

UPDATE FOR COMMITTEE

Committee Date: 21st March 2019

App No: SL/2018/0925

Proposal: Kendal Flood Risk Management Scheme - Phase 1 Kendal Linear Defences, comprising works along the rivers Kent & Mint through Kendal including new & raised flood walls, new & raised flood embankments, ground raising, pumping station & associated changes to the public realm & landscaping

Late representations

1. Representations received now total 295 objections, 121 letters of support and 23 labelled as, or taken to be, neutral comments. For the most part the representations received since completion of the Committee report raise no issues that have not already been summarised. However, there are two issues that need further consideration.

Call in request

2. We have now been copied into a total of four letters requesting that the Secretary of State call in this application for his own determination.
3. The Planning Casework Unit for the Secretary of State has confirmed receipt of the call-in requests and has asked SLDC not to issue any planning permission (if the Committee resolves to approve the application) until the Secretary of State has had an opportunity to consider fully the issues that have been raised. Officers have agreed to this request, in the knowledge that the Secretary of State has the power to compel us not to grant planning permission in these circumstances. SLDC is still free to, and should, consider the application at committee, and to make a resolution, but, as things stand, we are prevented from granting planning permission. The Secretary of State's request does not, however, stop SLDC from refusing the application and issuing a decision notice setting out the reasons for refusal.
4. The recommendation has been updated accordingly.
5. If the Secretary of State does call in the application then it will proceed to be determined via a public inquiry.

Further representations from Friends of the Lake District (FLD)

6. In an email dated 18 March the Friends of the Lake District has commented as follows:

We wish to express concerns relating to the above case, which we consider Planning Committee should be made aware of.

This Judicial Review case of 2014 established that SLDC had failed to 'demonstrably apply' the 'strong presumption' laid down by s.72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

Whilst the Officer's report in the current case mentions this legislation and to associated paragraph in the NPPF, it must be evident that the

presumptions in s.66(1) and s.72(1) have been 'demonstrably applied' as is required.

The 2014 case above, and that relating to [Forge Field](#) established that there must be 'clear and express recognition - and application - of the Presumption' and that even where there is an express reference to the presumption in the Officer's report, there must also be clear evidence that the presumption has actually been applied.

Para. 564 of the report states that the proposals are contrary to both s.66(1) and s.72(1). It goes on to highlight NPPF para. 193 regarding 'great weight' to Members, but it is not evident that the Officer has applied 193, or the presumptions set out in s.66(1) or s.72(1), himself in coming to his recommendation for approval. Instead, para. 566 of the report suggests a balance has simply been struck between harm and benefit: "Nevertheless, in officers' judgement, the strategic importance of reducing flood risk, even by the levels associated with Phase 1 in isolation, represents a significant public benefit that outweighs the harm in this case".

The 2014 case above makes clear that even if there are references to the relevant legislation or NPPF paras. "none of that matters if all that is actually done is 'a simple balancing exercise'" and "nor can it be said that it must be obvious from the references thereto that the author of the Report was in fact applying the presumption".

Related to this, one would have to question how it is possible to abide by this policy and legislation, particularly s.72, which clearly references 'appearance', in a case where even the relevant National body has expressed clear concerns that not enough information has been provided to "show the actual appearance of the development after it is implemented" or to "clarify the visual impact of the scheme upon the character and appearance of the Conservation Area".

We urge that Planning Committee are reminded/made aware of this case and precedent, and the risk of Judicial Review should the assessment of this scheme be similarly flawed.

7. This is an important point, although the assertion that the Committee report fails to apply these legal presumptions is refuted. Paragraphs 158 and 159 of the Committee report set out the Council's responsibilities under the Planning (Listed Buildings and Conservations Areas) Act 1990. Paragraphs 265 to 292 then consider the various listed buildings potentially affected by this development and explore the desirability of preserving their settings. And the detailed analysis of the impact of the proposals on Kendal Conservation Area in paragraphs 199 to 264 - which includes an assessment of the impact upon the significance of each of the relevant character areas identified in the Conservation Appraisal - clearly demonstrates that special attention has been paid to the desirability of preserving or enhancing the character or appearance of this particular heritage asset. Overall, and in full regard of these statutory responsibilities, the report concludes that, on balance, the significant public benefits associated with this development outweigh the harm in this case.

Habitat Regulations Assessment

8. Since completion of the Committee report the Environment Agency has provided a final Habitat Regulations Assessment (Draft 8 dated 11 March 2019) which has been signed by Natural England. The recommendation has been updated accordingly.

Updated recommendation

9. In the light of: (1) the Secretary of State's request in respect of a potential call in of the application; and (2) the Environment Agency having now agreed a final Habitat Regulations Assessment with Natural England, the recommendation at paragraph 567 of the Committee report is amended as follows:

567. *It is recommended that Members approve the application and delegate authority to the Director (People and Places) or, if granted after 1 April 2019, to the Director (Customer and Commercial Services) to grant planning permission subject to the following:-*

- a. *Confirmation that the Secretary of State does not wish to call in the application for his own determination.*
- b. *Acknowledging the Environment Agency as the lead competent authority in undertaking the Habitat Regulations Assessment necessary to meet the requirements of Regulation 63 of the Conservation of Habitats and Species Regulations 2017.*
- c. *Adopting the Environment Agency's final Habitat Regulations Assessment, Draft 8 dated 11 March 2019, (signed by Natural England) for the purposes of meeting the Council's obligations under Regulation 63 of the Conservation of Habitats and Species Regulations 2017.*
- d. *The conditions set out in the main agenda.*