

Rother District Council

Report to: Cabinet

Date: 25 July 2022

Title: Article 4 Direction – Coastal Land at Fairlight Cove

Report of: Ben Hook, Director of Place and Climate Change

Cabinet Member: Councillor Jonathan Vine-Hall

Ward(s): Southern Rother

Purpose of Report: To approve the making of an Article 4 Direction in respect of the land and those classes of development described in this report.

Decision Type: Non-Key

Officer

Recommendation(s): It be **RESOLVED**: That:

- 1) the making of an Article 4 Direction in respect of the land and those classes of development described in this report be approved;
- 2) the Director of Place and Climate Change be granted delegated authority to confirm the Article 4 Direction following a 21 day consultation period, subject to consideration of any representation response received, so that it comes into effect at the end of a 12 month notice period; and
- 3) the Director of Place and Climate Change be granted delegated authority to make an immediate Article 4 Direction within the 12 month period specified in 2) above, if warranted, i.e. if development is identified which constitutes a threat to the amenities of the area.

Reasons for

Recommendations: It has been shown that development near the cliff edge at Fairlight Cove has the potential to impact on land stability and therefore it is necessary for such development to be subject to a planning application so that the risks can be properly assessed.

Introduction

1. Fairlight Cove has experienced ongoing problems of coastal erosion and cliff instability that have led to a number of properties being lost since the 1980s as a result of cliff retreat. Since that time, a phased programme of coastal protection works and drainage has been undertaken, which has helped to slow down the rate of cliff recession. While these engineering works control erosion and land loss they do not prevent it, and it remains prudent to limit development

that may have an effect on loading near the cliff or the flow of water in the ground near the cliff edge.

2. National Planning Practice Guidance (PPG) confirms that the planning system has an important role in considering land stability by: minimising the risk and effects of land stability on property, infrastructure and the public; and helping ensure that development does not occur in unstable locations or without appropriate precautions. The PPG notes that removing “permitted development” rights in specific circumstances is one option that planning authorities may need to consider in planning for land stability.
3. An article 4 direction is a direction under article 4 of the Town & Country Planning (General Permitted Development) (England) Order 2015 (as amended) (“the GPDO”) which enables the Secretary of State or the local planning authority to withdraw specified permitted development rights across a defined area.
4. The effect of an article 4 direction at Fairlight Cove would be to remove permitted development rights from specified residential properties close to the cliff edge for certain forms of householder development. These forms of development include residential extensions and outbuildings, the uncontrolled development of which could have adverse effects on land stability in the coastal margin. The removal of these specific permitted development rights would mean that planning permission would be required. The submission of a planning application would allow such effects to be properly assessed before development is permitted to proceed.
5. An independent report by a Chartered Geologist and Chartered Civil Engineer specialising in coastal science, coastal risk management and landslide management has been undertaken, to evidence the need for the article 4 direction and inform its scope and geographical coverage. The report is attached at **Appendix 1**.
6. The report finds that cliff instability can result from both natural physical processes such as the cliff face weathering, sliding and retreating, or a change in drainage regime, as well as from human activity, and the most significant factor is likely to be natural cliff processes rather than human activity. However, loading or surcharge, occurring as a result of a change in the weight imposed on the top of a cliff, may cause the top of the cliff to fail and lead to cliff retreat (depending on the weight of the materials and the proximity to the cliff edge). On the cliffs above Fairlight Cove, human activity will be the most likely cause of surcharge and usually as a result of a load such as soil being deposited or by actual construction works. Along some sections of the Fairlight cliff line the top of the cliff has yet to reach a state of equilibrium (balance) and such surcharge may accelerate the instability processes, particularly at, or after, times of rainfall. In view of the greater level of risk and sensitivity of particular properties, largely on the seaward sides of Sea Road, Cliff Way and Rockmead Road, the removal of permitted development rights, in the form of an article 4 direction, can be justified.
7. There are existing planning policies which apply to planning applications for development at Fairlight Cove. Policy DEN6 of the Development and Site Allocations (DaSA) Local Plan is relevant to development on unstable or

potentially unstable land. Supporting text to the policy confirms that planning applications for development within a 50 metres wide “coastal zone” along the cliff face at Fairlight Cove must be accompanied by a structural engineer’s survey and a geo-technical report to demonstrate there would be no increase in ground loading. Policy DEN6 also prevents the use of soakaway drains in the coastal zone. However, the requirements of planning policy do not extend to development not requiring planning permission, hence the need for an article 4 direction in addition to existing planning policies.

