Flank Wave” (see Dr Moseley 2003 at para 7.50) but they also seek to destroy the setting of the Harbour itself with a very large construction at the west end which would change its character for ever.

8 The Framework states at para 132 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. The more important the asset, the greater the weight should be. Significance can be harmed or lost through **alteration of destruction of the heritage asset or development within its setting**. As heritage assets are irreplaceable, any harm or loss should require **clear and convincing justification**. Substantial harm to or loss of a grade II listed building should be **exceptional** (my emphasis).*

Note - as to the word ‘*setting*’ see Annex 2 : ‘Glossary’

9 Any reasonable person would conclude that the proposals for the South Pier and the Harbour Top constitute “substantial harm”, both to the structure of the pier and to the complete setting of the harbour. Dr Moseley concluded at para 7.85 that the Council’s proposals for the South Pier would *“cause significant harm to the special character of this listed building and the setting of both listed buildings”*. At para 19 of his decision letter 2003 re the Marina the Secretary of State agreed with Dr Moseley that *“the proposals would destroy the essential nature of the South Pier and would irreparably harm the setting of the two listed structures”*

10 At para 18 the Secretary of State agreed with the Environmental Assessor, Professor Tom Pritchard, that *“the loss of a very important stretch of beach . . . is a major adverse impact in its own right”*. It is this very same *“important stretch of beach”* which the Council once again seek to destroy completely.

11 At para 19 the Secretary of State further agreed with Professor Pritchard *“that the obliteration of the beach and the near shore environment, which is of **high ecological and visual quality**, would be seriously damaging to the natural heritage of Bridlington”* (my emphasis). He continued and stated *“that the proposed works would have a range of serious adverse effects on both the natural and man-made environment of Bridlington which together present a powerful case against allowing the proposed works”*.

12 At para 20, after considering the *“potential benefits”* of the scheme he concluded that when those *“speculative”* benefits were balanced against the *“clear”* adverse effects *“a very compelling case against allowing those proposals”* emerged.

13 The obsession of a succession of local authorities to acquire part of the Harbour Estate is well documented (see para 15 Secretary of State’s decision letter 2003 re Harbours Act). This ‘desire’ does not amount to the *“clear and convincing justification”* which the Framework requires to create *“exceptional”* circumstances (see para 132).

14 The Framework continues at para 133 *“Where a proposed development will lead to substantial harm or to total loss of significance of a designated heritage asset, **local planning authorities should refuse consent**, unless it can be demonstrated that the substantial harm or loss is necessary to achieve **substantial public benefits** that outweigh that harm or loss”* (my emphasis). The key word in this requirement is the word **“substantial”**.

15 In the absence of any statutory definition of the word ‘substantial’ it is important to give the word its natural and ordinary meaning. This is defined by the Shorter Oxford English Dictionary as *“exists as a substance”* or *“having a real existence”* or *“not illusory”* . . . and also having . . . *“real importance or value”*.

16 The word ‘substantial’ was considered in *Pulsar v Grinling (1948) AC 291*. There the court held that its primary meaning was *“considerable or solid or big”*. Thus any *“substantial public benefits”* must be considerable or big rather than minimal or unsubstantial.

17 The word “substantial” was also considered at length by the Court of Appeal in the matter of *The Badger Trust v The Welsh Ministers (2010) EWCA Civ. 807*. At paras 37-40 the Court considered the various ‘Authorities’, agreed by the parties, regarding the meaning of the word. These were said to be *Majorstake*

Ltd v Curtis (2008) 1A C 787 : Palser v Grinling (1948) A C 291 : R v Monopolies and Mergers Commission Ex Parte South Yorkshire Transport (1993) 1 WLR 23 : R v Lloyd(1967) 1 QB 175 .

18 At para 32 the Court quoted from the judge below who had held that “*the word ‘substantial’ has a chameleon character, its precise meaning and hue varying according to its context*”.

19 At para 37 the Court cited Baroness Hale in *Majorstake* : “*‘Substantial’ is a word which has a wide range of meanings. Sometimes it can mean ‘not little’. Sometimes it can mean ‘almost complete’, as in a ‘substantial agreement’. Often it means ‘big’ or ‘solid’, as in a ‘substantial house’. Sometimes it means ‘weighty’ or ‘serious’, as in a ‘substantial reason’. It will take its meaning from its context. But in an expression such as a ‘substantial part’ there is clearly an element of comparison with the whole : it is something other than a small or insignificant or insubstantial part*”.

20 Para 38 the Court cited Viscount Simon in *Palser* : “*It is plain that the phrase requires a comparison with the whole rent ‘Substantial’ in this connexion is not the same as ‘not unsubstantial’ i.e. just enough to avoid the ‘de minimis’ principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord*”

21 Para 39 the Court cited Lord Mustill in *South Yorkshire Transport* : “*It is sufficient to say that although I do not accept that ‘substantial’ can never mean ‘more than de minimis’ or that in [Palser], Viscount Simon was saying more than that in the particular statutory context it did not have this meaning, I am satisfied that in section 64(3) [Fair Trading Act 1973] the word does indeed lie further up the spectrum than that*”.

