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An application to Portsmouth City Council to adjourn the hearing of planning application (23/01089/FUL)

Introduction

1. This is an application to adjourn consideration of the above planning application (currently scheduled for next Wednesday 13 March – i.e. in 4 days time) as aspects of the application may be unlawful, and may leave the Council (and the applicant) open to a claim for damages under section 6 of the Human Rights Act 1998, as PCC is a public authority about to make a decision that has an impact on the civil rights of some local residents.

2. Section.6.(1) of the Act states that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".
"*In this context, your civil rights and obligations are those recognised in areas of UK law such as property law and planning law*"[1]

3. Those who may be affected by a breach of S.6 have a right to a fair and public hearing that[2]:
   - is held within a reasonable time
   - by an independent and impartial decision-maker
   - within a reasonable time

   A hearing that
   - gives those affected all the relevant information
   - is open to the public
   - allows you representation
   - is followed by a public decision.

[1] https://www.equalityhumanrights.com/human-rights/human-rights-act/article-6-right-fair-trial
[2] As above

which determines whether such a development (or this particular aspect of the development) would be in breach of the Rights protected by S.6 of the 1998 Act, given that PCC has a duty to protect those affected by any breach of those rights.

4. In this case, there is the very clear prospect of an overlooking nuisance (a cause of action in law) caused by the sheer number, size and proximity of the windows proposed. This was suddenly increased by the developer 3 weeks ago by 28% from 21 windows in Simon Wing West to 27, making a total of 39 windows in the 2 Simon Wings, seen below[3]. Note also that all the new windows are of the largest possible size!

   - Those 39 windows are now totalling 86 sq. m. – taking up much of the elevation.
   - That is in fact 40% of the elevation, which is absurd when the usual size of a window is 10-20% of the floor space[4].
   - There are 13 windows on 3rd floor (which is much higher than any of the homes in The Thicket, those alone totalling over 27 sq. m.
   - Those 3rd floor windows are positioned at a minimum height of 6.7m above the ground, and reach up to 8.13m at their highest.

5. Present proposal:

6. Previous proposal:

Please note that both proposals give rise to this objection under s.6 of the HRA 1998, given the rulings in the case of Fearn, below.

[3] Submitted 16 February 2024: 23_01089_FUL-22171-HGP-19-XX-D-A 0351__P05__B19_ SIMON_WING_PROPOSED_ELEVATIONS_SHEET_2_OF_2.-2616583

[4] https://assets.publishing.service.gov.uk/media/61deba42d3bf7f054fcc243d/ADF1.pdf

7. Such a nuisance (actionable under law) was found in the recent Supreme Court case of *Fearn v Tate Gallery Trustees [2023] 2 W.L.R. 339* when residents of a block of flats brought a claim under S.6 of the 1998 Act against the Trustees of the Tate Gallery, who had erected a gallery where visitors "*had a clear and uninterrupted view in to the living areas"* of the flats in question, from a distance of just over 30 metres, for the 8 hours a day when the Gallery was open – whilst this plan would allow the equivalent 24 hours a day, from distances of 14 to 22 metres.

8. The Supreme Court found that those looking from the gallery were given a "*clear and uninterrupted view of how the claimants seek to conduct their lives in those flats. One can see them from practically every angle on the southern walkway*''.

9. It was found that that "*intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance*", and that this was a "*straightforward case of nuisance"*.

10. Moreover, that "*anything which materially interfered with the ordinary use and enjoyment of neighbouring land by a person with a legal interest in that land was capable of being a nuisance*".

11. What is proposed here is to erect these blocks just 14-22 metres from various homes in The Thicket, <u>giving the inhabitants of Simon Wing a clear and uninterrupted view 24 hours a day from a considerable height in to those homes in The Thicket</u>.

    The plans[5] submitted by the applicant reveal that in fact the Simon Wings would be situated
    - 14m distance from 21 & 22 The Thicket;
    - 20m to The Lawns;
    - 21m to Thicket Cottage; and
    - 22m to Trematon.

12. They would have, as was found in the case of Fearn, a "*clear and uninterrupted view of how" (*we, the residents of the homes they overlook) *"seek to conduct their lives".* Exactly as in the case above, the residents of Simon Wing would be able to "*see straight into the living areas*" of our homes.

13. Nor would it be "*a defence to an action for nuisance that (those looking) were only making reasonable use of their own land*" by just looking out of their windows. The design of the building itself gives rise to this unlawful condition.

[5] 23_01089_FUL-22171-HGP-19-XX-D-A-0250__P05__B19_SIMON_WING_PROPOSED_PLANS_1_OF_4.-2616568

14. As a public authority, PCC has a duty to protect our rights under the 1992 Act, and must therefore not enable a development that may infringe upon those rights.

15. The Law Society has advised that
"Planning authorities may need to assess the potential impact of causing an overlooking nuisance on future developments before granting planning permission to avoid this type of situation from reoccurring. There is no guarantee that lack of foresight will be tolerated by the courts in future".[6]

16. They also pointed out that
"*There is also the question whether remedial and mitigating steps could have been taken by both sides to reduce the intrusion and inconvenience suffered by the tenants*".

17. Some legal commentators have advised that
"*The Supreme Court then left the question of the remedy (for such harm) for a future determination by the High Court… Lord Leggatt suggested that …any injunction and the possibility of quantifying damages may constitute the relevant factors*".[7]

18. I would also urge PCC to consider this point, also made by Brabners Solicitors, that
"*A proper consideration of the prospect of intolerable visual intrusion at the planning stage could have forestalled the claim altogether. The prospect of private nuisance claims and the injunctions that may be obtained to prevent certain developments must be woven into the risk assessment by developers early on in the process*".

19. That has clearly not happened so far in this case, but legally must take place now, before this application can proceed any further.

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[6] https://www.lawsociety.org.uk/topics/property/what-a-nuisance-the-impact-of-fearn-v-tate-gallery-on-future-nuisance-claims
[7] https://www.brabners.com/blogs/how-will-fearn-v-tate-gallery-impact-developers-and-landowners