8. The independent report confirms that for the short to medium term, the most vulnerable properties are up to 12 in number, which are closest to the cliff line. However, the report also notes that while not all developments require planning permission, the Building Regulations provide a complementary mechanism helping to ensure that land stability issues are suitably addressed in those developments not requiring planning permission. It is actually the case that for small developments such as residential extensions, an assessment of the impact of the development on ground stability is unlikely to be required through the Building Regulations either, and furthermore, there are a number of types of developments, such as small detached buildings with no sleeping accommodation, which are exempt from the Building Regulations.
9. Consequently, in order to offer appropriate protection in terms of reducing risks to ground stability, it is proposed that the article 4 direction would cover land within which there are 28 residential properties. These are all of the properties located on the seaward sides of the roads closest to the cliff edge, where the gardens either extend directly to the cliff-edge or where there is little intervening land. This is considered to present a reasonable and consistent approach. Furthermore, it is in line with the recommendation of the report for the introduction of an article 4 direction for an “Outer Zone” bordering the cliff line, rather than for the entire “coastal zone” as defined in the DaSA Local Plan.

Details of the proposals

10. It is proposed that the article 4 direction removes permitted development rights for all identified properties closest to the cliff edge, as shown on Map 1 and List A in **Appendix 2**, in respect of:
 - (i) Schedule 2, Part 1 of the GPDO - Development within the Curtilage of a Dwellinghouse - Classes: A (enlargement, improvement or other alteration of a dwellinghouse); AA (enlargement of a dwellinghouse by construction of additional storeys); B (additions etc to the roof of a dwellinghouse); D (porches); E (buildings, enclosures, pools, containers etc incidental to the enjoyment of a dwellinghouse); F (hard surfaces incidental to the enjoyment of a dwellinghouse).
 - (ii) Schedule 2, Part 20, of the GPDO - Construction of New Dwellinghouses - Classes: AC (new dwellinghouses on terrace buildings in use as dwellinghouses) and AD (new dwellinghouses on detached buildings in use as dwellinghouses).
11. In addition, it is proposed that the article 4 direction removes permitted development rights for a number of other residential properties where the rear gardens extend to the cliff edge (but the house is further back), as identified on

Map 1 and List B in **Appendix 2**, in respect of Schedule 2, Part 1, Class E (buildings, enclosures, pools, containers etc incidental to the enjoyment of a dwellinghouse).

12. There are additional Classes within Schedule 2 to the GPDO which give additional “permitted development” rights to householders for other minor developments such as roof windows, chimneys, roof antennae, boundary fences and walls. It is not proposed to include these forms of development within the article 4 direction because they are unlikely to involve placing significant additional weight on the ground, cause vibrations, or increase drainage into the ground, i.e. they are unlikely to have any noticeable effect on land stability.
13. The approach which has been followed, in obtaining evidence and limiting the extent and coverage of the direction to that found to be necessary, complies with the National Planning Policy Framework (NPPF) which requires (amongst other things), at paragraph 53, that the use of article 4 directions should: be limited to situations where it is necessary to protect local amenity or the well-being of the area, be based on robust evidence, and apply to the smallest geographical area possible.

Next Steps

14. The Council makes a non-immediate article 4 direction and adheres to the procedures set out in Schedule 3 of the GPDO. This requires that the Local Planning Authority will publish a notice of the article 4 direction by local advertisement, by displaying site notices and if practicable, by individual notification to all owners and occupiers.
15. Notice of the article 4 direction must (amongst other things) allow a period of at least 21 days within which any representations can be made to the Local Planning Authority and specify the date on which it is proposed that the article 4 direction will come into force, which date must be between 28 days and two years following the date on which the representation period began. A copy of the article 4 direction and notice must be sent to the Secretary of State on the same day as it is first published or displayed.
16. Compensation can be payable by the Council to affected householders following the imposition of an article 4 direction in certain circumstances. This is further detailed under “Financial Implications” below. Compensation can only be payable if a planning application is made within 12 months of the article 4 direction taking effect. No compensation is payable if a Local Authority gives notice of the article 4 direction taking effect between 12 months and 24 months in advance.
17. Therefore, there are two options: (a) to give the minimum notice period which would mean the article 4 direction comes into effect quickly, removing “permitted development rights” from the affected properties within 28 days, but carrying a risk of compensation; or (b) to give a notice period of 12 months, thereby removing the risk of compensation but enabling affected property owners to commence developments within that time period, without needing planning permission, should they wish to do so.