22 Para 40 the Court cited the trial judge in *Lloyd* : “*You are the judges, but your common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so was it substantially impaired ?*”

23 Taking the authority set out by *The Badger Case*, it is clear that it is for the Inspector to decide whether the public benefits, which will arise from the Harbour and Marina proposals, will be “*substantial*” enough to outweigh the “*substantial*” damage which would be caused to the natural and man-made environment. As in

Palsler where the onus was upon the landlord, the burden of proof lies with ERYC to demonstrate that it is more likely than not that “*substantial public benefits*” will be certain to follow the implementation of its proposals. If the Council cannot do this its Plan must not be approved.

24 These definitions of the word ‘substantial’ places the Council in difficulty. It is not sufficient for it to merely demonstrate that the public benefits are just ‘expected’ or ‘probable’. It has to prove, beyond the balance of probability, that the public benefits which **will arise** from its proposals will be **certain and considerable**. The Council has also to prove that the said public benefits are “solid” (i.e. in the context of the AAP “*financially sound*” and more probable than not likely to reach fruition). Thus there has to be certain and demonstrable “*substantial public benefits*” to outweigh the real and substantial threat to the heritage asset. Nothing less will suffice

25 There is no doubt that a huge hole in the listed pier amounts to “*substantial harm*” (Dr Moseley used the words “*significant harm*” and the Secretary of State used the words “*irreparably harm*”). The proposals for the Harbour Top also amount to “*substantial harm*” to the significance of the setting of the listed structures. Indeed, from the gardens opposite the Harbour Top, the proposals amount to the total obliteration of that setting. When considering “The setting of the listed buildings” Dr Moseley at para 3.6 said that this was the most striking view of the harbour “*Most striking of all is the view looking out to sea along the seaward length of the South Pier from South Cliff Road*”. Professor Pritchard made the same point regarding this view of the setting of the Harbour in his conclusions at para 10.71.

26 Finally, on the matter of “*substantial harm*” to the environment. Should the marina proposal be approved there will also certainly be real “*substantial harm*” which will occur from the loss of a “*very important stretch of beach*”. The loss of this stretch of beach was considered by the Secretary of State in 2003 to be “*a major adverse impact in its own right*”. Nothing has changed since then. It is the very same section of beach, which is just as full of ‘life’ today as it was ten years ago, which will be covered in concrete and its important natural habitat destroyed. As the Inspector’s report of 2003 stated at para 11.85 “*the loss of a significant area of beach was of **substantial significance** and could not be mitigated*” (my emphasis). Here the word “*substantial*” is used in its legal and natural sense.

27 But what of the public benefits - can they really be said with any certainty to be “*substantial*” and thus of “*real importance or value*”? These benefits, by the very definition of the word, have to be of substance. Thus they must be either already coming into existence or very foreseeable in the near future. They cannot be merely illusory (“*having the character of an illusion*” i.e. “*deception : delusion :*

involving a false belief ”).

28 However, the said “*substantial public benefits*” which ERYC claim will outweigh the substantial harm to the heritage asset are, at this moment in time, purely illusory. They are hypothetical : they are a fantasy : they are part of a ‘wish-list’ of ‘goodies’ which council officers think **may** (and I wish to emphasise the word ‘may’) come about if the AAP is approved. These so-called “*public benefits*” are not yet of substance, they are not certain, and they may never come about. On the other hand there is nothing illusory about a listed pier with a great big hole cut into its imposing southern face destroying the continuity of the surface swept by the Great Flank Wave. This is a real and foreseeable and certain ‘*significant harm*” and “*substantial harm*” to the heritage asset. When ‘a certain outcome’ is placed on the scales of probability against a ‘theoretical outcome’ the balance falls in favour of the former.

29 As a final comment upon the word “*substantial*”. Whilst the Council may foresee public benefits arising from the purchase of the Harbour Top and the creation of a Marina, it cannot guarantee that they will be “*substantial*” or “*considerable, solid or big*” benefits. Therefore, the Council cannot pass the ‘test’ as set out and required by the Framework. This test is very strictly worded. It does not simply require “public benefits” in exchange for causing “*substantial harm*” to the listed piers and their setting. The Framework requires public benefits of a “*substantial*” nature. Nothing less will suffice in these circumstances. There is no evidence that the Council can meet this test. Therefore, the proposals in the Plan for the Harbour Top and for the Marina cannot be approved.

Conclusion

30 As my conclusion I wish to simply rely upon the words of Professor Tom Pritchard, the Environmental Assessor at the Marina Inquiry. In his final “*Summary of Conclusions*” para 10.71(4) he put into one sentence the consequences of the ERYC’s applications :-

“Beach and seashore amenities of the South Beach would be destroyed or severely altered, including facilities for admiring the view of the historic harbour, enjoying the sands, seawater and the wildlife, and digging for bait and fishing from the shore and the South Pier”

31 This statement was true in 2003. It remains true today ten years later. The main footprint of the proposed marina may be smaller but the overall effect of the proposals remain the same : “*a major adverse level of significance*”.

32 Therefore, it is my respectful opinion that the proposals for the Harbour Top and Marina should not be approved.