18. It is not possible to determine whether a successful compensation claim against the Council is likely, nor the monetary value of any potential claim (although the value could potentially be significant, particularly if it relates to the difference in the value of the land if planning permission is refused). Having regard to this, together with the findings of the independent report that while an article 4 direction can be justified for a limited geographical area, natural cliff processes are likely to be a more significant factor in cliff instability than human activity, it is proposed that the Council make a non-immediate article 4 direction giving a notice period of 12 months.
19. Notwithstanding this, during the 12 month period it is intended that any development that goes on in the locality will be closely monitored, and if any significant harm is identified then this could be addressed by making an immediate article 4 direction to withdraw permitted development rights straight away. If an immediate article 4 direction were to be made, the Council could still be liable to pay compensation but in these circumstances, it is felt that this risk could be outweighed by the necessity to prevent harm caused by development. It should be noted, however, that article 4 directions cannot prevent development which has been commenced, or which has already been carried out.
20. The article 4 direction will come into force on the date specified but only if it is first confirmed by the Council taking account of any representations received or unless the Council receives a direction from the Secretary of State cancelling or modifying it.

Conclusion

21. It has been shown that development close to the cliff edge at Fairlight Cove has the potential to impact on land stability and therefore, it is necessary for such development to be subject to a planning application so that the risks can be properly assessed. An article 4 direction, as set out, is recommended.
22. Cabinet is recommended:
 - 1) To approve the making of an Article 4 Direction in respect of the land and those classes of development described in this report;
 - 2) To delegate authority to the Director of Place and Climate Change to confirm the Article 4 Direction following a 21 day consultation period, subject to consideration of any representation response received, so that it comes into effect at the end of a 12 month notice period; and
 - 3) To delegate authority to the Director of Place and Climate Change to make an immediate Article 4 Direction within the 12 month period specified in 2) above, if warranted, i.e. if development is identified which constitutes a threat to the amenities of the area.

Financial Implications

23. The Town and Country Planning Act 1990 includes the provision that compensation can be claimed by anyone whose permitted development rights have been withdrawn. The Council may be liable only where planning permission is refused where it would otherwise have been permitted development, or where the grant of planning permission is subject to

conditions which are more limiting than the permitted development rights. The claim may be made only on grounds of abortive expenditure or other loss or damage directly attributable to the withdrawal of permitted development rights. This can include the difference in the value of the land if the development had been carried out and its value in its current state, as well as the cost of preparing the plans for the works. Compensation is only payable in respect of planning applications made within 12 months of the date an article 4 direction takes effect. Local Planning Authorities can minimise compensation liability on withdrawal of the permitted development rights by publicising their intention to make an article 4 direction at least one year, and not more than two years, ahead of the article 4 direction coming into force.

Legal Implications

24. The legal effect of the recommendation would be that the permitted development rights granted under Classes A, AA, B, D, E and F of Part 1 of Schedule 2 and Classes AC and AD of Part 20 of Schedule 2 of the GPDO will be removed in the areas identified in this report and as more fully set out in paragraphs 8 and 9.

Environmental Implications

25. The report relates to an environmental matter, that is, minimising the risk and effects of land stability on property, infrastructure and the public; and helping ensure that development does not occur in unstable locations or without appropriate precautions.

Human Resources Implications

26. There are Human Resources implications for the proposals within this report. The preparation, making and serving of the Article 4 Direction will necessitate support from Legal Services. The administration of the Article 4 Direction will fall predominantly to the Directorate of Place and Climate Change.

Risk Management

27. The making of an Article 4 Direction requires compliance with Article 4 and Schedule 3 of the Town and Country Planning (General Permitted Development Order) (England) Order 2015 (as amended). The Council needs to be mindful that paragraph 53 of the NPPF states that the use of article 4 should be limited to where they are necessary to protect local amenity or the well-being of the area and be based on robust evidence and apply to the smallest geographical area possible.

Equalities and Diversity Implications

28. Having regard to the Council’s duty under Section 149 of the Equality Act 2010, there is not considered to be any implications for those with protected characteristics arising from the proposal.

Other Implications	Applies?	Other Implications	Applies?
Human Rights	No	Equalities and Diversity	No

Crime and Disorder	No	External Consultation	Yes
Environmental	Yes	Access to Information	No
Risk Management	Yes	Exempt from publication	No

Report Contact Officer:	Holly Harrison Principal Planning Officer
e-mail address:	holly.harrison@rother.gov.uk
Appendices:	Appendix 1: Assessment on the potential impacts of development on ground stability at Fairlight Cove Coastal Zone (Coastal and Geotechnical Services, 2021). Appendix 2: Lists and maps of properties to which the article 4 direction will relate.
Relevant Previous Minutes:	None
Background Papers:	None
Reference Documents:	None